





A TREATISE,
ON THE LAW OF
LANDLORD AND TENANT

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§ 184. General considerations.

What is known as an "eviction" of the tenant from the demised premises has important consequences, one of which is the

suspension or extinction of the landlord's right to rent, in whole or in part,¹ and another is that it gives a right of action to the tenant against the landlord, either on the covenant for quiet enjoyment² or, in case the eviction is by the landlord, in tort.³

An eviction having legal consequences of the character referred to may be either by the landlord or by a third person having a title paramount to that of the landlord. There is no such thing, in a legal sense, as an eviction by a third person not having paramount title, or, as the same idea may be otherwise expressed, using the term in an untechnical sense, an eviction by a third person, not having paramount title, does not have any legal effect as against the landlord but merely renders such third person liable as a tortfeasor for the trespass.⁴

An eviction may, in general terms, be said to occur when the tenant is forced to yield possession to one having a title paramount to that of the landlord, or when the landlord himself dispossesses the tenant, either by actually taking possession or by such acts of interference with the latter's enjoyment of the premises that the tenant is, in the eye of the law, justified in relinquishing possession, and he does relinquish it.

§ 185. By landlord.

a. **Actual and constructive eviction.** The question whether, in a particular case, there has been an eviction by the landlord may, and frequently does, involve very considerable difficulty. There clearly is an eviction by the landlord if he forcibly dispossesses the tenant, as there is if, during the temporary absence of the tenant, the landlord prevents him from returning.⁵ But not only is such an act, which in itself involves a direct deprivation of possession, regarded as an eviction, but so is any other act which so affects the tenant's enjoyment of the premises that he relinquishes possession, provided this act is a legal justification for such relinquishment. It is in determining what acts constitute such a justification that the chief difficulty of the subject arises. An eviction of the latter class, that is, not by the forcible removal or exclusion of the tenant but by acts of inter-

¹ See ante, § 182 e.

² See ante, 79.

³ See post, § 185 i.

⁴ See post, § 186 b.

⁵ See post, § 185 f (1).

ference with his enjoyment resulting in his relinquishment of possession, is quite frequently referred to as a "constructive" eviction, as distinguished from an "actual" eviction.

The courts usually speak of a particular act or series of acts on the part of the landlord as constituting a constructive eviction *vel non* without any reference to the subsequent relinquishment of possession by the tenant. This is not a strictly accurate mode of expression, since parting with the possession is as much a part of the eviction when the tenant leaves as a result of the landlord's interference with his enjoyment as when he is forcibly ousted, he being in theory ousted by the landlord in the former case as in the latter. This mode of expression is, however, highly convenient, and will be adopted in the following pages, it being borne in mind, however, that when we speak of a certain act on the part of the landlord as constituting an eviction, we mean that, if such act results in the tenant's relinquishment of possession, they together have the legal effect of an eviction.

b. **Intention of landlord.** In order that an eviction may take place as a result of acts on the part of the landlord involving merely an interference with the tenant's possession and enjoyment, as distinct from an actual dispossession, it is necessary that they be such as to indicate an intention on the landlord's part to deprive the tenant of the possession.⁶ The intention here referred to is, however, ordinarily of a purely legal nature, inferred from the character of the landlord's act or acts, and the question of actual intent arises, it has been said, "only when the acts are such as do not of themselves afford a presumption of intent."⁷ There are, indeed, but few reported cases in which the

⁶ *Upton v. Townend*, 17 C. B. 30; Generally the question whether acts of the landlord in consequence of which the tenant abandons the premises amount to an eviction is a question of law, and includes the question whether they constitute proof of the intent. A person is presumed to intend the natural and probable consequences of his acts; and when the acts of a landlord upon the demised premises are such as naturally and probably exclude the tenant from the possession and

⁷ *Rice v. Dudley*, 65 Ala. 63; *Elsen-*
hart v. Ordean, 3 Colo. App. 162, 32
Pac. 495; *Fleming v. King*, 100 Ga.
449, 28 S. E. 239; *Hayner v. Smith*,
63 Ill. 420, 14 Am. Rep. 124; *Morris*
v. Tillson, 81 Ill. 607; *Dennick v.*
Ekdahl, 102 Ill. App. 199; *Hayward*
v. Ramge, 33 Neb. 836, 51 N. W. 229;
Miller v. Maguire, 18 R. I. 770, 30
Atl. 966.

⁷ *Skally v. Shute*, 132 Mass. 367,
per W. Allen, J., who continues: the tenant from the possession and

actual mental intention of the landlord was regarded as material in determining whether there was an eviction.⁸

c. **General character of landlord's acts.** In order to support the inference of an intention to deprive the tenant of possession, the landlord's act or acts must not only involve a substantial interference with the tenant's enjoyment of the premises, but the interference must be more or less permanent. As is generally said, the act of the landlord must be "something of a grave and permanent character."⁹ To these words is ordinarily added in the cases the statement that the act must be "done by the landlord with the intention of depriving the tenant of the demised premises," but this, as above remarked, is almost invariably inferred from the character of the act, that is, its "grave and permanent character" is apparently sufficient to show this intention.

This requirement of substantiality and permanency in the landlord's act is apparently what is ordinarily involved in the statement, frequently made, that a "mere trespass" by the landlord does not constitute an eviction.¹⁰ That is, a trespass by the land-

enjoyment of the premises, and as- session of the tenant or as a per-
sert a title in the landlord himself, sonal trespass.

the law presumes an intent to do In *Kistler v. Wilson*, 77 Ill. App.
so; and, if the natural consequence 149, it was decided that the land-
follows, the acts are said to amount lord's consent to the erection of an
to an eviction." In this case it was elevated railroad in front of the
held to be a question for the jury premises did not effect an eviction,
whether the evidence showed that since it did not indicate an inten-
the landlord dug up the soil under tion to deprive the tenant of the
the building so as to render it un- full enjoyment of the premises,
safe for occupancy, while it was a though this was its effect.

question for the court whether these ⁹ *Upton v. Townend*, 17 C. B. 30;
acts were done with such an inten- *Rice v. Dudley*, 65 Ala. 68; *Fleming*
tion that an eviction resulted. See, *v. King*, 100 Ga. 449, 28 S. E. 239;
also, to the effect that the intent is to *Hayner v. Smith*, 63 Ill. 430, 14 Am.
be determined from the acts, *Waite*
v. O'Neil, 76 Fed. 408.

⁸ In *Henderson v. Mears*, 1 Fost. & 172; *Miller v. Maguire*, 18 R. I. 770,
F. 636, 28 Law J. Q. B. 305, the forcible 30 Atl. 966. See *Royce v. Guggen-*
expulsion of the tenant's agent heim, 106 Mass. 201, 8 Am. Rep. 322.
in charge of the premises was held
not to be necessarily an eviction of
the tenant, but it was left to the
jury to say whether this act by the
landlord was intended as a dispos-

¹⁰ *Upton v. Townend*, 17 C. B. 30;
Newby v. Sharpe, 8 Ch. Div. 39;
Rice v. Dudley, 65 Ala. 68; *Hyman*
v. Jockey Club Wine, etc., Co., 9
Colo. App. 299, 48 Pac. 671; *Isabella*

lord on the premises, if wanting in the above named characteristics, cannot result in an eviction, while if it has those characteristics, and it is followed by the tenant's relinquishment of possession, it does so result.

Applying this distinction between a trespass and an eviction, it has been held that an eviction was not shown by evidence that the landlord merely went upon the demised premises and removed therefrom chattels belonging either to himself or to the tenant,¹¹ or dug coal thereon,¹² or cut flowers, trees or crops.¹³ So there is merely a trespass if the landlord piles firewood on a part of the premises without interfering with the tenant's substantial enjoyment,¹⁴ if he occasionally uses the premises in the tenant's absence,¹⁵ if he enters after a fire to clean the brick,¹⁶ or even, it has been decided, if he makes an assault on the tenant.¹⁷ On the other hand, there was held to be an eviction when the tenant abandoned the premises owing to the act of the landlord in digging up the soil under the building, thereby rendering it unsafe for occupancy,¹⁸ and when, after the destruction of a building, of which parts were leased to different tenants, the landlord authorized the reconstruction of the building in such a

Gold Min. Co. v. Glenn, 37 Colo. 165,

86 Pac. 349; Fleming v. King, 100

Ga. 449, 28 S. E. 239; Hayner v.

Smith, 63 Ill. 430, 14 Am. Rep. 124;

Royce v. Guggenheim, 106 Mass. 201,

8 Am. Rep. 322; Kimball v. Grand

Lodge of Masons, 131 Mass. 59; Mc-

Fadin v. Rippey, 8 Mo. 738; Elliott

v. Aiken, 45 N. H. 30; Edgerton v.

Page, 1 Hilt. (N. Y.) 320; Noble v.

Warren, 38 Pa. 340. That a tres-

pass, without any dispossession of

the tenant, is not an eviction was

explicitly decided by the old authori-

ties before the theory of "construc-

tive" eviction arose. See the review

of the cases in Bennet v. Bittle, 4

Rawle (Pa.) 339.

¹¹ Kimball v. Grand Lodge of

Masons, 131 Mass. 59; Bartlett v.

Farrington, 120 Mass. 284; Hayward

v. Ramage, 38 Neb. 836, 51 N. W. 229;

Newby v. Sharpe, 8 Ch. Div. 39.

¹² Tiley v. Moyers, 43 Pa. 404.

¹³ Bartlett v. Farrington, 120

Mass. 284.

¹⁴ Lounsberry v. Snyder, 31 N. Y.

514.

The act of the landlord in filling up the cellar of the demised premises with dirt is said, in *McFadin v. Rippey*, 8 Mo. 738, to be "a mere trespass or illegal ouster, and not a legal eviction."

¹⁵ Way v. Myers, 64 Ga. 760.

¹⁶ Fleming v. King, 100 Ga. 449, 28 S. E. 239.

¹⁷ Vatel v. Herner, 1 Hilt. (N. Y.)

149; Haas v. Ketcham, 87 N. Y. Supp.

411. See post, § 185 f (9).

The act of the landlord in procuring the tenant's arrest for interfering with a distress is at most a trespass. *Noble v. Warren*, 38 Pa. 340.

¹⁸ Skally v. Shute, 132 Mass. 367.

way that the area of the premises of each tenant was changed, each tenant was regarded as evicted.¹⁹ Likewise it has been decided that the act of the landlord, after breaking into the premises, in having the lock altered and retaining the key, changed what was a trespass into an eviction.^{19a}

The question whether there has been an eviction is one for the jury, it is said,²⁰ that is, it is for them to decide whether the acts done by the landlord are of a substantial and permanent character, showing an intention to dispossess the tenant of the premises. But the courts, in many cases, discuss the question as a matter of law with reference to whether, in the particular case, the facts are sufficient to justify the finding of an eviction.²¹

¹⁹ *Upton v. Townend*, 17 C. B. 30. [21]. This legal result of the destruction of the building would seem not to be changed by the presence of a covenant to rebuild in case of destruction, as in the English case referred to, but this might perhaps be construed as a covenant to rebuild and to give a new lease for the residue of the old term.

There it was held that a tenant was evicted, although the premises which he would enjoy under the new plans were larger than those to which he was entitled before the fire, since he was thereby deprived of the occupation "of the thing demised" and he could not use his premises without the danger of trespassing on another's premises, and he was also deprived of the protection and support of his boundary wall, which was removed to another's premises. The discussion of the subject of eviction in this case has been constantly referred to, and it is no doubt the leading case on the subject. In this country, however, where the lease of part of a building is not regarded as passing any interest in the land itself (see ante, §§ 24c, 26c [21]), the actual decision would presumably have been otherwise, and the tenancy being regarded as terminated by the destruction of the building (see ante, § 12 g [8]), any subsequent change in the nature and plans of the building could not be regarded as an eviction (see ante, § 182 m

^{19a} *Lester v. Griffin*, 57 Misc. 628, 108 N. Y. Supp. 580.

²⁰ *Hunt v. Cope*, Cowp. 242; *Upton v. Townend*, 17 C. B. 30; *New York Dry Goods Store v. Pabst Brew. Co.*, 50 C. C. A. 295, 112 Fed. 381; *Rice v. Dudley*, 65 Ala. 68; *Collins v. Karatovsky*, 36 Ark. 316; *Hyman v. Jockey Club Wine, etc., Co.*, 9 Colo. App. 299, 48 Pac. 671; *Holly v. Brown*, 14 Conn. 255; *Talbott v. English*, 156 Ind. 299, 59 N. E. 857; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Barrett v. Boddie*, 158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172; *Rubens v. Hill*, 213 Ill. 523, 72 N. E. 1127; *Jackson v. Eddy*, 12 Mo. 209; *Peck v. Hiler*, 31 Barb. (N. Y.) 117; *Broadway Bldg. Co. v. Myers*, 49 Misc. 531, 97 N. Y. Supp. 977.

²¹ In *Skally v. Shute*, 132 Mass. 367, it was said that "generally the

d. **Tenant must relinquish possession.** In order that there be an eviction by the landlord, in the legal sense, it is necessary that the tenant no longer retain possession of the premises. In case of an actual dispossession of the tenant, an "actual eviction," no question can arise in this regard, but when there is merely an interference with his possession and enjoyment, it is necessary that the tenant relinquish possession of the premises in order that there be a "constructive eviction," the theory being that the acts of interference by the landlord compel the tenant to leave, and that he is thus in effect dispossessed, though not forcibly deprived of possession.²² As has been remarked, "the proposition that there can be retention of demised premises and an eviction are logically and legally contradictory."²³ Not

question whether acts of the landlord in consequence of which the tenant abandons the premises amount to an eviction is a question of law," and it was held to be ground for reversal that the question was left to the jury, it being merely for them to say whether the landlord did the acts alleged.

²² *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499; *Agar v. Winslow*, 123 Cal. 587, 56 Pac. 422, 69 Am. St. Rep. 84; *Barrett v. Boddie*, 158 Ill. 479, 42 N. E. 142, 49 Am. St. Rep. 172; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 37 Am. St. Rep. 175 (obstruction of light); *Higbie Co. v. Weeghman Co.*, 126 Ill. App. 97; *Talbott v. English*, 156 Ind. 299, 59 N. E. 857; *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. 203; *Roth v. Adams*, 185 Mass. 341, 70 N. E. 445; *International Trust Co. v. Schumann*, 158 Mass. 287, 33 N. E. 509; *Beecher v. Duffield*, 97 Mich. 423, 56 N. W. 777; *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *Edgerton v. Page*, 20 N. Y. 281; *Beakes v. Haas*, 36 Misc. 796, 74 N. Y. Supp. 843; *Hall v. Irvin*, 38 Misc. 123, 77 N. Y. Supp. 91; *Kinney v. Libbey*, 54 Misc. 595,

104 N. Y. Supp. 863; *Mahoney v. Broadway Brew. & Malting Co.*, 57 Misc. 420, 108 N. Y. Supp. 237; *Jackson v. Paterno*, 58 Misc. 201, 108 N. Y. Supp. 1073; *Sutton v. Foulke*, 44 Leg. Int. (Pa.) 5; *Leiferman v. Osten*, 167 Ill. 93, 47 N. E. 203; *Humiston, Keeling & Co. v. Wheeler*, 175 Ill. 514, 51 N. E. 893; *Ralph v. Lomer*, 3 Wash. St. 401, 28 Pac. 760; *Wilson v. Smith*, 13 Tenn. (5 Yerg.) 279. But compare cases referred to post, note 34.

²³ *Mortimer v. Brunner*, 19 N. Y. (6 Bosw.) 653.

Sometimes this requirement is expressed by the statement that the tenant's abandonment of the premises is necessary to effect an eviction, and sometimes by the statement that an eviction by the landlord must be followed by such abandonment to have a legal effect on the rent or to give a right of action. We would prefer the former mode of expression, since the landlord's abandonment of the premises is, as before stated (see ante, § 185 a), a constituent part of the eviction. The legal consequences are a result of the eviction, and not of the eviction plus

only must there be a relinquishment or abandonment of possession, but this must be on account of the interference by the landlord; and, if this is not the case, the fact that the abandonment follows after acts of interference sufficient in themselves to justify the abandonment does not give rise to a legal eviction.²⁴ Accordingly there is no eviction if the acts on the part of the landlord are merely temporary in their effect, and are no longer operative at the time of the tenant's abandonment of possession.²⁵

It has been said that the tenant must abandon the premises within a reasonable time after the acts complained of,²⁶ the meaning of which presumably is that the lapse of a considerable time before abandonment tends to show that the abandonment, when it does take place, is not a result of such acts. A delay in abandonment is, however, it seems, excused if this is the result of promises by the landlord to remove the cause for abandonment.²⁷ And though the tenant fails to abandon the premises on account of conditions justifying him in so doing, this does not prevent him from so doing on a subsequent renewal of such conditions in a more aggravated form, and from then asserting an eviction.²⁸

e. **Total and partial eviction.** An eviction may be from the whole of the demised premises, or from part only, a "partial eviction" as it is termed. For the purpose of constituting a

the tenant's abandonment. As is said by Larremore, C. J., in *Koehler v. Scheider*, 15 Daly, 202, 4 N. Y. Supp. 611, the statement that a tenant, while remaining in possession, cannot assert an eviction, "is only another way of saying that one cannot raise the defense of eviction unless he has been evicted."

²⁴ *Eisenhart v. Ordean*, 3 Colo. App. 162, 32 Pac. 495; *Riley v. Lally*, 172 Mass. 244, 51 N. E. 1088; *Edwards v. Candy*, 14 Hun (N. Y.) 596; *Humiston, Keeling & Co. v. Wheeler*, 175 Ill. 514, 51 N. E. 893.

²⁵ *Ryan v. Jones*, 2 Misc. 65, 20 N. Y. Supp. 842; *Adams v. Burr*, 13 Misc. 247, 34 N. Y. Supp. 156.

²⁶ *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499; *Dennick v. Ek-dahl*, 102 Ill. App. 199; *Orcutt v. Isham*, 70 Ill. App. 102; *Fox v. Murdock*, 58 Misc. 207, 109 N. Y. Supp. 108; *Seaboard Realty Co. v. Fuller*, 33 Misc. 100, 67 N. Y. Supp. 146.

The tenants cannot delay their abandonment, it has been held, till after a time when, by the provisions of the lease, they might have terminated the tenancy. *Megargee v. Longaker*, 10 Pa. Super. Ct. 491.

²⁷ *Wallace v. Lent*, 1 Daly (N. Y.) 481.

²⁸ *Marks v. Bellaglio*, 56 App. Div. 299, 67 N. Y. Supp. 736.

defense to a claim for rent, a partial eviction by the landlord is as effective as an entire eviction,²⁹ but there would ordinarily be a difference as regards the liability of the landlord in damages.³⁰ An actual eviction may be partial, as when the landlord takes possession of part of the premises by actually dispossessing or excluding the tenant therefrom,³¹ as likewise, presumably, may a constructive eviction, as when the landlord so interferes with the tenant's enjoyment of a part of the premises that the latter is justified in relinquishing possession of that part and he does so, retaining possession of the residue.³² Moreover, an actual eviction of the tenant from part of the premises may so affect his enjoyment of the premises as a whole as to justify their entire abandonment by him, thus resulting in a constructive eviction from the whole.³³

Ordinarily the question whether an eviction is from part or all of the premises presents but little difficulty, and there are but few decisions bearing thereon. Occasionally, however, the question has arisen whether there was an actual eviction from part of the premises or merely acts on the part of the landlord justifying the tenant's abandonment of the whole, which, not being followed by such abandonment, were without legal effect, and some courts have gone decidedly far in regarding, as constituting a partial actual eviction, acts which merely cause an interference with the tenant's enjoyment of the premises, and which would seem to be legally ineffective unless followed by the tenant's abandonment of the whole or of part of the premises.³⁴ These cases in effect, it seems, deny the rule before as-

²⁹ See ante, § 182 e (2).

³⁰ See post, § 185 i.

³¹ See post, at notes 37-40.

³² See *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322. Compare ante, § 182 e (2), at notes 859a-861.

³³ See *Newton v. Allin*, 1 Q. B. 518.

³⁴ In *Hamilton v. Graybill*, 19 Misc. 521, 43 N. Y. Supp. 1079, and *Seigel v. Neary*, 38 Misc. 297, 77 N. Y. Supp. 854, it was held that the closing by the landlord of one of the two entrances to the room leased

constituted an actual eviction from part of the premises, so that the right to rent was suspended, though the tenant retained possession of the whole office. It is somewhat difficult to understand how the closing of an opening in the wall can be regarded as an exclusion from possession of a part of the premises, so as to be an actual eviction in part, except upon the theory that the threshold, a part of the leased premises, is actually occupied by the closed door or by some other obstruc-

serted, that there can be no eviction while the tenant remains in possession of the leased premises, and obliterate all distinction between actual and constructive eviction. Several of them

tion placed there by the landlord. In *Lawrence v. Denham Co.*, 58 Misc. 543, 109 N. Y. Supp. 752, it was held that there was an "actual partial eviction" because the tenant of a loft in a building was at times prevented from personally entering the building.

In *Hall v. Irvin*, 78 App. Div. 107, 79 N. Y. Supp. 614, it was decided that it was ground for refusal to pay rent, although the tenant retained possession of the leased premises, that he was deprived of the use, to a considerable extent, of the lavatories in the building, and that his use of the passages, stairways and elevators leading to the offices leased by him was greatly interfered with by the making of repairs. In *Edmison v. Lowry*, 3 S. D. 77, 52 N. W. 583, 44 Am. St. Rep. 774, 17 L. R. A. 275, it was decided that the acts of the landlord in depositing lumber in the street, thereby interfering with access to the premises leased, constituted an actual eviction from part of the premises sufficient as a defense to rent, though the tenant retained possession of all the premises not within the line of the street. And in *Pridgeon v. Excelsior Boat Club*, 66 Mich. 326, 33 N. W. 502, where the premises were leased for use as a boat house, the fact that the landlord interfered with access thereto from the water was regarded as an actual eviction excusing the payment of rent, though the tenant remained in possession. So in *Witte v. Quinn*, 38 Mo. App. 681, there was held to be an actual eviction for the purpose of a defense to

rent when the tenant's right to the use of a certain yard and certain conveniences therein appurtenant to the leased premises was prevented by the landlord's building in the yard.

In *New York Dry Goods Store v. Pabst Brew. Co.*, 50 C. C. A. 295, 112 Fed. 381, the act of the landlord in cutting openings in the wall, while extending his window space on the floor above that leased, was regarded as an actual eviction. And in *Herpolsheimer v. Funke*, 1 Neb. Unoff. 471, 95 N. W. 688, the act of the landlord in obstructing the view into a show window of which the tenant had the use was regarded as an eviction, though the tenants remained possessed of the leased premises as before.

To these cases may be added *Brown v. Holyoke Water Power Co.*, 152 Mass. 463, 25 N. E. 966, 23 Am. St. Rep. 844, where there was said to be an eviction from "part of the premises let," when the tenant was deprived of power which the landlord had agreed to furnish, though the tenant remained in possession of all of the rooms leased. This was an action against the landlord for damages, and the use of the term eviction may perhaps be regarded as a mere mode of expression, the wrong consisting in the breach of the contract to furnish power. Power for manufacturing purposes, transmitted by belting or otherwise, a mere form of energy, cannot, properly speaking, it is submitted, be "a part of the premises let." See ante, §§ 24 a, 136.

are apparently based on the theory that if, upon the lease of a part of a building, the lessee has an appurtenant right, such as that of access, in another part of the building remaining in the lessor's possession, that right constitutes a part of the leased premises, so that an interference with the exercise thereof constitutes an actual eviction from a part of such premises. This, it is submitted, is incorrect. A right to make a particular use of a part of the building adjoining that part of which the lessee is given possession, in order that such possession may be more beneficial or valuable, is, it is conceived, not a part of the leased premises, but is merely a right appurtenant to the tenant's possessory interest. This seems particularly the case when there is no specific mention of such right in the lease but merely an implication of a grant thereof, based on the mode of construction of the building or on the previous method of use.

f. Specific acts by landlord—(1) Forcible expulsion or exclusion. The forcible expulsion and exclusion of the tenant from the premises by the landlord is, as stated above, undoubtedly an eviction, an "actual" eviction, in the full sense of the term,³⁵ and, even without any expulsion of the tenant, his absolute exclusion from the premises after he has taken possession is an eviction.³⁶

In case the exclusion is from not the whole of the demised premises but a part thereof, there is but a partial eviction.³⁷ In case of such exclusion from part there is, it has been said, a partial eviction, without reference to the extent of such part, or whether such exclusion materially changes the character and

³⁵ *Hyman v. Jockey Club Wine*, 138, 57 N. E. 360, it was held a question for the jury on the evidence etc., Co., 9 Colo. App. 299, 48 Pac. 671; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Skally v. Shute*, 132 Mass. 367; *Hall v. Joseph Middleby, Jr.*, 197 Mass. 485, 83 N. E. 1114; *Witte v. Quinn*, 38 Mo. App. 681.

A forcible expulsion of the tenant is an eviction, though thereafter no attempt is made to prevent his return. *Cibel v. Hills*, 1 Leon. 110.

³⁶ *Pendill v. Eells*, 67 Mich. 657, 35 N. W. 754; *New York Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 217. In *Faxon v. Jones*, 176 Mass.

whether the act of the landlord in taking the keys of the rooms leased out of the door, where they had been left by the tenant, was a substantial exclusion of the tenant, or whether his holding of the keys was merely temporary and incidental to the care of the rooms, with a desire on his part to have an opportunity of speaking to the tenant.

³⁷ *Smith v. Raleigh*, 3 Camp. 513; *Colburn v. Morrill*, 117 Mass. 262, 19 Am. Rep. 415; *Smith v. Wise*, 58

enjoyment of the premises.³⁸ A different view has, however, been expressed.³⁹ Though the tenant is actually excluded from a part only on the premises, there is, as before stated, an eviction from the whole, no doubt, if this is such a substantial interference with the enjoyment of the whole as to justify the tenant in relinquishing possession of the other part, and he does so.⁴⁰

The refusal of the lessor to allow the lessee to take possession under his lease is, it seems, not an eviction, since one who has never been in possession cannot be dispossessed.⁴¹

Somewhat similar, in its nature and effect, to an exclusion of the tenant from possession by the landlord, is the former's exclusion by the act of the landlord in procuring an *ex parte* in-

Ill. 141; *Smith v. McEnany*, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272, in which latter case the landlord allowed a wall to be built encroaching on the premises. It depends on circumstances. Twenty inches might be a great deal in the crowded streets of a city, but wholly insignificant if the boundary of a Texas ranch." Obviously, however trifling, the encroachment would be a trespass, though not an eviction.

³⁸ *Smith v. McEnany*, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272, where it is said, per Holmes, J., that "when the tenant proves a wrongful deforcement by the landlord from an appreciable part of the premises, no inquiry is open as to the greater or less importance of the parcel from which the tenant is deforced. Outside the rule *de minimis*, the degree of interference with the use and enjoyment of the premises is important only in the case of acts not physically excluding the tenant, but alleged to have an equally serious practical effect." No suggestion is here made as to what constitutes "an appreciable part of the premises" as distinguished from a part not appreciable.

³⁹ See *Osmers v. Furey*, 32 Mont. 581, 81 Pac. 345; *Newton v. Allin*, 1 Q. B. 518.

⁴⁰ *McClurg v. Price*, 59 Pa. 420, 93 Am. Dec. 356; *Stiger v. Monroe*, 109 Ga. 457, 34 S. E. 595; *Etheridge v. Osborne*, 12 Wend. (N. Y.) 529; *Vanderpool v. Smith*, 4 Abb. Dec. (N. Y.) 461; *Hawkes v. Orton*, 5 Adol. & E. 267. But see *Walker v. Tucker*, 70 Ill. 527.

The landlord's failure to remove certain chattels belonging to him after the tenant's contract for their use has expired is not an eviction. *Baumgardner v. Consolidated Copying Co.*, 44 Ill. App. 74.

⁴¹ In *Birckhead v. Cummins*, 33 N. J. Law, 44, it is decided that no eviction resulted from the fact that the lessor, before the lessee took possession, removed all the furniture on the premises, for the reason that a lessee never in possession has merely

junction against the tenant's use of the premises, which has been regarded as involving an eviction.⁴²

(2) **Interference with ingress or egress.** The act of the landlord in placing obstructions in the way of the approach to the leased premises, so as materially to interfere with the tenant's use and enjoyment of the premises, has been regarded as an eviction,⁴³ and the same view has been taken of the act of the landlord in closing up one of the two entrances to the demised premises.⁴⁴ There is not an eviction if the lessor locks out the tenant while the latter is temporarily absent from the premises.⁴⁵ The exclusion of persons seeking to enter the premises

an *interesse termini*, and cannot, therefore, be evicted. Presumably even if he had taken possession, the removal of the furniture would not have been an eviction. See ante, at note 11.

⁴² *Pfund v. Herlinger*, 10 Phila. (Pa.) 13, where the injunction was against the use of the premises for a particular purpose. The fact that the landlord obtained the injunction in order to obtain a construction of the lease as to the tenant's right to use the premises for this purpose was regarded as immaterial. And see *Friend v. Oil Well Supply Co.*, 165 Pa. 652, 30 Atl. 1134.

⁴³ *Hall v. Irvin*, 78 App. Div. 107, 79 N. Y. Supp. 614; *Hoeverler v. Fleming*, 91 Pa. 322 (dictum). In *Pridgeon v. Excelsior Boat Club*, 66 Mich. 326, 33 N. W. 502, it was held that the lessor of a boat house was guilty of an eviction when he kept a vessel moored so as to cut off all approach to the boat house from the water. And so there was held to be an eviction when the lessor deposits lumber in the street in front of the premises for a period of three months so as to deprive the lessee of free access to the premises. *Edmison v. Lowry*, 3 S. D. 77, 52 N. W. 583, 17 L. R. A. 275, 44 Am. St. Rep.

774. But in *Meeker v. Spalsbury*, 66 N. J. Law, 60, 48 Atl. 1026, it was held that an obstruction of the passageway leading to the demised premises was not an eviction, and in *Manchester, S. & S. R. Co. v. Anderson* [1898] 2 Ch. 394, it was held that a temporary inconvenience caused by the landlord's interference with the access to the premises by blocking up the street and also a private right of way was not a breach of the covenant for quiet enjoyment.

⁴⁴ *Hamilton v. Graybill*, 19 Misc. 521, 43 N. Y. Supp. 1079. See ante, note 34.

⁴⁵ *Williams v. Yoe*, 22 Tex. Civ. App. 446, 54 S. W. 614 (semble). So in *Morgan v. Short*, 13 Misc. 279, 34 N. Y. Supp. 10, a finding of eviction was held to be justified when the landlord placed a padlock on the door after the tenant had removed from the premises. And see *Lester v. Griffin*, 57 Misc. 628, 108 N. Y. Supp. 580; ante, note 19 a. In *Colburn v. Morrill*, 117 Mass. 362, 19 Am. Rep. 415, it was held that there was a partial eviction when the landlord removed the tenant's goods from one of the rooms leased and locked the doors of that and another room, carrying away the key.

at the tenant's request in order to make necessary repairs, followed by the tenant's removal, has also been held to involve an eviction.^{45a}

Such an interference with access or ingress to the premises, unless the effect is to deprive the tenant of the actual possession of the whole or part of the premises, can, it seems clear, constitute an eviction only if followed by the tenant's relinquishment of possession on account thereof, in accordance with the rule before referred to.⁴⁶ The tenant cannot retain possession of the whole premises and allege an eviction from part merely because his access thereto is interfered with. Some courts, however, have adopted a different view.⁴⁷

(3) **Deprivation of rights appurtenant to leasehold.** There is an English decision to the effect that the landlord's interference with an easement appurtenant to the land cannot effect an eviction which will constitute a defense to a claim for rent, since the rent issues out of the demised premises alone.⁴⁸ This seems most questionable, if such interference substantially and permanently affects the tenant's enjoyment of the land itself and he consequently abandons possession, and there are decisions in this country of an opposite tendency.⁴⁹

^{45a} *Bergman v. Papia*, 58 Misc. 533, depriving the lessee of the use of a window for advertising purposes, 109 N. Y. Supp. 856.

⁴⁶ See ante, § 185 d.

⁴⁷ See ante, at note 34.

⁴⁸ *Williams v. Hayward*, 1 El. & El. 1040, where the easement in question was the right to use a railway. In *Coleman v. Reddick*, 25 U. C. C. P. 579, a like decision was rendered as to a right to draw water from a pond for power purposes.

⁴⁹ In *West Side Sav. Bank v. Newton*, 76 N. Y. 616, it was decided that the act of the landlord in cutting off the city water supply might effect an eviction.

In *Witte v. Quinn*, 38 Mo. App. 681, the landlord's act in building over a yard which the tenant had a right to use was regarded as an eviction, as was, apparently, in *O'Neill v. Manget*, 44 Mo. App. 279, his act in

In *Fuller v. Ruby*, 76 Mass. (10 Gray) 285, it is said that the act of the landlord in preventing a tenant from using the roof of the tenement house for drying clothes might be an eviction.

In *Hall v. Irvin*, 78 App. Div. 107, 79 N. Y. Supp. 614, the tenant's deprivation of the use of the water closet and wash basins in the office building in which the room leased was located was regarded as sufficient to constitute an eviction.

In *Peck v. Hiler*, 31 Barb. (N. Y.) 117, it seems to be assumed that the tenant's deprivation of the use of a railroad on adjoining land might result in an eviction, but it was decided that it did not in fact so re-

It has been decided that the tenant's deprivation of a privilege previously enjoyed by him in connection with the demised premises, merely under a license given separately and apart from the lease, cannot justify a claim of eviction,⁵⁰ and in no case, it seems, should an interference with the tenant's right to make a specified use of premises adjoining those leased be regarded as an eviction, unless the tenant relinquishes possession of a part or the whole of the latter,⁵¹ though there are decisions apparently to the contrary.

(4) **Acts of omission.** An eviction by the landlord is properly an affirmative act on his part, an act of commission, involving an interruption of or interference with the tenant's possession or enjoyment of the premises. It is, in its nature, a wrongful act which involves a breach of the covenant of quiet enjoyment. Unfortunately, the courts have occasionally lost sight of the true nature of an eviction in this respect. Some courts have, for instance, applied the term to a mere failure of the tenant to perform covenants which he may have made, the nonperformance of which renders the premises less desirable for some particular purposes. Thus, breaches by a landlord of covenants by him to furnish electric power for use on the premises,⁵² to furnish heat,⁵³ and to furnish proper elevator service,⁵⁴ have each been referred to as constituting an eviction. Occa-

sult, since the tenant had already as agreed for the enjoyment of the rendered it incapable of use. In license.

other words, there was no substantial interference with the tenant's enjoyment. In *Eschmann v. Atkinson*, 91 N. Y. Supp. 319, evidence that the servant of the tenant of an apartment was arbitrarily excluded from the use of the elevator was regarded as sufficient to sustain a finding of an eviction. See, also, cases referred to ante, note 34, and post, § 185 f (8).

⁵⁰*Lynch v. Baldwin*, 69 Ill. 210. In this case, as a matter of fact, the deprivation of such use was not by the tenant's landlord but was by the owner of the adjoining land by reason of the landlord's failure to pay

⁵¹ See ante, § 185 d.

⁵² See ante, at note 34.

⁵³ *Brown v. Holyoke Water-Power Co.*, 152 Mass. 463, 25 N. E. 966, 9 L. R. A. 509, 23 Am. St. Rep. 844.

⁵⁴ *Harmony Co. v. Rauch*, 64 Ill. App. 386; *Bass v. Rollins*, 63 Minn. 226, 65 N. W. 348; *Jackson v. Paterno*, 58 Misc. 201, 108 N. Y. Supp. 1073.

⁵⁵ *Lawrence v. Mycenian Marble Co.*, 1 Misc. 105, 20 N. Y. Supp. 698; *Ardsley Hall Co. v. Sirrett*, 86 N. Y. Supp. 792. See *Delmar Inv. Co. v. Blumenfeld*, 118 Mo. App. 308, 94 S. W. 823.

sionally the expression has even been applied to an undesirable physical condition of the premises, not the result of any act or omission of the landlord, merely because the tenant has, by statute, the right to relinquish possession and refuse to pay rent if such condition is not removed.⁵⁶ The mere fact that the tenant is thus given the right to refuse to pay rent on account of such "untenantable" condition of the premises does not impose upon the landlord any obligation to remedy that condition, as appears from the fact which, it is conceived, is not open to question, that the tenant has no right of action against the landlord for failure to remove such condition unless he has entered into a covenant to that effect. This being so, the statement that the existence of such a condition constitutes an eviction by the landlord is equivalent to a statement, it would seem, that the landlord may be guilty of an eviction because he fails to do what he is under no obligation to do. Even when the tenant has entered into a covenant, the failure to perform which results in an untenantable condition, it is not perceived how either the breach of covenant, or the resulting untenantable condition, or both together, can be regarded as constituting an eviction.

This use of the term "eviction," as applying to cases in which the tenant is, by force of statute or otherwise, regarded as justified in leaving the premises and refusing to pay rent, owing to their "untenantable" condition, as it is ordinarily expressed, is no doubt a result of the fact that such right in the tenant also exists in cases of actual interference by the landlord with the tenant's enjoyment of the premises, a "constructive eviction" properly so called. Such extended application of the term can, however, but result in obscuring the real nature of an eviction, as being a wrongful act and not a mere failure to act,

⁵⁶ See e. g., *Tallman v. Murphy*, and terminate his obligation to pay 120 N. Y. 345, 24 N. E. 716; *Sully v. rent.*" But here there was a nuisance in the cellar under the premises 49 Am. St. Rep. 659. So in *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117, it is said that "any act or default of the lessor that renders the tenement such as endangers the life or health of the occupants may be treated as an eviction, and give him the right to abandon the premises,

rightful or wrongful. In some cases what is, it is submitted, a more correct conception of the nature of an eviction in this respect has been asserted.⁵⁷ Thus, it has been decided that the fact that the landlord is guilty of a breach of covenant to furnish certain facilities in connection with the demised premises does not involve an eviction,⁵⁸ and a like decision has been made as to the breach of a covenant to repair.⁵⁹ So the fact that the premises are infested by vermin, and that the landlord has taken no measures to remove them, has been recognized as not involving an eviction.^{59a}

(5) **Occupation by landlord on tenant's abandonment.** The mere fact that the tenant has temporarily vacated the premises gives the landlord no right to resume possession,⁶⁰ and if the latter does resume possession, with the effect of preventing the tenant's return, this no doubt constitutes an eviction.⁶¹ If, however, the vacation of the premises by the tenant is intended to be permanent, if they are "abandoned" by him, as it is fre-

⁵⁷ "The common-law doctrine of failure of the landlord to perform eviction has reference to affirmative his covenant to build a raceway for acts of the landlord or of a third the use of the tenant was held not to person under a title paramount to be an eviction.

the landlord's. There must be a ⁵⁹ *Speckels v. Sax*, 1 E. D. Smith forcible ouster of the tenant, or such (N. Y.) 253; *Huber v. Ryan*, 26 Misc. 428, 56 N. Y. Supp. 135; *Hallett v. Wylie*, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; *Wright v. Lattin*, 38 Ill. 293. "It can hardly be necessary to It seems a confusing mistake to con- say that the failure of the lessor to sider the statute (of 1860) as an make the repairs stipulated in the enlargement of the law of eviction. lease would not in itself amount to The law of eviction is as it was be- constructive eviction." *Biggs v. Mc- fore the statute was passed.*" Per *Curley*, 76 Md. 409, 25 Atl. 466.

Gaynor, J., in *Huber v. Ryan*, 26 ^{59a} *Pomeroy v. Tyler*, 9 N. Y. St. Misc. 428, 56 N. Y. Supp. 135. Rep. 514; *Jacobs v. Morand*, 110 N. Y. Supp. 208.

⁵⁸ In *Watts v. Coffin*, 11 Johns. (N. ⁶⁰ *Hough v. Brown*, 104 Mich. 109, Y.) 495, it was decided that the ten- 62 N. W. 143; *Larkin v. Avery*, 23 ant's deprivation by the landlord of a right of common in adjoining land, Conn. 304; *Chancey v. Smith*, 25 W. which was secured merely by a coven- Va. 404, 52 Am. Rep. 217.

⁶¹ See *Briggs v. Thompson*, 9 Pa. 338; *Day v. Watson*, 8 Mich. 535, and ante, note 45.

Osborn, 12 Wend. (N. Y.) 399, the

quently expressed, the landlord may, it seems, resume possession.⁶² Since this is not wrongful, while an eviction by the landlord is always a wrongful act on the latter's part, it is not proper to term such resumption of possession after the tenant's abandonment an eviction, though this has occasionally been done.⁶³ It may, and frequently does, result in a surrender by operation of law, as is elsewhere explained,⁶⁴ and so terminates the right to subsequently accruing rent, and this effect on the right to rent constitutes its point of resemblance to an eviction.

(6) **Subsequent lease or other conveyance.** There are occasional *dicta* and decisions to the effect that if the landlord, during the existence of the tenancy, makes a lease to another person, this effects an eviction of the tenant.⁶⁵ These are, it is submitted, incorrect. If the first lease is still outstanding and the second lessee has notice thereof, which he generally has, either by the tenant's possession or otherwise, the second lease is in effect nugatory as regards the first tenant.⁶⁶ If, on the other hand, the second lessee has no notice of the first

⁶² *Packer v. Cockayne*, 3 G. Greene (Iowa) 111; *Haller v. Squire*, 91 Iowa, 10, 58 N. W. 921; *Kiplinger v. Green*, 61 Mich. 340, 28 N. W. 121, 1 Am. St. Rep. 584; *Duffy v. Day*, 42 Mo. App. 638; *Torrans v. Stricklin*, 52 N. C. (7 Jones L.) 50; *McKinney v. Reader*, 7 Watts (Pa.) 123; *Pier v. Carr*, 69 Pa. 326.

⁶³ See *Matthews' Adm'r v. Tobener*, 39 Mo. 115; *Hall v. Burgess*, 5 Barn. & C. 332; *Hegeman v. McArthur*, 1 E. D. Smith (N. Y.) 147. That such resumption of possession does not involve an eviction, see *Smith v. Billany*, 4 Houst. (Del.) 113; *State v. McClay*, 1 Har. (Del.) 520; *Humiston, Keeling & Co. v. Wheeler*, 175 Ill. 514, 51 N. E. 893, 67 Am. St. Rep. 232; *Wheeler v. Stevenson*, 6 Hurlst. & N. 155.

⁶⁴ See post, § 190 c.

⁶⁵ *Morris v. Kettle*, 57 N. J. Law, 218, 30 Atl. 879; *Dolton v. Sickel*, 66 N. J. Law, 492, 49 Atl. 679; *Haw-*

thorne v. Coursen, 18 Misc. 447, 41 N. Y. Supp. 995; *Smith v. Maxfield*, 9 Misc. 42, 29 N. Y. Supp. 63; *Hirschfield v. Franks*, 112 Mich. 448, 70 N. W. 894 (semble); *Hall v. Burgess*, 5 Barn. & C. 332, per *Holroyd, J.* In *Harrington v. Hall*, 126 Mich. 704, 86 N. W. 153, it is apparently decided that a subsequent demise to another person gives a right to the tenant under the existing demise to recover rent paid by him in advance. There is no discussion and the term "eviction" is not used.

That such a subsequent demise is not an eviction, see *Carey v. Bostwick*, 10 U. C. Q. B. 156; *Neale v. Mackenzie*, 1 Mees. & W. 747.

An attempt to lease to a third person is not an eviction, *Mills v. Sampsel*, 53 Mo. 360, even though such person be a subtenant of the original lessee. *Ogilvie v. Hull*, 5 Hill (N. Y.) 52.

⁶⁶ See ante, § 146, at note 1.

lease, either by the tenant's possession or otherwise, the second lease would ordinarily take priority.⁶⁷ In this latter case there is some slight basis in precedent for regarding the making of the second lease as an eviction, arguing by analogy from occasional decisions in which it has been held that there is an eviction, constituting a breach of the covenant for quiet enjoyment on a conveyance in fee, if the grantor makes a second conveyance which takes priority over the first because first recorded.⁶⁸ These latter cases have, however, been criticized by high authority,⁶⁹ and the view asserted by them has been repudiated by other courts.⁷⁰ A lessor or his transferee has a perfect right, during the continuance of the term, to make another lease to another person, such lease to take effect either as a concurrent lease or as one in reversion,⁷¹ and the fact that, owing to the first lessee's failure to take proper precautions, by securing possession or recording his lease, the second lease takes precedence over the first lease, is no reason, it is conceived, for treating the second lease as a wrongful act, which it must be in order to constitute an eviction.⁷²

If the second lessee ousts the first lessee, this is not the act of the lessor, unless he has connived at or directed it. If the second lease is a concurrent lease, such act on the part of the second lessee is an eviction by the landlord, since such second lessee is the landlord, but if, as usually is the case, the second lease is a lease in reversion, such act is by a stranger to the first lease, and is not, properly speaking, an eviction. But, as suggested above, if the ouster by the second lessee is by the connivance or direction of the lessor, then it may be regarded as having been by him, and is, properly speaking, an eviction.⁷³ Occasionally an ouster by the second lessee has been regarded as an eviction by the lessor without any evidence of complicity on the part of the latter, that is, the lessor was regarded as guilty of an eviction because he leased to another, who took possession.⁷⁴

⁶⁷ See ante, § 146, at note 4.

⁶⁸ See *Curtis v. Deering*, 12 Me. 499; *Maeder v. City of Carondelet*, 26 Mo. 112, 69 Am. Dec. 483; *Lukens v. Nicholson*, 4 Phila. (Pa.) 22.

⁶⁹ Rawle, *Covenants for Title* (5th Ed.) p. 168, note 5.

⁷⁰ *Wade v. Comstock*, 11 Ohio St.

71; *Scott v. Scott*, 70 Pa. 244; *Foster v. Woodward*, 141 Mass. 160, 6 N. E. 853.

⁷¹ See ante, § 146 d.

⁷² See ante, § 146 a, at notes 7, 8.

⁷³ *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108.

⁷⁴ *Wright v. Lattin*, 38 Ill. 293;

As before stated, the mere leasing does not properly constitute an eviction, and it is difficult to see how the lessor can be held responsible for the act of the second lessee, unless he has advised or directed it, or, perhaps, has made the second lease with knowledge of the action intended by the second lessee. That the lessor is not responsible for the act of one to whom he conveys the premises in fee subject to the lease has been clearly decided,⁷⁵ and he should no more be held responsible for the acts of one to whom he conveys a less interest, be it an interest for life, for ninety-nine years, or for one year only. Occasionally it is said that there is an eviction by the lessor if he "puts the second lessee into possession,"⁷⁶ and this is no doubt correct if "putting into possession" means turning out the prior lessee, or authorizing the second lessee so to do.

The making of a subsequent lease by the landlord to another person is usually the sequence of an abandonment of the premises by the tenant under the first lease, and while in a few cases this is spoken of as an "eviction" of the previous tenant,⁷⁷ more usually it is regarded as involving merely an acceptance of the tenant's previous relinquishment of possession, thus effecting an implied surrender,⁷⁸ while in many jurisdictions it has not even this effect. The action of the landlord in re-letting after the abandonment is not a wrongful act, and consequently should not be termed an eviction.

If the tenant expressly or tacitly consents to the making of a new lease to another, he can evidently not assert that the making of such lease involves an eviction.⁷⁹

Morris v. Kettle, 57 N. J. Law, 218, 30 Atl. 879, eviction, citing *Morris v. Kettle*, 57 N. J. Law, 218, 30 Atl. 879, where it

⁷⁵ *Gribbie v. Toms*, 70 N. J. Law, 522, 57 Atl. 144; *Id.*, 71 N. J. Law, 338, 59 Atl. 1117; *Linton v. Hart*, 25 Pa. 193, 64 Am. Dec. 691. was said that if "the tenant has vacated and abandoned the premises, an eviction by such reletting is constructive merely, and should, within

⁷⁶ *Miller v. Michel*, 13 Ind. App. 190, 41 N. E. 467; *Schneider v. Patterson*, 38 Neb. 680, 57 N. W. 398. the reason of the rule, impose upon the landlord no other penalty than that of crediting the tenant with the

⁷⁷ *Hall v. Burgess*, 5 Barn. & C. 332; *Matthews v. Tobener*, 39 Mo. 115; *Rice v. Dudley*, 65 Ala. 68. In *Dolton v. Sickel*, 66 N. J. Law, 492, 1026. sum so earned by the property during the term." Compare *Meeker v. Spalsbury*, 66 N. J. Law, 60, 48 Atl.

⁷⁸ See post, § 190 c. 49 Atl. 679, it was decided that leasing to another after abandonment by the former tenant constituted an
⁷⁹ *Stewart v. Sprague*, 71 Mich. 50, 38 N. W. 673; *Id.*, 76 Mich. 184, 42

There is one decision to the effect that the making of a conveyance in fee by the landlord, without any clause therein recognizing the rights of the tenant under the existing lease, involves an eviction of the tenant.⁸⁰ The same considerations are here applicable as in connection with the theory of an eviction by a subsequent lease.⁸¹ It seems never to have been suggested, except in this one case, that a conveyance in fee by a lessor, without mention of an outstanding lease, effects an eviction, and such a conveyance must have been of frequent occurrence. There is no reason, it is submitted, why an eviction should result from the act of the landlord in doing what he has a perfect right to do, that is, in transferring his reversionary interest, and no further interest can pass by the conveyance if the grantee has notice, actual or constructive, of the lease. If he has no such notice, the conveyance presumably takes priority over the lease, but this is owing to the tenant's failure to protect his interest, either by taking possession or by recording the lease.⁸²

(7) **Unauthorized demand for possession.** It has occasionally been decided that if the landlord notifies the tenant, before the termination of the tenancy, to relinquish the possession, and the tenant complies with the demand, this constitutes an eviction.⁸³ This view is not, however, entirely satisfactory. An

N. W. 1088; *Ogden v. Sanderson*, 3 E. D. Smith (N. Y.) 166; *Pausch v. Guerrard*, 67 Ga. 319; *Thomas v. Drennan*, 112 Ala. 670, 20 So. 848; *Lettick v. Honnold*, 63 Ill. 335.

⁸⁰ *Mathews v. People's Natural Gas Co.*, 179 Pa. 165, 36 Atl. 216 (oil and gas lease).

⁸¹ See ante, notes 65-75.

⁸² That such a conveyance does not involve an eviction, see *Gribbie v. Toms*, 70 N. J. Law, 522, 57 Atl. 144; *Id.*, 71 N. J. Law, 338, 59 Atl. 1117; *Blythe v. Pratt*, 62 Miss. 707; *Life v. Secrest*, 1 Ind. 512.

On the same principle, the landlord's assent to a decree in favor of a third person, which could not affect the lessee because he took the lease without notice of the suit, is

not an eviction by the landlord. *Sullivan v. Beardsley*, 55 Cal. 608.

⁸³ *Starkweather v. Maginnis*, 98 Ill. App. 143; *Id.*, 196 Ill. 274, 63 N. E. 692; *Tarpy v. Blume*, 101 Iowa, 469, 70 N. W. 620; *Greton v. Smith*, 33 N. Y. 245 (semble); *Watson v. Moggey*, 15 Manitoba, 241. So in *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957, where the demand for possession took the form of a suit therefor to which the tenant yielded. In *Amsden v. Atwood*, 69 Vt. 527, 38 Atl. 263, it was decided that if a landlord orders his tenant to vacate before the expiration of the term, and the tenant does so, the landlord is liable for the value of the unexpired portion of the term. The court does not call this an eviction, but

eviction involves a wrongful act upon the part of the landlord, but there is no legal wrong involved in his making this unjustifiable demand for possession, however morally improper it may be, and the fact that the tenant acts as if it were justified cannot well change its character in this respect. The case is like that of any other unjustifiable demand for the possession of property to which the possessor is foolish enough to yield. If a grantor in fee were to demand possession of the land granted, or even if he were to sue therefor, and the grantee were to yield possession, there is no authority for saying that this is an eviction, giving a right of action on the grantor's covenant for title, and it does not seem that under the circumstances a lessee could sue his lessor on the covenant for quiet enjoyment, which he should be able to do if such transaction constitutes an eviction. We would prefer to regard this as a case of implied surrender, based on a relinquishment of possession to the landlord by agreement of the parties, and such it seems to have been, in other cases, decided to be.⁸⁴

Somewhat similar to the cases above criticised is one in which the landlord, having the right to terminate the tenancy when he desired to put an end to the use of the premises for the particular purpose for which they were used by the tenant, obtained the premises from the tenant by falsely stating to the latter that such was his desire, this being regarded as an eviction by the landlord.⁸⁵ We would prefer to regard this as a case of fraud.⁸⁶

presumably that is what is meant. 60 Pac. 1009, 82 Am. St. Rep. 749. The authorities cited do not seem to Here the landlord falsely stated that sustain the decision. That a wrongful demand for possession, acceded to by the tenant, does not involve an eviction, is decided in *Greenberg v. Murphy*, 26 Ohio Cir. C. R. 359. he no longer desired the premises to be used for hop culture, and after thus obtaining possession used them himself for that purpose. The action was for damages.

In *Lierz v. Morris*, 19 Pa. Super. Ct. 73, it was apparently decided that, if the lessor induces the lessee to leave the premises by false representations that the lessor's estate has come to an end, the lessee may recover damages as for an eviction. ⁸⁶ In *Davis v. Schweikert*, 130 Cal. 143, 62 Pac. 411, the lessee covenanted to yield possession in case the premises were sold, and the lessee, having yielded possession upon the transfer of the property by the landlord, afterwards brought suit on the ground that the transfer was merely colorable for the purpose of depriving him of possession. Here the

⁸⁴ See post, § 190 c, at notes 151-154.

⁸⁵ *Salzgeber v. Mickel*, 37 Or. 216,

(8) **Injurious conditions on adjoining premises.** The question whether acts of the landlord in improving or utilizing in a particular way premises belonging to him adjoining the premises leased, or failing so to utilize them, can constitute an eviction, when they result in the tenant's relinquishment of possession, involves a number of considerations.

There is, as before stated, a general rule that a grantee or lessee is entitled to an easement in land retained by the grantor or lessor corresponding to a pre-existing *quasi* easement,⁸⁷ and any utilization by the lessor of land retained by him in such a way as to interfere with the lessee's enjoyment of such an easement may well be regarded as a constructive eviction. Thus, if one makes a lease of land on which there is a building, which depends for support on a building on adjoining land belonging to the lessor, an easement of support is created in favor of the leased property,⁸⁸ and any interference by the lessor with such easement may well be regarded as an eviction, if this affects the lessee's enjoyment, and he relinquishes possession on account thereof.^{88a} The same would be the case if there were an express grant of an easement by the lessor to the lessee. Furthermore, in some jurisdictions at least, the doctrine that a grantor cannot derogate from his own grant may apply so as to create in the lessee an easement in adjoining property retained by the grantor, restricting the uses of the latter to such as may be made without interfering with the use of the premises leased for the purpose for which they were leased,⁸⁹ and a use of such adjoining property in another way might so interfere with the use of the premises leased as to justify the lessee in relinquishing possession and asserting an eviction.

The general rule in this country is that there is no implied grant, upon a conveyance or lease of premises, of an easement to have light and air pass without interruption over adjoining land retained by the grantor or lessor,⁹⁰ and consequently an eviction

term "eviction" is not used, and the N. Y. 263, 36 N. E. 1059, post, note action appears to be rather one for 217.

deceit.

⁸⁹ Grosvenor Hotel Co. v. Hamilton

⁸⁷ See 1 Tiffany, Real Prop. § 317, [1894] 2 Q. B. 836. See ante, § 128, and ante, § 128, at notes 21-31. at notes 33, 34.

⁸⁸ See ante, § 128 a, at note 29.

⁹⁰ See ante, § 133. See, also, Keat-

^{88a} Compare Snow v. Pulitzer, 142 Ill. 481, 34 N. E.

tion cannot usually be asserted by a lessee because his lessor improves adjacent land in such a way as to cut off the light and air.⁹¹ In the case of a lease of a room in a building, however, light and air for which room must necessarily pass over another part of the building, a different rule might possibly obtain, and an obstruction of the light or air by the landlord be regarded as an eviction, if the tenant relinquishes possession on account thereof.⁹²

Without interfering with any easement created by express or implied grant, the landlord may create such a state of things upon adjacent or neighboring premises that the tenant is justified in abandoning them, thus effecting an eviction. Such is the case if the landlord discharges water, dirt or filth from adjoining premises on those leased to such an extent that the continued occupation by the tenant is rendered seriously uncomfortable or unhealthy,⁹³ or if he creates a noise and vibration by operations on the adjoining premises with like results.⁹⁴ So in

805, 22 L. R. A. 544, 37 Am. St. Rep. 175; 1 Tiffany, Real Prop. § 317.

⁹¹ Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Solomon v. Fantozzi, 43 Misc. 61, 86 N. Y. Supp. 754; Palmer v. Wetmore, 4 N. Y. Super. Ct. (2 Sandf.) 316; Myers v. Gemmel, 10 Barb. (N. Y.) 537; Johnson v. Oppenheim, 12 Abb. Pr. (N. S.) 454, 43 How. Pr. (N. Y.) 433; Dimmock v. Daly, 9 Mo. App. 354. But see dictum to the contrary in Hazlett v. Powell, 30 Pa. 293, with which compare Rennyson's Appeal, 94 Pa. 147, 39 Am. Rep. 777.

⁹² See ante, § 133, at notes 73-77.

In Herpolsheimer v. Funke, 1 Neb. Unoff. 471, 95 N. W. 688, it is decided that the action of the landlord in placing an obstruction in front of show windows in the part of the building leased constituted an eviction.

⁹³ Sully v. Schmitt, 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659.

So in Jackson v. Eddy, 12 Mo. 209, the tenant of a store was held to be justified in leaving when his goods were continually being damaged by drippings from goods stored by the landlord on an upper floor. And see Alger v. Kennedy, 49 Vt. 109, 24 Am. Rep. 1171, a case of water in a cellar below the premises leased, referred to ante, note 56.

⁹⁴ See Coope v. Kollstade, 33 Misc. 113, 67 N. Y. Supp. 181, where it was held to be for the jury whether the noise from a pump used by the lessor on adjoining premises "was a nuisance so as to effect an eviction." In Wade v. Herndle, 127 Wis. 544, 107 N. W. 4, it was held that an eviction occurred when the tenant was compelled to leave by the vibration caused by the use of adjoining premises, belonging to the same lessor, for automobile purposes. In this case the lease of the adjoining premises was the last one made, and it was held that the landlord's responsibility for the vibration depended on

the case of the lease of an apartment in a building, if the lessor fails to properly manage or repair pipes, drains or other plumbing in other parts of the building within his control, so as seriously to affect the enjoyment of the leased premises, and the tenant leaves on account thereof, there is, it has been decided, a constructive eviction.^{94a} The condition on adjoining premises which, when created by the landlord, may thus result in an eviction, has been spoken of as a "nuisance,"⁹⁵ and this, it seems, is a proper standard by which to determine whether such a condition may so result; that is, if the condition is such that it would constitute a nuisance as against a stranger, had he been occupying the premises leased, it is a cause for abandonment of such premises by one who occupies as tenant under the person creating the condition. There is, however, a decision, though not by the highest court of the state, that if one who has leased a part of a building for a florist's shop thereafter leases another part for a laundry, which would render it impossible to maintain the

whether this was a necessary or usual result of their use for an automobile shop. Presumably, the second lease was made with knowledge of the intended use, but this is not stated.

In *Donovan v. Koehler*, 119 App. Div. 51, 103 N. Y. Supp. 935, the maintenance of a bowling alley under the leased premises all day and all night so as seriously to interfere with their enjoyment by the lessees was held to constitute an eviction.

In *McLaughlin v. Bohm*, 20 Misc. 338, 45 N. Y. Supp. 745, it was held that the operation of a properly constructed pump in the cellar of an apartment house did not justify the tenant of an apartment in leaving, though the pump was audible in the apartment, the lower court having found that there was no particular vibration caused by the pump.

There is no eviction if the inter-

ference with the beneficial enjoyment thus caused is merely an isolated occurrence and not long continued. *Finck v. Rogers*, 30 Misc. 123, 61 N. Y. Supp. 866.

^{94a} *McCurdy v. Wyckoff*, 73 N. J. Law, 368, 63 Atl. 992; *Bradley v. De Goicouria*, 12 Daly (N. Y.) 393, 67 How. Pr. 76; *St. Michael's Protestant Episcopal Church v. Behrens*, 10 N. Y. Civ. Proc. R. 181; *Lathers v. Coates*, 18 Misc. 231, 41 N. Y. Supp. 373; *Marks v. Dellaglio*, 56 App. Div. 299, 67 N. Y. Supp. 736; *Id.*, 32 Misc. 94, 65 N. Y. Supp. 502. See *November v. Wilson*, 49 Misc. 533, 97 N. Y. Supp. 989.

⁹⁵ *Sully v. Schmitt*, 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659; *Coope v. Kollstade*, 33 Misc. 113, 67 N. Y. Supp. 181; *Marks v. Dellaglio*, 56 App. Div. 299, 67 N. Y. Supp. 736; *Id.*, 32 Misc. 94, 65 N. Y. Supp. 502; *McCurdy v. Wyckoff*, 73 N. J. Law, 368, 63 Atl. 992.

florist's shop, he is guilty of a constructive eviction, although the laundry does not constitute a nuisance.⁹⁶

There may be, it has been held, an eviction of the tenant of part of a building if he is compelled to leave by the use of other parts of the building, with the landlord's consent, for purposes of prostitution or gambling, or for other purposes calculated to cast disrepute upon tenants of the building, and to render it an unfit place for residence or the conduct of business.⁹⁷ Such use may be by the landlord himself, or by other persons with his permission, during his possession of such other parts, or it may be by persons to whom he has leased such other parts with knowledge that they will make such use thereof. The doctrine of these cases has, it is true, been criticised,⁹⁸ but it accords with the principle, suggested by the cases above referred to, that any use of adjoining premises by the lessor which can be regarded as a nuisance will, if it results in the tenant's relinquishment of possession, constitute an eviction, and it seems to provide but a proper degree of protection to the tenant. Such improper use of adjoining premises by other tenants of the same landlord is not, however, sufficient to constitute an eviction, although followed by the tenant's abandonment of possession, if the landlord had no reason to suspect, at the time of making the lease to them, that they would be guilty of such improper

⁹⁶ *Duff v. Hart*, 40 N. Y. St. Rep. 727, has been spoken of as an extreme case in *Gilhooley v. Washington*, 4 N. Y. (4 Comst.) 217; *Etheridge v. Osborn*, 12 Wend. (N. Y.) 252, 35 Pac. 748; *Rowbotham v. Pearce*, 5 Houst. (Del.) 135; *Weiler v. Pancoast*, 71 N. J. Law, 414, 58 Atl. 1084; *Stewart v. Forst*, 15 Misc. 621, 37 N. Y. Supp. 215. See, as approving, *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727; *Edgerton v. Page*, 20 N. Y. 281; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370; *Jackson v. Eddy*, 12 Mo. 209.

⁹⁷ *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727; *Lay v. Bennett*, 4 Colo. App. 532; *Vanderbilt v. Persse*, 3 E. D. Smith (N. Y.) 428; *Ogilvie v. Hull*, 5 Hill (N. Y.) 54. In *Molineux v. Hurlburt*, 79 Conn. 243, 64 Atl. 350, 2 L. R. A. (N. S.) 531, the tenant's allegations as to the use of the adjoining apartment by the landlady for the reception of a male guest were held to be insufficient to show an improper use thereof by her, even conceding that such use could justify the tenant in leaving.

⁹⁸ *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *De Witt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58. *Dyett v. Pendleton*, 8 Cow. (N. Y.)

use, he having no greater power than the tenant subsequently to prevent it.⁹⁹

There are several cases which apparently assert a doctrine that there is an eviction if the lessor, after having made the lease, discontinues the use which he was making of the adjoining premises at the time of the lease, so as to render the leased premises less desirable for the purpose for which the lessees obtained the lease.¹⁰⁰ So far as these cases assert that a mere failure to make a certain use of adjoining premises constitutes an eviction, they are, it is submitted, erroneous, on the principle before asserted, that a mere omission by the landlord to act, as distinct from an act of commission, cannot be an eviction.¹⁰¹ In some cases, under the modern doctrine of equitable easements, the lessee might assert that the lease to him was part of a common scheme of improvement, and so obtain an injunction against a change in the use of the adjoining premises,¹⁰² but this, being a purely equitable doctrine, could not be the basis for a

⁹⁹ *Townsend v. Gilsey*, 31 N. Y. Super. Ct. (1 Sweeny) 155; *Gilhooley v. Washington*, 4 N. Y. (4 Comst.) 217; *De Witt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58; *Cogle v. Densmore*, 57 Ill. App. 591.

¹⁰⁰ In *Conlon v. McGraw*, 66 Mich. 94, 33 N. W. 388, the court held that there was an eviction of the tenant of part of a building if the owner of the building destroyed other parts of the building, when the effect was to diminish the number of the tenant's customers. In *Denison v. Ford*, 7 Daly (N. Y.) 384, it was held that the tenant of a "market stand" was evicted when the landlord and owner of the market building, finding it unprofitable, induced the other tenants to surrender their stands, and the tenant in question having refused to do so, the landlord extinguished the lights except those of that stand and closed all the doors except that in front of it. The courts here says that in letting a stand in the market the lessor entered into an implied contract to keep a market during the term. In *Coulter v. Norton*, 100 Mich. 389, 59 N. W. 163, 43 Am. St. Rep. 458, there was held to be an eviction of the tenant of a cigar stand in a hotel for which damages could be recovered on the covenant of quiet enjoyment when the hotel was closed for lack of business. In *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108, it was decided that, if one portion of a building was leased for a hotel, the owner could not lease other portions of the building for a saloon and a tinshop, thereby affecting the availability of the other portion for use as a hotel, and that there was an eviction if he did so.

¹⁰¹ See ante, § 185 f (4).

That the change of an office building into a hotel does not involve the eviction of a tenant of an office, though it makes it unsuitable for his purposes, see *Tucker v. Du Puy*, 210 Pa. 461, 60 Atl. 4.

¹⁰² See ante, § 131.

finding of a constructive eviction. The doctrine suggested, if not directly asserted, by the cases referred to above, that one who leases property is bound not to change the use of the adjoining property, if such use is advantageous to the leased premises, seems possibly productive of considerable hardship to the lessor. And it may be asked, what are the limits to the application of the doctrine. Does it apply to a lease for a long term of years? Does the obligation on the lessor that the use of the adjoining premises shall not be changed continue in case he transfers such premises to another, so that a discontinuance of the use by such other will constitute an eviction of the tenant? And, if the reversion in the leased premises is transferred, may the transferee be deprived of rent by the act of the lessor in discontinuing the former use of the adjoining premises? Questions of this character may be difficult, if not incapable, of satisfactory solution. And the policy of recognizing any rights in the lessee as to the use of adjoining premises, other than such as may be based on the existence of an easement in his favor and on his right to immunity from the creation of a nuisance, is, it is submitted, open to serious question. A grantee in fee has no such other rights as to the use of adjoining premises retained by his grantor unless he has the foresight to insert special stipulations to that effect, and it is not perceived why a grantee for years should be in any better position. The cases previously cited, to the effect that the lessee may, by erecting a building on adjoining premises, cut off the light and air from those leased, seem opposed to any such rule in favor of a tenant under a lease.

A condition on adjoining premises, created by another tenant under the same lessor, but not such as the latter could have anticipated, and in no way connived at or authorized by him, cannot be asserted by the tenant as constituting an eviction.^{102a}

(9) **Threats and annoyances by landlord.** Occasionally an eviction has been regarded as taking place when the tenant relinquished possession owing to abusive or threatening language on the part of the landlord or his representatives, or because of petty annoyances and indignities, intentionally caused to the former by the latter, making the continuance of the occupancy

^{102a} French v. Pettingill, 128 Mo. and cases cited ante, note 99, and App. 156, 106 S. W. 575; McKinney post, note 201.

v. Browning, 110 N. Y. Supp. 562,

unpleasant and uncomfortable.¹⁰³ Evidence of the repeated doing of such acts might, it is conceived, properly be submitted to the jury to determine whether they are of such "a grave and permanent character" as to constitute an eviction, but it would hardly seem that one or two isolated acts of this character should be given this effect.¹⁰⁴ If the conduct of the landlord can be construed as a demand for possession, and the tenant yields possession in consequence thereof, the case may be regarded, it seems, as one of surrender by operation of law¹⁰⁵ rather than as one of eviction.

The assertion by the landlord of reasonable objections to the making of particular alterations by the tenant obviously does not involve any element of an eviction.¹⁰⁶

¹⁰³ There was held to be an eviction where the tenant left the premises after threats on the landlord's part to forcibly dispossess him, the posting by the latter of notices "to lease" on the premises and attempts by him to lease to others. *Greton v. Smith*, 33 N. Y. 245. Compare *Ogilvie v. Hull*, 5 Hill (N. Y.) 52.

In *Wyse v. Russell*, 16 Misc. 53, 37 N. Y. Supp. 683, the landlord was disagreeable and discourteous, made unreasonable demands on the tenant, and finally assaulted the tenant, and told him he "must go," whereupon the tenant left, and there was held to be an eviction.

In *Cohen v. Dupont*, 3 N. Y. Super. Ct. (1 Sandf.) 260, it was held that there was an eviction of a tenant when he left owing to the infliction on him by the landlord's family of petty annoyances, such as abuse of himself, his family and his business visitors, the dirtying of the halls and stairways, and the muffling of his door bell. And in *Fox v. Murdock*, 58 Misc. 207, 109 N. Y. Supp. 108, it was intimated that the authorized action of the landlord's representative in making slanderous remarks concerning the tenant's wife, and his action in listening to her conversations at the telephone, might justify the tenant in leaving and asserting an eviction.

In *Ewing v. Cottman*, 9 Pa. Super. Ct. 444, it was held that remarks by the landlord to persons boarding in the house, derogatory to the character of the house as "kept" by the tenant, did not effect an eviction, since they did not prevent the tenant from enjoying the house to its full capacity; and in another case it was held to be no defense to a claim for rent that certain of the tenant's lodgers left because of the use by the landlord of boisterous language in addressing the tenant. *Fish v. Ryan*, 88 Ill. App. 524. In the latter case there is no mention of eviction, and the tenant retained possession.

¹⁰⁴ A single assault on the tenant or on his servant has been held not to constitute an eviction. *Haas v. Ketcham*, 87 N. Y. Supp. 411; *Vatel v. Herner*, 1 Hilt. (N. Y.) 149.

¹⁰⁵ See post, 190 c, at note 151.

¹⁰⁶ *Whitcomb v. Brant* (N. J. Law) 68 Atl. 1102.

That the landlord objected to the erection of a building by the tenant in accordance with a stipulation in

(10) **Interference with subtenant.** Where the lease does not forbid the lessee to sublet, the action of the landlord in refusing to allow a subtenant to enter on the premises has been regarded as an eviction of the tenant,¹⁰⁷ and the same view has been taken of his action in expelling the subtenant¹⁰⁸ and in forcing the subtenant to pay rent to him instead of to the tenant.^{109,110}

(11) **Making of repairs.** As elsewhere stated,¹¹¹ the landlord has ordinarily no right, in the absence of special stipulation and without the tenant's consent, to enter on the premises to make repairs. Usually, when the landlord enters for such a purpose, he does so under authority given by the lease,¹¹² or by permission given by the tenant, either express¹¹³ or inferred

the lease; that he notified a dealer who had agreed to furnish the lumber that he, the landlord, would not pay therefor, and threatened to prosecute the tenant's employes if they proceeded with its erection, was held not to involve a "breach of the lease." *Buhler v. Smith*, 130 Wis. 488, 110 N. W. 412. By the latter expression is presumably meant an eviction.

¹⁰⁷ *Randall v. Alburtis*, 1 Hilt. (N. Y.) 285; *Doran v. Chase*, 2 Wkly. Notes Cas. (Pa.) 609, referred to in *Hoeveler v. Fleming & Co.*, 91 Pa. 322. See *Rowbotham v. Pearce*, 5 Houst. (Del.) 135.

¹⁰⁸ *Burn v. Phelps*, 1 Starkie, 94.

^{109, 110} *Leadbeater v. Roth*, 25 Ill. 587; *Burhans v. Monier*, 38 App. Div. 466, 56 N. Y. Supp. 632.

The bringing of ejectment by the original landlord against his tenant, who had subleased, is not an eviction, when the landlord advises the subtenant to continue paying rent to the tenant pending the suit. *Agar v. Winslow*, 123 Cal. 587, 56 Pac. 422, 69 Am. St. Rep. 84.

In *Lewis v. Payn*, 4 Wend. (N. Y.) 423, one who had leased portions of his farm to different persons and

had thereafter transferred the reversion in fee, reserving rent, was held to have evicted his grantee, and so suspended the rent reserved on the conveyance, by distraining for the rent reserved on the prior leases, not he, but his grantee, being entitled to such rent.

¹¹¹ See ante, § 3 b (2), at notes 35-39.

¹¹² *International Press Ass'n v. Brooks*, 30 Ill. App. 114. In *Waite v. O'Neil*, 22 C. C. A. 248, 76 Fed. 408, 34 L. R. A. 550, it was held that the reservation, on the lease of a "landing" of the right to make such repairs as might be necessary for the security and preservation of the premises, did not give the right to construct works in the river which would make the landing useless, and that the construction of such works was an eviction.

¹¹³ *Cook v. Anderson*, 85 Ala. 99, 4 So. 713; *Ludington v. Seaton*, 32 Misc. 736, 66 N. Y. Supp. 497; *Robinson v. Henaghan*, 92 Ill. App. 620; *Ferguson v. Troop*, 17 Can. Sup. Ct. 527; *Days v. Doyle*, 99 Ga. 62, 24 S. E. 405; *Peterson v. Edmondson*, 5 Har. (Del.) 378.

from his tacit acquiescence,¹¹⁴ and in such cases there can be no eviction.¹¹⁵ If, however, he enters and makes repairs or rebuilds without any such authority or permission, this may involve such an absolute exclusion of the tenant from the demised premises or a part thereof as to cause an "actual" eviction in whole or in part, or he may thereby so substantially interfere with the tenant's possession and enjoyment as to justify the latter in relinquishing possession of the whole or a part of the premises, this constituting a "constructive" eviction.¹¹⁶

It has been decided that the mere fact that the tenant fails to object to the making of repairs or improvements by the landlord, or that he pays rent after the commencement thereof, does not necessarily show a consent thereto on the tenant's part.¹¹⁷ Whether there is, in any particular case, an oral consent to the repairs, or whether a consent is to be inferred from conduct, would, it seems, be a question for the jury on the evidence.¹¹⁸

In case the lease is of a building alone or of a part of a building, the tenancy comes to an end on the destruction thereof,¹¹⁹ and consequently a subsequent entry on the land by the landlord in order to rebuild cannot be an eviction.¹²⁰ There are

¹¹⁴ *Barnum v. Fitzpatrick*, 27 Abb. & Malting Co., 57 Misc. 430, 108 N. C. 334, 16 N. Y. Supp. 934; *Campbell v. Shields*, 11 How. Pr. (N. Y.) 565; *Phillips & Buttorff Mfg. Co. v. Whitney*, 109 Ala. 645, 20 So. 333; *Smith v. McLean*, 22 Ill. App. 451; *Rosenbloom v. Finch*, 37 Misc. 818, 76 N. Y. Supp. 902.

¹¹⁵ *Cook v. Anderson*, 85 Ala. 99, 4 So. 713; *Peterson v. Edmonson*, 5 Har. (Del.) 378; *Barnum v. Fitzpatrick*, 27 Abb. N. C. 334, 16 N. Y. Supp. 934; *Campbell v. Shields*, 11 How. Pr. (N. Y.) 565; *Smith v. McLean*, 22 Ill. App. 451; *Humiston, Keeling & Co. v. Wheeler*, 70 Ill. App. 349; *Id.*, 175 Ill. 514, 51 N. E. 893, 67 Am. St. Rep. 232; *Ernst v. Straus*, 114 App. Div. 19, 99 N. Y. Supp. 597; *Rogers v. Grote Paint Co.*, 118 Mo. App. 300, 94 S. W. 548 (premises destroyed by fire).

¹¹⁶ See *Wait v. O'Neil*, 47 U. S. App. 19, 76 Fed. 408, 34 L. R. A. 550; *Brown v. Wakeman*, 42 N. Y. St. Rep. 677, 16 N. Y. Supp. 846; *Osmers v. Furey*, 32 Mont. 581, 81 Pac. 345; *Magaw v. Lambert*, 3 Pa. 444; *Hoeveler v. Fleming*, 91 Pa. 322.

¹¹⁷ *Wusthoff v. Schwartz*, 32 Wash. 337, 73 Pac. 407.

¹¹⁸ Compare § 3 b (3).

¹¹⁹ See ante, § 12 g (8), at note 325.

¹²⁰ *Alexander v. Dorsey*, 12 Ga. 12, 56 Am. Dec. 443; *Fleming v. King*,

cases also to the effect that the action of the landlord in rebuilding or repairing in case of the destruction of a building is not an eviction, though the lease was of the land as well as of the building.¹²¹ This view is perhaps based on the theory that the reconstruction of the building is so greatly for the advantage of the tenant that his failure to object thereto is evidence of consent. If he should object thereto, however, and the landlord's operations have the effect of excluding him from possession, it would, it seems, be an eviction, provided the tenancy is to be regarded as still existent under such circumstances;¹²² and there is at least one case to the effect that the rebuilding in such case without the tenant's consent may result in an eviction.¹²³ It has been held that a landlord, if not responsible for an injurious condition of the premises arising during the tenancy, is not responsible for the consequences of his act, not wrongful or negligent in character, in trying, at the tenant's request, to remove this condition, and that the tenant cannot relinquish possession and refuse to pay rent on account of such act.^{123a}

If repairs are legally ordered by the municipal authorities, no eviction can arise from the landlord's compliance with such order.¹²⁴

In one or two cases it is intimated that an undue delay in completing repairs, undertaken with the tenant's consent, might constitute an eviction.¹²⁵

100 Ga. 449, 28 S. E. 239; *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654.

¹²¹ *Izon v. Gorton*, 5 Bing. N. C. 501; *Connecticut Mut. Life Ins. Co. v. U. S.*, 21 Ct. Cl. 195; *Monotuck Silk Co. v. Shay*, 37 Ill. App. 542.

¹²² See ante, § 182 m (6) (d), (8) (g).

¹²³ *Hoeveler v. Fleming & Co.*, 91 Pa. 322. In *Magaw v. Lambert*, 3 Pa. 444, as quoted in the above case, it is said that "if a landlord take possession of the ruins of his premises destroyed by fire for the purpose of rebuilding, without the consent of his tenant, it is an eviction; if with his assent it is a rescission of the lease, and in either case the rent is sus-

pended." There is apparently no authority for the statement as to the effect of the entry by the tenant's assent. This seems to involve the imposition on the landlord of a penalty for doing something which enures to the advantage of the tenant.

^{123a} *Blake v. Dick*, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671.

¹²⁴ *Fleming v. King*, 100 Ga. 449, 28 S. E. 239; *Cassard v. Thornton*, 119 Ill. App. 397; *Markham v. David Stevenson Brew. Co.*, 51 App. Div. 463, 64 N. Y. Supp. 617; *Id.*, 169 N. Y. 593, 62 N. E. 1097; *Barnum v. Fitzpatrick*, 46 N. Y. St. Rep. 891, 19 N. Y. Supp. 385. See post, § 186 c.

¹²⁵ *Ferguson v. Troop*, 17 Can. Sup.

That the owner of a building prevented the entry of persons for the purpose of repairing an apartment therein, which had become untenable by reason of the act of a stranger, was held to justify the tenant of the apartment in relinquishing possession and asserting an eviction.^{125a}

(12) **Withholding of license for business.** The fact that the tenant is unable to obtain a license from the authorities to carry on the business for which he took the lease has been held not to involve an eviction by the landlord,¹²⁶ though a different view was taken when this was the result of the willful refusal of the landlord to give his written consent to the use of the premises for the purpose for which, as appeared from the written instrument, the lease was obtained.¹²⁷ Whether such a mere act of omission, on the part of the landlord, however willful, should be regarded as effecting an eviction seems very doubtful.¹²⁸ In another case it was decided that the action of the landlord in persuading the authorities to refuse a liquor license to the tenant did not involve an eviction, since it "had no tendency to interrupt, and did not interrupt, the tenant's possession,"¹²⁹ and a like decision was rendered as to the act of the landlord in joining, as owner of neighboring property, in a remonstrance against the grant of a license to the tenant, although if he had not joined the remonstrance would have been unsuccessful.¹³⁰

g. **Tenant's assent to landlord's acts.** Acts on the part of

Ct. 527; *Dexter v. King*, 28 N. Y. St. Rep. 750, 8 N. Y. Supp. 489.

^{125a} *Bergman v. Papia*, 58 Misc. 533, 109 N. Y. Supp. 856.

¹²⁶ *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966, where the tenant was unable to obtain a renewal of his liquor license because the city had erected a school building nearby. See *Guth v. Mehling*, 84 App. Div. 586, 82 N. Y. Supp. 1018.

¹²⁷ *Grabenhorst v. Nicodemus*, 42 Md. 236, where the lessor refused to give his written consent to the use of the premises as a distillery, for which purpose they were leased, and thereby prevented their use for that purpose, since the act of congress

requires the owner's written consent to be filed. In this case the tenant retained possession of the premises, and so, it is submitted, no eviction, actual or constructive, occurred, and indeed such refusal of consent was not set up as an absolute defense to the claim for rent but merely as a ground for "recoupment," and for this purpose it might be considered that there was merely a breach by the lessor of a contract to give such consent.

¹²⁸ See ante, § 185 f (4).

¹²⁹ *International Trust Co. v. Schumann*, 158 Mass. 287, 33 N. E. 509.

¹³⁰ *Kellogg v. Lowe*, 38 Wash. 293, 80 Pac. 458, 70 L. R. A. 510.

the landlord to which the tenant assents cannot be asserted by the tenant as constituting an eviction.¹³¹ This self-evident principle has been applied in the case of an entry by the landlord, with the tenant's assent, to make repairs or improvements,¹³² and so, assuming that a subsequent lease by the landlord would otherwise constitute an eviction,¹³³ it cannot be such if assented to by the tenant. Likewise, acts which the landlord is, by the terms of the lease, authorized to do cannot constitute an eviction.¹³⁴⁻¹³⁶

h. Effect of eviction on tenancy. An eviction by the landlord does not, it seems, terminate the tenancy. That this is so would appear from the statements in the books, not that the rent is extinguished by an eviction, but that it is suspended thereby,¹³⁷ and that it is revived by the tenant's re-entry.¹³⁸ That an eviction from part does not terminate the tenancy has been clearly asserted,¹³⁹ and it does not, it has been decided, relieve the tenant from the performance of his covenants other than for

¹³¹ See *Murray, Caldwell & Co. v. Pennington*, 3 Grat. (Va.) 91; *Horberg v. May*, 153 Pa. 216, 25 Atl. 750, 34 Am. St. Rep. 697; *Price v. Pittsburg, Ft. W. & C. R. Co.*, 34 Ill. 13; *Lettick v. Honnold*, 63 Ill. 335; *Austin v. Strong*, 47 N. Y. 679.

In *Mirick v. Hoppin*, 118 Mass. 582, it was held that there was no eviction if the lessor by mistake put a fence where it cut off a part of the premises demised, the lessee knowing of his action and making no objection, and forbidding the removal of the fence on the lessor's discovery of the mistake.

¹³² *Ludington v. Seaton*, 32 Misc. 736, 66 N. Y. Supp. 497; *Cook v. Anderson*, 85 Ala. 99, 4 So. 713; *Robinson v. Henaghan*, 92 Ill. App. 620; *Ogden v. Sanderson*, 3 E. D. Smith (N. Y.) 166; *Olson v. Schevlovitz*, 91 App. Div. 405, 86 N. Y. Supp. 834; *Wetterer v. Soubirous*, 22 Misc. 739, 49 N. Y. Supp. 1043; *Olmstead v. Ten-*

nessee Fixture & Showcase Co., Tenn. Ch. App. 653.

¹³³ See ante, § 185 f (6).

¹³⁴⁻¹³⁶ *Morris v. Tillson*, 81 Ill. 607; *Matthews v. Meyberg*, 4 Hun (N. Y.) 78; *Murphy v. Marshall*, 179 Pa. 516, 36 Atl. 294. So where the landlord re-enters in compliance with a provision of the lease authorizing him so to do on a certain contingency. *Wright v. Everett*, 87 Iowa, 697, 55 N. W. 4; *Hunnewell v. Bangs*, 161 Mass. 132, 36 N. E. 751.

¹³⁷ See Bro. Abr., *Apportionment*, pl. 7; Co. Litt. 148 b; *Hodgkins v. Robson*, Vent. 277. See ante, § 182 e (1), at note 845.

¹³⁸ *Cibel v. Hills*, 1 Leon. 110, pl. 149; *Timbrell v. Bullock*, Styles, 446; Bro. Abr., *Extinguishment*, pl. 4; Co. Litt. 319 a.

¹³⁹ *Leishman v. White*, 83 Mass. (1 Allen) 489; *Morrison v. Chadwick*, 7 C. B. 266, 283; *Smith v. McEnany*, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272.

the payment of rent, such as that to repair,¹⁴⁰ or to use the premises in a tenant-like manner.¹⁴¹ The occasional statements to the contrary, that a partial or entire eviction terminates the tenancy, are presumably to be construed as referring merely to the question then at issue, the termination, for the time being, of the liability for rent. The view that the tenancy still exists after the eviction does not necessarily mean that the tenant's liability for rent revives merely upon the landlord's subsequent withdrawal from the premises, but it is, it seems, only upon the tenant's re-entry that such liability revives.¹⁴² For any loss by reason of his continuing liability upon his covenants, the tenant could, it is conceived, recover damages in an action on account of the eviction,¹⁴³ and, in some jurisdictions, presumably, he could assert damage caused by the eviction by way of recoupment or set-off in an action on any of the covenants.

i. **Action for damages.** The ordinary form of action against the landlord in favor of the tenant for the recovery of damages, on account of the eviction of the latter by the former, is one upon the covenant for quiet enjoyment.¹⁴⁴ The tenant may, however, instead of suing on the covenant, bring an action of tort on account of the landlord's interference with his possession or enjoyment of the land.¹⁴⁵ This action would, in juris-

¹⁴⁰ *Newton v. Allen*, 1 Q. E. 519; *Smith v. McEnany*, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272 (dictum). And see *Carrel v. Read*, Cro. Eliz. 374. But in *Pellatt v. Boosey*, 31 Law J. C. P. 281, while it was admitted that the lessee might be liable on the covenant to repair, a forfeiture for breach thereof was not allowed, in view of the eviction.

¹⁴¹ *Morrison v. Chadwick*, 7 C. B. 266, 283.

¹⁴² See ante, § 182 e (1), at note 846.

¹⁴³ See *Morrison v. Chadwick*, 7 C. B. 266, 283.

¹⁴⁴ See ante, § 79.

That the tenant cannot obtain the aid of a court of equity to restore him to possession, see *Williams v. Mathewson*, 73 N. H. 242, 60 Atl. 687.

¹⁴⁵ *Shuman v. Smith*, 100 Ga. 415, 28 S. E. 448 (semble); *Taylor v. Cooper*, 104 Mich. 72, 62 N. W. 157; *Mancy v. Lamphere*, 139 Mich. 429, 102 N. W. 979; *Cannon v. Wilbur*, 30 Neb. 777, 47 N. W. 85; *Huest v. Marx*, 67 Mo. App. 418; *Denison v. Ford*, 10 Daly (N. Y.) 412; *Chatterton v. Fox*, 12 N. Y. Super. Ct. 64; *Gallagher v. Burke*, 13 Pa. Super. Ct. 244; *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957; *Loyd v. Capps* (Tex. Civ. App.) 29 S. W. 505; *Wilkinson v. Stanley* (Tex. Civ. App.) 43 S. W. 606; *Utah Optical Co. v. Keith*, 18 Utah, 464, 56 Pac. 155; *Robrecht v. Marling's Adm'r*, 29 W. Va. 765, 2 S. E. 827, 6 Am. St. Rep. 676.

The payment of all arrears of rent is not a condition precedent to the

dictions where the old forms of action are retained, be in trespass, or in trespass on the case, accordingly as the landlord's acts involve a direct interference with the tenant's possession, or merely an interference with his beneficial enjoyment.

It has ordinarily been decided that, in such an action of tort, the tenant may recover the difference between the rental value of the premises and the rent agreed to be paid,¹⁴⁶ as he may in an action on the covenant for quiet enjoyment;¹⁴⁷ and the cases do not suggest the possibility of difference in the amount of recovery in such two forms of action,¹⁴⁸ except as this may be implied in the occasional assertion of a right to recover punitive damages in the action of tort.¹⁴⁹ There are difficulties, however, in regarding the measure of damages as the same in the two classes of action.

The tenant's right of action against the landlord in tort is, it seems, similar to that which he would have against any stranger who might similarly interfere with his possession or enjoyment. Such right of action grows out of the violation of a right *in rem* and not *in personam*, and, in determining the right and amount of recovery, the fact that the parties occupy the relation of landlord and tenant is, it is conceived, immaterial. In other words, accurately speaking, the tenant recovers not for an eviction by his landlord but for a trespass on his possession, or for an interference with his rights of enjoyment. If the tenant is forcibly expelled from the land, either by his landlord or by a third person, he may recover in an action of trespass for the

maintenance of such an action. *graber*, 70 Minn. 220, 73 N. W. 7; *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53. *Silber v. Larkin*, 94 Wis. 9, 68 N. W. 406; *Williams v. Yoe*, 22 Tex. Civ. App. 87, 54 S. W. 614.

In *Rice v. Baker*, 84 Mass. (2 Allen) 411, it was decided that where the parties agreed that the value of the residue of the term remaining after the eviction should be set-off in an action for rent, the fact that the lease was not assignable could be considered in determining such value.

¹⁴⁶ See *Dawson v. Marsh*, 74 Conn. 498, 51 Atl. 529; *Dobbins v. Duquid*, 65 Ill. 464; *Haines v. Beach*, 90 Mich. 563, 51 N. W. 644; *Wacholz v. Gries-*

¹⁴⁷ See ante, § 79 g.

¹⁴⁸ In *Dobbins v. Duquid*, 65 Ill. 464, and *Goldstein v. Asen*, 46 Misc. 251, 91 N. Y. Supp. 783, apparently actions in tort, the court expressly adopted the measure of damages stated in the case of actions on the covenant for quiet enjoyment.

¹⁴⁹ *Gildersleeve v. Overstolz*, 90 Mo. App. 518; *Dobbins v. Duquid*, 65 Ill. 464.

trespass on the land and for any consequential damage directly caused thereby, but he should not, it would seem, recover against his landlord upon the theory that his exclusion from the land will continue during his whole term, any more than he could against a stranger who thus ousted him from the land, nor indeed than a tenant in fee could recover for such a trespass on the theory that the exclusion would continue in perpetuity.¹⁵⁰ In case the trespass assumes a permanent character, as when the landlord or a stranger erects a wall or other structure upon the leased land, the tenant might, it seems, in some jurisdictions, recover both past and future damages, on the theory that his exclusion will endure for the whole term of his lease, though in others he could, even in the case of an act of such a permanent nature, recover only the damages which had accrued prior to the time of the action.¹⁵¹ So if the tenant is not actually excluded from the land, but the landlord, or a third person, interferes with the tenant's enjoyment of the leased land by his mode of use of adjoining land, as when he obstructs the access over such land to the leased land, or interferes with water rights appurtenant to the leased land, or creates a nuisance polluting the atmosphere, the wrong is not ordinarily of a necessarily continuing character, and the tenant should not recover for damages which may possibly accrue, subsequently to the action, by reason of the continuance of the wrong. And even though the wrongdoer is the landlord, the tenant, it is submitted, should not be allowed to change the character of the wrong, or the *quantum* of damages recoverable, by relinquishing possession and asserting

¹⁵⁰ That the tenant can in such an action recover only for damage suffered by the tenant prior to the commencement of the action, see *Salmon v. Blasier Mfg. Co.*, 123 App. Div. 171, 108 N. Y. Supp. 448. Mich. 163; *Murphy v. Century Bldg. Co.*, 90 Mo. App. 621. But not, it would seem, if he could resume possession and restore his business on the same footing as before.

¹⁵¹ See *Sedgwick, Damages* (8th Ed.) §§ 91, 92, 95, 924; *Sutherland, Damages*, §§ 114, 116; *Mayne (Wood)* §§ 102-111; 8 *Am. & Eng. Enc. of Law* (2d Ed.) 864. The cases on the subject of the recovery of such prospective damages appear, so far as one can judge from the textbooks, to be in a state of great confusion.

But damages for the wrongful entry and expulsion may, in a proper case, be computed with reference to the fact that this destroys his business and thus deprives him of profits which otherwise he would have received for the balance of the term. *Ashley v. Warner*, 77 Mass. (11 Gray) 43; *Shaw v. Hoffman*, 25

an eviction. In so far as any of the cases may recognize a right of recovery by a tenant against his landlord for wrongful expulsion, or for wrongful use of adjoining premises, different from that which the tenant would have against a third person committing the same wrong, and similar to that which he would have in an action on the covenant for quiet enjoyment, they in effect assert, it seems, that there is a peculiar class of tort, involving an interference with property rights, and consisting of an actual or constructive eviction, which is neither a trespass or a nuisance, which can be perpetrated only by a landlord and only against a tenant, and damages for which are measured not so much by the extent of the injury as by the extent of the interest of the person injured.

In such an action the possible profits which the lessee might have made from his continued occupation of the premises are ordinarily regarded as not recoverable,¹⁵² though a different view has occasionally been taken when the profits were those of an established business, which might have been in the contemplation of the parties;¹⁵³ and in one case evidence of past profits was admitted to show the loss resulting from a temporary interruption of the lessee's business caused by the lessor's wrongful entry.¹⁵⁴

Besides the difference between the rental value and the stipulated rent, the lessor may recover "special damages" directly growing out of the eviction.¹⁵⁵ It has apparently been decided that he may recover a loss caused by being forced to sell off his stock and implements as a result of the eviction,¹⁵⁶ though else-

¹⁵² *Denison v. Ford*, 10 Daly (N. Y.) 412, disapproving *Shaw v. Hoffman*, 25 Mich. 162, ante, note 150; *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Eisenhart v. Ordean*, 3 Colo. App. 162, 32 Pac. 495; *Taylor v. Cooper*, 104 Mich. 72, 62 N. W. 157; *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957; *Karbach v. Fogel*, 63 Neb. 601, 88 N. W. 659; *Robrecht v. Marling's Adm'r*, 29 W. Va. 765, 2 S. E. 827, 6 Am. St. Rep. 676; *Loyd v. Capps* (Tex. Civ. App.) 29 S. W. 505; *De La Zerda v. Korn*, 25 Tex. Supp. 193; *Wilkinson v. Stanley* (Tex. Civ. App.) 43 S. W. 606.

¹⁵³ *Smith v. Eubanks*, 72 Ga. 280; *Shaw v. Hoffman*, 25 Mich. 162; *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. Unoff. 340, 96 N. W. 487; *Rice v. Whitmore*, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479 (semble).

¹⁵⁴ *Goebel v. Hough*, 26 Minn. 252, 2 N. W. 847, 37 Am. Rep. 407.

¹⁵⁵ *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957; *Shutt v. Lockner*, 77 Neb. 397, 109 N. W. 383; *Robrecht v. Marling's Adm'r*, 29 W. Va. 765, 2 S. E. 827, 6 Am. St. Rep. 676.

¹⁵⁶ *Supplee v. Timothy*, 124 Pa.

where a different view has been asserted.¹⁵⁷ The depreciation of the value of his property as a result of the removal cannot be recovered, it is said,¹⁵⁸ and the increased cost of procuring water for his stock and family at the place to which he removes has also been excluded from consideration.¹⁵⁹

The value at maturity of the crops, which the lessee would have gathered had the eviction not taken place, cannot be recovered without allowing the landlord for the balance of the rent to be paid, since this is one of the necessary expenses of obtaining the crop.¹⁶⁰

The lessee cannot recover both the value of the term and also the cost of labor in making the land ready for cultivation,¹⁶¹ but on the other hand the lessor cannot claim an allowance for his labor in wrongfully gathering the crops.¹⁶² The expense of the lessee's removal to another residence has been allowed.¹⁶³ In one case the tenant was even allowed the expense of guards employed by him before he vacated in order to prevent the entry on the premises of defendant's employees for the purpose of demolishing the building.^{163a}

The plaintiff may recover for injury to his feelings caused by the eviction, it has been decided, where the wrong was willful or done with gross disregard of the lessee's rights, but not for grief at illness in his family resulting from the eviction, nor for the personal exposure of himself and family in seeking another shelter.¹⁶⁴

¹⁵⁷ *Robrecht v. Marling's Adm'r*, 29 W. Va. 765, 2 S. E. 827, 6 Am. St. Rep. 676. jectural at the time of the eviction, though ascertained at the time of bringing suit.

¹⁵⁸ *De La Zerda v. Korn*, 25 Tex. Supp. 193; *Wilkinson v. Stanley* (Tex. Civ. App.) 43 S. W. 606. ¹⁶¹ *Cornelissens v. Driscoll*, 89 Mich. 34, 50 N. W. 746.

¹⁵⁹ *Wilkinson v. Stanley* (Tex. Civ. App.) 43 S. W. 606. ¹⁶² *Jefcoat v. Gunter*, 73 Miss. 539, 19 So. 94.

¹⁶⁰ *Jefcoat v. Gunter*, 73 Miss. 539, 19 So. 94; *Merritt v. Closson*, 36 Vt. 172. See *Freeman v. Slay* (Tex. Civ. App.) 13 Tex. Ct. Rep. 664, 88 S. W. 404. ¹⁶³ *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957; *Wade v. Herndl*, 127 Wis. 544, 107 N. W. 4; *McElvaney v. Smith*, 76 Ark. 468, 88 S. W. 981; *Grosvenor Hotel Co. v. Hamilton* [1894] 2 Q. B. 836 (semble).

^{163a} *Gray v. Linton*, 38 Colo. 175, 88 Pac. 749. ¹⁶⁴ *Fillebrown v. Hoar*, 124 Mass. 580.

In *Shutt v. Lockner*, 77 Neb. 397, 109 N. W. 383, it was decided that the lessee could not recover the profit which he would have made from the crop, because this was con-

The tenant may recover exemplary damages in case there are circumstances of oppression or aggravation,¹⁶⁵ but he must for this purpose, it is said, show that the act complained of was wanton and malicious;¹⁶⁶ and in another case it is said that the lessor is not liable for such damages, even though the eviction was unlawful and violent, if the lessor honestly entertained the belief that he had a right to evict the lessee.¹⁶⁷

In one state it has been decided that a lessee for years can, under the local statute, recover treble damages against the landlord for wrongful and forcible entry and expulsion,¹⁶⁸ and it seems that the state statutes in reference to forcible entry would ordinarily apply in favor of a tenant forcibly expelled by the landlord during the term.¹⁶⁹

§ 186. By third person.

a. Under title paramount—(1) **What constitutes title paramount.** An eviction under title paramount occurs when the tenant is deprived of possession by one having a right to such possession not derived from the tenant himself, which takes precedence of the rights of the tenant under the lease.¹⁷⁰ The expression "title paramount" does not, in this connection, necessarily refer to a title superior to that which the landlord originally had, but it includes a title derived from the landlord himself which, as being prior to the lease, takes precedence thereover.^{170a} For instance, if the tenant under the lease is dispossessed by one claiming under a valid prior lease made by the same lessor, there is an eviction by title paramount;¹⁷¹ and there is likewise such an evic-

¹⁶⁵ *Gallagher v. Burke*, 13 Pa. R. 617; *Naglee v. Ingersoll*, 7 Pa. Super. Ct. 244; *Gray v. Linton*, 38 Colo. 175, 88 Pac. 749. ¹⁶⁶ *Wamsganz v. Wolff*, 86 Mo. App. 205.

¹⁶⁷ *Baumier v. Antiau*, 65 Mich. 31, 31 N. W. 888. ¹⁶⁸ *Shaw v. Hoffman*, 21 Mich. 151. ¹⁶⁹ See post, chapter XXI, at note 198. Compare *Cole v. Eagle*, 8 Barn. & C. 409; *Willard v. Warren*, 17 Wend. (N. Y.) 257; commented on in *Shaw v. Hoffman*, 21 Mich. 151.

¹⁷⁰ See *Foster v. Pierson*, 4 Term 433, it was held that one tenant in common has a title paramount to that of one claiming under a lease made by his cotenant. ¹⁷¹ See *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505; *Tunis v. Grandy*, 22 Grat. (Va.) 109; *Neale v. McKenzie*, 1 Crompt. M. & R. 61, 1 Mees. & W. 747; *Lawrence v. French*, 25 Wend. (N. Y.) 443 (semble).

tion if the tenant is dispossessed by one claiming under a mortgage or other lien created by the landlord before the making of the lease, as when it is by a mortgagee having the legal title, with the right of possession thereunder,¹⁷² or by a purchaser at foreclosure sale.¹⁷³ The title of the dispossessor can, in such cases, be regarded as "paramount" to that of the landlord only in so far as any grantee's title is paramount to that of his grantor.¹⁷⁴ In cases where the eviction is by one having a valid title not derived from the lessor, the title is evidently "paramount" in the strictest sense of the term. Occasionally the paramount title is that of the lessor in chief to which a subtenant is compelled to yield upon the termination or forfeiture of the principle lease, this effecting an eviction of the subtenant which he may assert against the sublessor.¹⁷⁵

The paramount title to which the tenant yields must involve a present right of possession in the person asserting it, and there is no eviction if the tenant yields possession to one having a right to possession merely at some future day.¹⁷⁶ Accordingly, it has been decided that a tenant yielding possession on demand to a purchaser at foreclosure sale, before the latter had received his deed or the sale to him had been confirmed, could not claim to have been evicted.¹⁷⁷

(2) **Acts constituting eviction.** For the purpose of an eviction by title paramount, the tenant may be dispossessed under legal proceedings on the part of the holder of such title,¹⁷⁸ or he

¹⁷² See *Smith v. Shepard*, 32 Mass. (15 Pick.) 147, 25 Am. Dec. 432; *Geer v. Boston Little Circle Zinc Co.*, 126 Mo. App. 173, 103 S. W. 151.

George v. Putney, 58 Mass. (4 Cush.) 351, 50 Am. Dec. 788; ante, § 73 a. ¹⁷⁶ *Borough of Poole v. Whit*, 15 Mees. & W. 577; *Camp v. Scott*, 47 Conn. 366; *Morse v. Goddard*, 54 Mass. (13 Metc.) 177, 46 Am. Dec. 728.

¹⁷³ See *Simers v. Saltus*, 3 Denio (N. Y.) 214; *O'Neill v. Morris*, 28 Misc. 613, 59 N. Y. Supp. 1075; *Kane v. Mink*, 64 Iowa, 84, 19 N. W. 852; *Mariner v. Chamberlain*, 21 Wis. 251. See ante, § 73 b. ¹⁷⁷ *Peck v. Knickerbocker Ice Co.*, 18 Hun (N. Y.) 183; *O'Neill v. Morris*, 28 Misc. 613, 59 N. Y. Supp. 1075.

¹⁷⁴ See *Abbott's Law Dictionary*, *sub. verb.* "Paramount."

¹⁷⁵ *Holbrook v. Young*, 108 Mass. 83, 11 Am. Rep. 310; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370; *Hyman v. Boston Chair Mfg. Co.*, 32 N. Y. St. Rep. 113, 58 Super. Ct. (26 Jones & S.) 282, 11 N. Y. Supp. 52; ¹⁷⁸ *Rawle, Covenants for Title*, § 132; *Upton v. Townend*, 17 C. B. 34. The relinquishment of possession by the tenant on the issue of a writ in favor of a prior mortgagee involves an eviction. *Barnes v. Belamy*, 44 U. C. Q. B. 303.

may, it seems, be dispossessed by the latter by force exerted directly by himself or his servants without any judicial authority,¹⁷⁹ as when the owner of the paramount title renders the premises untenable by removing part of a structure thereon.¹⁸⁰ But it is not necessary that the tenant be dispossessed by legal proceedings or by the exercise of force on the part of the holder of the superior title, it being sufficient that, upon demand by the holder of the paramount title, the tenant yields possession to him.¹⁸¹ There are occasional decisions, moreover, that there is an eviction of the tenant if he buys the paramount title to protect his possession.¹⁸²

There are a considerable number of cases to the effect that, without any yielding of possession to the paramount claimant or purchaser of the paramount title, the tenant, if he attorns to the paramount title upon the hostile assertion thereof, may assert such attornment as an eviction.¹⁸³ This view appears to be entirely

¹⁷⁹ *Foster v. Pierson*, 4 Term R. 617; *Parker v. Dunn*, 47 N. C. (2 Jones Law) 203; *Ricketts v. Garrett*, 11 Ala. 806.

¹⁸⁰ *Bentley v. Hill*, 35 Ill. 414 (removal of wall by owner thereof).

¹⁸¹ *Carpenter v. Parker*, 3 C. B. (N. S.) 206; *Moffat v. Strong*, 22 N. Y. Super. Ct. (9 Bosw.) 57; *Tyson v. Chestnut*, 118 Ala. 387, 24 So. 73; *Camp v. Scott*, 47 Conn. 366; *Hamilton v. Cutts*, 4 Mass. 349, 3 Am. Dec. 222; *Marsh v. Butterworth*, 4 Mich. 575; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370; *Hyman v. Boston Chair Mfg. Co.*, 58 N. Y. Super. Ct. (26 Jones & S.) 282, 11 N. Y. Supp. 52.

The tenant may yield possession to the holder of the paramount title and claim an eviction, though the demand by the latter was not for the possession but merely for the payment of rent to him. *Simers v. Saltus*, 3 Denio (N. Y.) 214. The demand in this case was by a purchaser at a sale under a mortgage.

¹⁸² *Ross v. Dysart*, 33 Pa. 452; *Hulseman v. Griffiths*, 10 Phila. (Pa.) 350, 32 Leg. Int. 208. See *Rawle, Covenants for Title*, § 142; 8 Am. & Eng. Enc. of Law (3d Ed.) 108.

¹⁸³ *Borough of Poole v. Whitt*, 15 Mees. & W. 571; *Merryman v. Bourne*, 76 U. S. (9 Wall.) 592; *Lyon v. Washburn*, 3 Colo. 201; *Smith v. Shepard*, 32 Mass. (15 Pick.) 147, 25 Am. Dec. 432; *Conley v. Schiller*, 24 N. Y. Supp. 473; *Holbrook v. Young*, 108 Mass. 83, 11 Am. Rep. 310; *Morse v. Goddard*, 54

defensible on principle,¹⁸⁴ but there are a number of cases opposed thereto.^{184a}

The tenant, in yielding possession on demand to a third person asserting a claim of superior title, takes the risk of such claim being a valid one, and in an action between him and his landlord, in which he asserts this as an eviction, he has the burden of showing the validity of the claim to which he has thus yielded.^{184b} The same holds true in the case of an attornment, without a yielding of possession, to one asserting a paramount title,¹⁸⁵ and likewise in the case of the tenant's purchase of such claim. In case he is unwilling to take this risk he may await the bringing of an action by the claimant, and, by then giving to the party bound by the covenant for quiet enjoyment, the lessor or the owner of the reversion, notice of the action, and requiring him to defend it, he is relieved from the burden of subsequently proving the validity of the alleged paramount title in an action by him on the covenant for quiet enjoyment.¹⁸⁶

The tenant cannot assert an eviction by reason of the fact that he yielded possession or attorned to the holder of a paramount title, unless he did this in pursuance of a hostile assertion of such title.¹⁸⁷ By hostile assertion of title in this connection is meant,

Mass. (13 Mete.) 177, 46 Am. Dec. 54 Mass. (13 Mete.) 177, 46 Am. Dec. 728; *George v. Putney*, 58 Mass. (4 728; *Marsh v. Butterworth*, 4 Mich. Cush.) 351, 50 Am. Dec. 788; *Ross* 575; *Spear v. Allison*, 20 Pa. 200; *v. Dysart*, 33 Pa. 452; *Martin v. Mar-* *Murray v. Pennington*, 3 Grat. (Va.) *tin*, 7 Md. 368, 61 Am. Dec. 364; 91; *Rawle, Covenants for Title*, § *Montanye v. Wallahan*, 84 Ill. 355; 136. *185 Merryman v. Bourne*, 76 U. S. Lunsford v. Turner, 28 Ky. (5 J. J. 185 Merryman v. Bourne, 76 U. S. Marsh.) 104, 20 Am. Dec. 248; *Kane* (9 Wall.) 592, 19 Law. Ed. 683; *v. Mink*, 64 Iowa, 84, 19 N. W. 852; *Borough of Poole v. Whitt*, 15 Mees. & W. 577. *Foss v. Van Driele*, 47 Mich. 201, 10 & W. 577. *186 See ante*, § 79 d (3), at note N. W. 199; *Whalin v. White*, 25 N. 110, and *Rawle, Covenants for Title*, §§ 117-125, 136. There appears to be no reason why the same rule should not apply as to the proof of the alleged paramount title when eviction thereunder is asserted in defense to a claim for rent. See *Wheelock v. Warschauer*, 34 Cal. 265. *187 See Rawle, Covenants for Title*, ante, §§ 73 a, c, 78 p (2).

¹⁸⁴ See ante, § 78 p (2), at note 541.

^{184a} See ante, § 78 p (2), at note 538.

^{184b} *Hamilton v. Cutts*, 4 Mass. 349, 3 Am. Dec. 222; *Morse v. Goddard*,

¹⁸⁷ See *Rawle, Covenants for Title*,

apparently, an assertion of title made in such manner and under such circumstances that the tenant has reason to believe that, unless he does yield possession or attorn, the owner of the paramount title will assert his claim by legal proceedings.¹⁸⁸ When an action has been actually instituted for this purpose, there can, it seems clear, be no question as to the hostile assertion of the title.^{189, 190}

(3) **Effect of eviction.** The effect of the tenant's eviction, actual or constructive, under paramount title, is ordinarily to end the relation of landlord and tenant,¹⁹¹ such an eviction being thus different in its effect from an eviction by the landlord.¹⁹² It has apparently been decided that such is the effect of an eviction under a judgment in favor of a stranger, even though the judgment is afterwards reversed.¹⁹³ Whether, after an eviction by virtue of a paramount mortgage or lien in favor of a third person,

§ 135; 8 Am. & Eng. Enc. of Law (2d Ed.) 110, and cases cited ante, §§ 19 b (3), 73 a.

In *Mattoon v. Munroe*, 21 Hun (N. Y.) 74, it was held that when a lease of a dock provided that rent should be paid only until the lessor's license from the state should be rescinded and the lessee dispossessed, the lessee could not defend against rent on the ground of a rescission of the license if this was procured by the lessee acting in collusion with the state officers.

¹⁸⁸ See cases cited 8 Am. & Eng. Enc. Law (2d Ed.) 113, and ante, § 78 p (2).

In *In re Emery & Barnett*, 4 C. B. (N. S.) 423, the fact that the tenant, in yielding possession to the holder of the paramount title, did so willingly, desiring to get rid of the lease, was regarded as tending to show that he acted voluntarily and not under compulsion. In *Geer v. Boston Little Circle Zinc Co.*, 126 Mo. App. 173, 103 S. W. 151, it is said that the tenant's secret desire to

get rid of the lease is immaterial, but that it would be otherwise if his desire found expression in conduct or words.

^{189, 190} See 8 Am. & Eng. Enc. Law, 113.

¹⁹¹ *Wheelock v. Warschauer*, 34 Cal. 265; *Fitzgerald v. Beebe*, 7 Ark. 310; *Gartside v. Outley*, 58 Ill. 210, 11 Am. Rep. 59; *Fitchburg Cotton Manufactory Corp. v. Melven*, 15 Mass. 268; *Stubbings v. Evanston*, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839, 29 Am. St. Rep. 300; *Mussey v. Holt*, 24 N. H. 248, 55 Am. Dec. 234; *Friend v. Oil Well Supply Co.*, 165 Pa. 652, 30 Atl. 1134. So in *Andrews v. Needham*, Noy, 75, Cro. Eliz. 656, it is decided that by the entry under elder title the tenant is relieved from a covenant to repair and yield up at the end of the term, "for if the land be gone, the obligation is discharged." See, also, *Wheelock v. Warschauer*, 34 Cal. 265.

¹⁹² See ante, § 185 h.

¹⁹³ *Montanye v. Wallahan*, 84 Ill. 355.

the tenancy is revived upon a redemption therefrom, appears to have been the subject of decision in only one case, and there it was held that such revival did take place.¹⁹⁴ On such a theory the tenancy would, in the meanwhile, be in abeyance so far as regards the payment of rent under the lease, and presumably as regards any other obligations upon the part of the tenant.¹⁹⁵ The effect of an eviction by paramount title in terminating, in whole or in part, the liability for rent has been elsewhere referred to.¹⁹⁶

b. **Wrongful acts of third persons.** Except in the case of an eviction by title paramount¹⁹⁷ there is, as was before stated, no eviction, in the legal sense of the term, when the tenant's possession or enjoyment is interfered with by a third person not acting by the landlord's authority or with his consent. This is so whether such interference involves an unauthorized trespass on the leased premises, or other wrongful act,¹⁹⁸ or whether it is

¹⁹⁴ *Russell v. Fabyan*, 27 N. H. 529; *Id.*, 28 N. H. 543, 61 Am. Dec. 629.

¹⁹⁵ In the case last cited the question whether the tenant was relieved from rent for the period after the eviction and prior to the redemption seems to have been regarded as dependent on whether during that time he actually paid rent to the claimant by paramount title. But, conceding that there was an eviction, actual or constructive, it is not perceived how the fact of the tenant's having agreed to pay the same rent to such claimant, and his payment or nonpayment thereof, could in any way affect his liability to his original landlord. He holds under the paramount claimant by a new demise (ante, § 73 c), and he can, by reason of the eviction, refuse to pay rent to his original landlord although he has agreed to pay merely a peppercorn rent to such claimant and has then failed to pay it.

¹⁹⁶ See ante, § 182 e (2).

¹⁹⁷ See ante, § 186 a.

¹⁹⁸ *Kimball v. Grand Lodge of Masons*, 131 Mass. 59; *Talbott v. Eng-*

lish, 156 Ind. 299, 59 N. E. 857; *Schilling v. Holmes*, 23 Cal. 227, 83 Am. Dec. 111; *Eisenhart v. Ordean*, 3 Colo. App. 162, 33 Pac. 495; *McKenzie v. Hatton*, 141 N. Y. 6, 35 N. E. 929; *Meeks v. Bowerman*, 1 Daly (N. Y.) 99; *McNairy v. Hicks*, 62 Tenn. (3 Baxt.) 378; *Blythe v. Pratt*, 62 Miss. 707; *Wagner v. White*, 4 Har. & J. (Md.) 564; *State v. George*, 34 Ohio St. 657; *Gribbie v. Toms*, 70 N. J. Law, 522, 57 Atl. 144; *Id.*, 71 N. J. Law, 338, 59 Atl. 1117; *Linton v. Hart*, 25 Pa. 193, 64 Am. Dec. 691.

So there was held to be no eviction when the interference with the tenant's possession was by the wrongful acts of an independent contractor employed by the landlord to work on adjoining premises. *Talbott v. English*, 156 Ind. 299, 59 N. E. 857. Or when it was by a sheriff, who after attaching chattels on the premises for rent locked up the building and excluded the tenant. *Grey v. Sheridan Elec. Light Co.*, 19 Abb. N. C. 152; *Daniels v. Logan*, 47 Iowa, 395. And there was no eviction of a subtenant because the chief landlord,

the result of lawful acts by adjoining owners or others,¹⁹⁹ as when adjoining land is so improved by the owner thereof as to cut off the light and air.²⁰⁰ So the tenant of an apartment cannot assert that he has been evicted because the tenants of other apartments have interfered with his possession or enjoyment by acts in which the landlord in no way participated and to which he did not consent.²⁰¹ On the other hand there is an eviction, in legal effect by the landlord himself, if the tenant's possession or enjoyment is interfered with by one acting under the landlord's authority, express or implied.^{202, 203}

who was, as to him, a stranger, wrongfully interfered with his possession. *Luckey v. Frantzkee*, 1 E. D. Smith (N. Y.) 47.

¹⁹⁹ There was no eviction when the tenants' continued possession was rendered impossible by the fact that the adjoining owner pulled down the division wall in order to rebuild it as a party wall, as he was allowed to do by the local statute (*Barns v. Wilson*, 116 Pa. 303, 9 Atl. 437), or where the owner of the adjoining lot made excavations causing the building to fall (*Eisenhart v. Ordean*, 3 Colo. App. 162, 32 Pac. 495; *Howard v. Doolittle*, 10 N. Y. Super. Ct. (3 Duer) 464; *Ramsay v. Wilkie*, 36 N. Y. St. Rep. 864, 13 N. Y. Supp. 554), or removed party stairs in the course of the lawful removal of the adjoining building. *Manville v. Gay*, 1 Wis. 250, 60 Am. Dec. 379.

²⁰⁰ *Hazlett v. Powell*, 30 Pa. 293; *Johnson v. Oppenheim*, 12 Abb. Pr. (N. S.) 454, 43 How. Pr. 433, 55 N. Y. 280; *Hilliard v. Gas Coal Co.*, 41 Ohio St. 662, 52 Am. Rep. 99. So when the view of the premises is cut off so as to obscure the tenant's sign. See *Oakford v. Nixon*, 177 Pa. 76, 35 Atl. 588, 34 L. R. A. 575, where the view of a wall "leased" for bill posting was cut off by a screen on an adjoining building.

There was properly no lease in this case, but merely a license.

²⁰¹ *Seaboard Realty Co. v. Fuller*, 33 Misc. 109, 67 N. Y. Supp. 146; *De Witt v. Pierson*, 112 Mass. 8; *Conrad Seipp Brew. Co. v. Hart*, 62 Ill. App. 212; *Gray v. Gaff*, 8 Mo. App. 329. There was accordingly no eviction when the tenant of an apartment used it as a house of ill fame, though this compelled the abandonment of a neighboring apartment by the tenant thereof, the landlord not being cognizant of such use. *Gilhooley v. Washington*, 4 N. Y. (4 Comst.) 217. Aliter, by some cases, when the landlord was cognizant of such use. See ante, note 97.

^{202, 203} *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Hyman v. Jockey Club Wine, Liquor & Cigar Co.*, 9 Colo. App. 299, 48 Pac. 671 (sheriff acting under landlord's orders); *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522; *City Power Co. v. Fergus Falls Water Co.*, 55 Minn. 172, 56 N. W. 685, 1006.

In *Kelly v. Miles*, 48 Hun 6, 15 N. Y. St. Rep. 319, *affd.* 122 N. Y. 645, 25 N. E. 957, it was held that if a subtenant gave up possession for a certain time that the owner might make improvements, the subtenant agreeing to pay rent during such time, he was relieved from rent if

The question whether the landlord has thus authorized or connived at the wrongful acts is said to be a question for the jury on all the evidence in the case.²⁰⁴ The subsequent leasing by the lessor of premises adjoining those leased, with knowledge that the second lessee intends to make use of the premises in a particular way, is sufficient, it seems, to make the lessor a party to such use for the purpose of determining whether there is an eviction;²⁰⁵ but even an express authorization by the landlord to a third person to interfere with the possession of the tenant cannot be regarded as making such interference in effect an eviction, if this was clearly intended to be effective only in case the tenant also gave such authorization.²⁰⁶

It has been held in one case that it is a question for the jury whether an eviction resulted from the giving of singing lessons by the tenant of an apartment adjoining that leased to the person asserting the eviction.²⁰⁷ Unless the adjoining apartment was leased for the giving of such lessons or the lessor connived in such use thereof, it does not seem that the lessor could be held responsible for its use for that purpose,²⁰⁸ and even his consent to such use should not have that effect unless he knew that the use was to be excessive, and consequently such as to constitute a nuisance.^{208a} As was said in a previous case in the same jurisdic-

kept out of possession a time longer than that agreed, the interfering occupation being by the owner with the sublessor's assent, and this, consequently, constituting an eviction by the latter. authorized or assented to the act complained of as wrongful."

²⁰⁵ *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 748. See *Wade v. Herndl*, 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855.

²⁰⁶ *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446, where it is said that "the nature and character of the act, taken in connection with the relation of the landlord to the actor, his employment or agency in the business of the landlord, and the acquiescence of the latter in former acts, accompanied by circumstances indicative of his knowledge that the act was done, or continued, and the absence of objection upon his part, are facts which must be considered by the jury, whose business it is to determine the inquiry whether he ²⁰⁶ *McKenzie v. Hatton*, 141 N. Y. 6, 35 N. E. 929. Here the landlord gave to the person excavating on adjoining property permission to enter in order to protect the walls, and it was held that if such person entered without also procuring the permission of the tenant, there was no eviction by the landlord.

²⁰⁷ *Chisolm v. Kilbreth*, 88 N. Y. Supp. 364.

²⁰⁸ See *Sefton v. Juillard*, 46 Misc. 68, 91 N. Y. Supp. 348.

^{208a} See ante, § 185 f (8).

tion: "An eviction cannot be predicated of acts or conduct, however wrongful or distressing, unless committed, encouraged or connived at by the landlord. He is not responsible for the conduct of other tenants acting within their rights in their own apartments. If defendant's grievance is a substantial one, he can secure redress, not against his landlord, but against the offending tenant in the adjoining premises."²⁰⁹ And it has there been held that the principle thus enunciated is applicable even when the lessor is by the lease of the adjoining apartment given an option to terminate the tenancy thereunder in case of the use thereof for the purpose objected to.²¹⁰

c. **Acts of public authorities.** As elsewhere stated, it has been decided in a number of cases that the taking of the premises by the state, or an agency of the state, for a public use, in the exercise of the power of eminent domain, is not an eviction of the tenant, though it results in his forced relinquishment of possession.²¹¹ That it is not an eviction by the landlord is evident, but in its nature it bears considerable similarity to an eviction under paramount title.²¹²

Legal action on the part of the municipal authorities, not involving the taking of the premises leased but merely requiring the cessation of a particular use thereof, or the repair or removal of buildings on the leased land for the sake of the public health and safety, cannot, even though it deprives the tenant of all benefit under the lease, be regarded as an eviction by the landlord,²¹³ nor can it be regarded as an eviction under paramount title, since the tenant is still left in possession of what remains, and the municipality does not have nor acquire any title, and does not take possession, except perhaps for a merely temporary purpose. The landlord may himself carry out municipal requirements of this character, legally imposed, without effecting an

²⁰⁹ *Seaboard Realty Co. v. Fuller*, 293, 72 N. Y. Supp. 171; *Forster v. 33 Misc. 109*, 67 N. Y. Supp. 146. *Eberle*, 7 Misc. 490, 27 N. Y. Supp.

²¹⁰ *Sefton v. Juillard*, 46 Misc. 68, 986. The removal by the municipal authorities of structures encroaching on the street is not an eviction by the landlord. *McLarren v. Spalding*, 2 Cal. 510; *Burke v. Tindale*, 12 272, 12 Atl. 352, 4 Am. St. Rep. 593; Misc. 31. 33 N. Y. Supp. 20, *afid.* 155

²¹¹ See ante, § 182 k, at note 956.

²¹² See ante, § 182 k, at note 976.

²¹³ *Hitchcock v. Bacon*, 118 Pa. 272, 12 Atl. 352, 4 Am. St. Rep. 593; *Steeffel v. Rothschild*, 64 App. Div. N. Y. 673, 49 N. E. 1094.

eviction, although such acts, done by him without express authority, would have justified the tenant in abandoning possession;²¹⁴ but such action by him, without any formal notice to that effect from the building department, has been regarded as an eviction,²¹⁵ and a like view was taken when the landlord was ordered by the municipal authorities to repair the building under penalty of having it destroyed by the authorities if he failed to do so, and he thereupon destroyed the building.²¹⁶ Likewise, there was held to be an eviction when the landlord intentionally, by operations on adjoining premises, made the building on the leased premises unsafe so as to necessitate its condemnation by the authorities.²¹⁷

²¹⁴ *Gallup v. Albany R. Co.*, 65 N. Y. 1; *Fleming v. King*, 100 Ga. 449, 28 S. E. 239; *Barnum v. Fitzpatrick*, 46 N. Y. St. Rep. 891, 19 N. Y. Supp. 385; *Markham v. David Stevenson Brew. Co.*, 51 App. Div. 463, 64 N. Y. Supp. 617; *Id.*, 169 N. Y. 593, 69 N. E. 1097; *Beakes v. Haas*, 36 Misc. 796, 74 N. Y. Supp. 843.

²¹⁵ *Brown v. Wakeman*, 42 N. Y. St. Rep. 677, 16 N. Y. Supp. 846.

²¹⁶ *Utah Optical Co. v. Keith*, 18 Utah, 464, 56 Pac. 155.

²¹⁷ *Silber v. Larkin*, 94 Wis. 9, 68 N. W. 406. In *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059, the lessor was held liable for the injury to his lessee by the destruction, under order of the municipal authorities, of the building in which the leased premises were situated, as a result of the withdrawal by him of the support of an adjoining building, though he did not intend to injure the former building or the occupants thereof by his operations on the adjoining property.

CHAPTER XVIII.

SURRENDER.

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§ 187. Nature of surrender.

“Surrender” is defined by Lord Coke as a yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them.¹ This definition has been followed, more or less closely, by such other writers as have undertaken to define the term,² and there has never been any question made as to its substantial correctness. A surrender, then, is a particular mode or form of transfer which derives its distinguishing characteristics from the fact that it is made by the tenant of a particular estate to the reversioner or remainderman.

This technical meaning of the word has, unfortunately, been to some extent obscured by its frequent use in an untechnical sense, as referring to the relinquishment or yielding up, not of an estate, but of the possession of the premises, as when the lessee covenants to “surrender” the premises in good condition at the end of the term, and the courts, as will be shown hereafter, frequently, in using the term, fail to clearly distinguish between such a surrender of possession and a surrender, properly so called, of a particular estate for life or for years.^{2a} Quite frequently, in using the term even in its technical sense, a surrender “of the lease” is spoken of, but this must be understood as merely an elliptical expression signifying a surrender of the particular estate or term created by the lease.

It seems desirable, in order to form a clear idea of the law of surrender, to briefly consider its relation to that of merger, which latter, though formerly the subject of much discussion and adjudication, is at the present time of but little practical importance. In the case of a surrender, the particular estate for life or for

¹ Co. Litt. 337 b.

² See Cruise Dig. tit. 32, c. 7, § 1; Platt, Leases, 499; Comyn, Landl. & Ten., 336; Taylor, Landl. & Ten. § 507; 1 Washburn, Real Prop. § 735.

^{2a} In *Bergland v. Frawley*, 72 Wis. 559, 40 N. W. 372, there was a provision in the instrument of lease that on a certain contingency the lessees should surrender the premises if demanded by the landlord, and the court says that this implied

an agency in either lessee to act for the other in making such surrender. The stipulation was really for a surrender of the possession, that is, that the lessees should relinquish possession upon the contingency named, and so its effect might seem to have been to create a limitation upon the duration of the term, taking effect, without any action by the lessor or lessee, upon the happening of the contingency. See ante, § 12 d.

years comes to an end as a result of the act of surrender, in compliance with the intention with which the surrender was made, while a merger of the particular estate in the reversion occurs as a result of the fact that the two estates are vested in one person, by a conveyance either of the reversion to the particular tenant, or of the particular estate to the reversioner.³ For most all practical purposes, however, it is entirely immaterial whether, upon a conveyance of the particular estate to the reversioner, the consequent destruction of the estate be regarded as a result of the fact that the conveyance was intended to take effect as a surrender, or of the fact that, both estates being vested in the same person, the particular estate is merged. There is, however, it is said, one case in which there is a difference in the practical results of a surrender and of a merger. When there is a life estate in one person, with a reversion in two persons as joint tenants, if the tenant for life should surrender his estate to one of the joint tenants, it would be extinguished, since a surrender to one of two joint tenants is as effectual as a surrender to both, while, on the other hand, if the life tenant should make a conveyance to one of the reversioners, which is not intended to, and does not, take effect as a surrender, but is merely such as might be made to a stranger, one moiety only of the life estate would be merged in the moiety of the reversion belonging to the grantee, and the other moiety of the life estate would be vested in such grantee as tenant *pur autre vie*, with the reversion thereon in the other joint tenant.⁴ Since, however, a surrender may be effected by any words of conveyance, it seems that the presumption would always be, in the absence of an express showing to the contrary, that the instrument transferring the particular estate to the reversioner was intended to take effect as a surrender,⁵ and consequently, even in the case above suggested, of a conveyance to one of two joint tenants of the reversion, the particular estate would ordinarily be extinguished as a whole and not in part only.

Cases in this country occasionally refer to the "rescission" or "cancellation" of the lease by the parties thereto, without ap-

³ 3 Preston, Conveyancing, 8; Chalmers, Real Prop. (2d Ed.) 77. Conveyancing, 24; Challis, Real Prop. (2d Ed.) 77.

⁵ Sheppard's Touchstone (Preston's Ed.) 307.

parently recognizing that a termination of the tenancy as a result of an agreement of the parties, made subsequently to its creation, necessarily involves the divesting of a leasehold estate out of the lessee, or his assignee, and a revesting thereof in the landlord.^{5a} After an estate, whether in fee simple or for life or for years, has been conveyed, the grantor and grantee in the conveyance cannot effect a reconveyance of the estate to the former by undertaking to "rescind" or "cancel" the original conveyance.^{5b} The parties to a contract can rescind or cancel the contract, that is, they can make a new contract by which each agrees to forego his rights under the previous contract, but the mere making of a new contract can never transfer property rights, even to a person in whom they were formerly vested. Any rescission or cancellation, so called, of a lease, by the parties thereto, must consequently, in order to terminate the tenancy, constitute in legal effect a surrender, and must satisfy the requirements ex-

^{5a} See *Silva v. Bair*, 141 Cal. 599, 75 Pac. 162; *Evans v. McKanna*, 89 Iowa, 362, 56 N. W. 527, 48 Am. St. Rep. 390; *Andre v. Graebner*, 126 Mich. 116, 85 N. W. 464; *Geddis v. Folliett*, 16 S. D. 610, 94 N. W. 431.

In *Leavitt v. Stern*, 159 Ill. 526, 42 N. E. 869, it was decided that, since an executory contract under seal cannot be modified by a parol agreement, an oral agreement for a new lease (meaning thereby presumably an oral lease) does not effect a surrender of a previous lease under seal. And see *Duncan v. Moloney*, 115 Ill. App. 522. In *Alschuler v. Schiff*, 164 Ill. 298, 45 N. E. 424, parol evidence of an agreement for surrender and the relinquishment of possession accordingly was held to be admissible on the theory that a sealed contract can be abrogated and cancelled by parol, though not altered or modified thereby. It would, it is conceived, have been preferable to treat this as a surrender by operation of law, resulting from delivery and acceptance of possession.

In *Stott v. Chamberlain* (S. D.) 114 N. W. 683, the action of the tenant in notifying the landlord that he intended to vacate the premises, apparently acquiesced in by the landlord, was regarded as effective to "rescind the contract of lease." There appears also to have been a relinquishment of possession to the landlord and resumption of possession by him. See post, § 190 c.

In *Snyder v. Harding*, 34 Wash. 286, 75 Pac. 812, it was held that, the tenant having "rescinded" the lease by bringing an action to recover the land as equitable owner, the commencement of an action by the landlord to recover the land and to quiet the title was an "acceptance" of the "rescission." A preferable way to view the case, it might be suggested, would be to consider the assertion of title by the tenant as giving a right of forfeiture, and the landlord's action as an election to enforce such forfeiture. See post, § 192.

^{5b} See post, at note 46.

isting with reference to such a mode of conveyance. The same may be said of the occasional use of the expression "abandonment" of a lease,^{5c} apparently meaning thereby either an agreement by the parties to ignore it, or a determination by the lessee not to take possession under it. The estate vested in the lessee by the lease cannot be transferred back to the lessor by a mere ignoring of the true state of the case, or a determination by the lessee not to exercise his right of possession.

§ 188. Parties to surrender.

a. **Persons who may make surrender.** A surrender may be made by such persons, and no others, as have personal capacity to make a grant.⁶ Consequently, a surrender by an infant may be repudiated by him upon his attainment of full age.⁷ And a surrender by one *non compos mentis*, even if regarded as voidable merely and not absolutely void, may be repudiated by him on recovery of his faculties.⁸

It is said that a lessee, who has not yet entered under his lease, cannot make an express surrender, for the technical reason that, until his entry, there is "no reversion in which the possession may drown,"⁹ and that in case of a lease to take effect *in futuro*, there can be no express surrender, since there is no reversion, the lessee having merely an *interesse termini*.¹⁰ Whether the above distinctions in this regard would be recognized at the present day may be doubted, and certainly a transfer, by one having a present term, who has not yet entered, to the lessor or his transferee, might well be regarded as extinguishing all rights under the lease, whether or not it be called a surrender.¹¹

One claiming under an assignment of the leasehold has the same right as the original lessee to surrender such interest,

^{5c} In *Brandt v. Phillippi*, 82 Cal. 640, 23 Pac. 122, 7 L. R. A. 224, the court speaks of the lease as being "waived and abandoned by mutual consent." In *Gazzolo v. Chambers*, 73 Ill. 75, it was held that, the lessee having refused to state whether he would take possession under his lease if a former tenant were gotten out, the lessor could regard this refusal as an "abandonment of the lease," justifying him in leasing to another.

⁶ Sheppard's Touchstone, 303.

⁷ *Zouch v. Parsons*, 3 Burrow, 1794.

⁸ *Thompson v. Leach*, 2 Vent. 198, note. See authorities cited 2 Tiffany, Real Prop. § 563.

⁹ Bac. Abr., Leases (S) 2, 2.

¹⁰ Co. Litt. 338 a.

¹¹ Compare ante, § 37.

the

even though he has not entered under the assignment,¹² as has an assignee by operation of law, such as an executor or administrator.¹³

The surrender must obviously be by one who has power of disposition over the particular estate sought to be surrendered. Accordingly, a surrender, by a husband, of the leasehold interest in premises occupied by him as a homestead, is invalid without the joinder of his wife, he having no power by his sole conveyance to dispose of the homestead.¹⁴ And one of several joint lessees cannot, by a surrender, destroy the interests of the others,¹⁵ though he may, it seems, surrender his own undivided interest.¹⁶

b. Persons to whom surrender may be made. A surrender can be made only to a person having the next immediate estate following (in possession) upon the particular estate surrendered.¹⁷ Accordingly, a subtenant cannot surrender to the chief landlord, unless the latter has first acquired the original leasehold interest.¹⁸ For the same reason, "if a lessee grants part of his estate to the lessor, whereby a reversion continues in himself, this is no surrender; as if a lessee for twenty years grants all his estate to the lessor, except one year, month or day, at the end of the term, this is not any surrender, because the lessee has a reversion,"¹⁹ and consequently there is an estate intervening in possession between that surrendered and that of the person to whom the surrender is made.

If the landlord has, during the term, made another valid lease which is to take effect during the term, a "concurrent" lease,^{19a} the reversion on the first lease is vested in the second lessee and the surrender must be made to him.²⁰ But if the second lease is by its terms not to take effect until the termination of the first

¹² Bac. Abr., Leases (S) 2, 2.

¹³ Sheppard's Touchstone, 303; Deane v. Caldwell, 127 Mass. 242.

¹⁴ Beranek v. Beranek, 113 Wis. 272, 89 N. W. 146.

¹⁵ Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. 476, 21 L. R. A. 489, 36 Am. St. Rep. 486; Harford v. Taylor, 181 Mass. 266, 63 N. E. 902 (semble); Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196. In Hooks v. Frost, 165 Pa. 238, 30 Atl.

846, 27 L. R. A. 234, the court stated that two of the lessees had at least tacit authority to act for the third lessee in this respect.

¹⁶ Sheppard's Touchstone, 303.

¹⁷ Sheppard's Touchstone, 303.

¹⁸ Bac. Abr., Leases (S) 2, 1.

¹⁹ 2 Rolle, Abr. 497, quoted in Burton v. Barclay, 7 Bing. 745.

^{19a} See ante, § 146 d, at note 24.

²⁰ Edwards v. Wickwar, L. R. 1 Eq. 403; Comyn, Landl. & Ten. 336.

term, that is, if it is a lease "in reversion," it passes no present interest in the reversion, and the surrender of the first leasehold must be made to the original lessor.²¹

Provided the person to whom the surrender is made has the immediate reversion, it is immaterial that his only interest is a term of years shorter than that surrendered.²² But an estate for life cannot be surrendered to one who has a reversion for years only.²³

In the case of a reversion held in joint tenancy, a surrender to one joint tenant is effectual as to all.²⁴

A surrender to an infant or insane person is, no doubt, like any other conveyance to such a person, valid, so far as for the benefit of such person, until repudiated by him after attaining full legal capacity.²⁵

§ 189. Express surrender.

a. **Necessity of writing.** There is, in the law of surrender, a distinction of primary importance, between a surrender in express terms and a surrender which the law implies from the acts of the parties, a surrender "by operation of law." We will first consider the requisites and characteristics of a surrender in express terms, known as an "express surrender" or as a surrender "in fact" or "in deed." Such a surrender may be of the leasehold interest in either a part or in all of the premises.²⁶

At common law, while an express surrender of a particular estate in a thing which lay in grant, that is, in an "incorporeal"

²¹ *Smith v. Day*, 2 Mees. & W. 684. held in joint tenancy or as tenants in common. This is implied in the decision in *Churchill v. Lam-Dickson v. Lehn*, 37 Fed. 319, that the prior lessee has no right to surrender possession to the lessee in reversion. *decided* that an acceptance of a surrender by one joint lessor bound the other, so as to bar any recovery for rent, on the ground that one of two joint obligees can release an obligation.

²² *Bac. Abr.*, Leases (S) 1, 2; *Hughes v. Robotham*, Cro. Eliz. 302.

²³ *Sheppard's Touchstone*, 303.

²⁴ *Co. Litt.* 183 a, 192, 214 a; 3 *Preston*, Conveyancing, 24. But in *Sperry v. Sperry*, 8 N. H. 477, it was decided that a surrender to one of two joint lessors was insufficient. It does not appear whether they

²⁵ See authorities cited 2 *Tiffany*, Real Prop. §§ 502, 503.

²⁶ *Bac. Abr.*, Leases (S) 2, 3; *Pleasant v. Benson*, 14 East, 234; *Ehrman v. Mayer*, 57 Md. 612, 40 Am. Rep. 448.

thing, as well as of a particular estate in a "corporeal" thing which, as not being a present estate in possession, was transferable by grant only, could be made only by writing under seal, a particular estate which was transferable by livery of seisin or by word of mouth, such as a present estate for life or for years in a corporeal thing, could be surrendered by word of mouth merely.²⁷ This was, however, changed by the provision of the Statute of Frauds (St. 29 Car. 2, c. 3, § 3), that no leases, estates or interests of freehold or terms of years, or any uncertain interest in lands, tenements or hereditaments, should be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering, or his agent thereunto lawfully authorized by writing, or by act and operation of law. This provision has been recognized as operative in at least one state in this country,²⁸ while in a few others a provision expressed in substantially similar language has been adopted.²⁹ In New York it is provided that no estate or interest in lands, other than leases for a term not exceeding one year, shall be granted, assigned or surrendered, unless by act or operation of law, or by deed or conveyance in writing,³⁰ and approximately similar language has been adopted in a number of other states.³¹ In Maine it is merely provided that no estate or interest in lands can be granted, assigned or surrendered, unless by writing signed by the grantor or his attorney,³² and in other New England states a similar provision is found, with the addition of an ex-

²⁷ Co. Litt. 338a; Sheppard's Touchstone, 300.

²⁸ In Maryland. See *Lamar v. McNamee*, 10 Gill & J. (Md.) 126, 32 Am. Dec. 152; *Lammott v. Gist*, 2 Har. & G. (Md.) 433. Also, perhaps, in Washington. See *Hart v. Pratt*, 19 Wash. 560, 53 Pac. 711; *Richards v. Redelsheimer*, 36 Wash. 325, 78 Pac. 934.

²⁹ Kirby's Dig. St. Arkansas, 1904, § 3665; *Florida* Gen. St. 1906, § 2448; *Missouri* Rev. St. 1899, § 3415; 2 Gen. St. New Jersey, p. 1602, § 2; *Pennsylvania* Act March 21, 1772; *South Carolina* Civ. Code 1902, § 2651.

³⁰ Real Prop. Law, § 207. See *Coe v. Hobby*, 72 N. Y. 145, 28 Am. Rep. 120; *Ramsay v. Wilkie*, 36 N. Y. St. Rep. 864, 13 N. Y. Supp. 554.

³¹ *Michigan* Comp. Laws 1897, § 9509; *Minnesota* Rev. Laws 1905, § 3487; *Montana* Rev. Codes 1907, § 7967; *Nebraska* Comp. St. 1905, § 3636; *Nevada* Comp. Laws 1900, § 2694; *Utah* Comp. Laws 1907, § 1974; *Wisconsin* Rev. St. 1898, § 2302. See *Kittle v. St. John*, 7 Neb. 73; *Burnham v. O'Grady*, 90 Wis. 461, 63 N. W. 1049.

³² Rev. St. 1903, c. 75, § 13.

ception in favor of an assignment or surrender "by operation of law."³³ In some states, where the local statute does not in terms require any writing in the case of a surrender, there are express provisions that any interest in lands, or any interest greater than a lease for a term named, can be transferred or assigned only by writing,³⁴ and these, it would seem, are applicable to a surrender as well as to any other conveyance.³⁵ In some states there are statutory enactments directed in terms against oral contracts for the sale or transfer of interests in lands, but not against oral transfers themselves. So far as such a provision might in any state be construed as prohibiting oral conveyances of land, it would, it seems, apply to conveyances by way of surrender.³⁶

The third section of the English Statute of Frauds, requiring a surrender to be in writing, contains no exception in reference to leases for short terms, such as, by the previous sections, exists in connection with the requirement of a writing for the creation of a leasehold interest. And the English cases are to the effect that the requirement of a writing applies to a surrender of a leasehold interest which, under the previous sections, is susceptible of creation orally.³⁷ In Pennsylvania, however, strong disapprobation of these decisions has been expressed, on the ground of the improbability that the legislature could have intended to

³³ *Massachusetts* Rev. Laws 1902, c. 127, § 3; *New Hampshire* Pub. St. 1901, c. 137, § 12; *Vermont* Pub. St. 1906, § 2582.

³⁴ See e. g., *California* Civ. Code, § 1091; *Connecticut* Gen. St. 1902, § 4029; *Burns' Ann. St. Indiana* 1901, § 6650; *Kentucky* St. 1903, § 490; *North Dakota* Rev. Codes 1905, § 4968; *Rhode Island* Gen. Laws 1906, c. 202, § 2.

³⁵ But in *McKenzie v. City of Lexington*, 34 Ky. (4 Dana) 129, it is decided that the failure to re-enact the third section of the English statute of frauds is evidence of an intention to dispense with the formality of a writing in the case of a surrender, and there is no suggestion that the general provisions of the local statute as to conveyance of

interests in lands would supply its place.

³⁶ The provision of the Delaware statute (Rev. Code, p. 526, § 7) that no action shall be brought on "any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them," unless in writing, seems to have been regarded as requiring a surrender to be in writing. *Logan v. Barr*, 4 Har. (Del.) 546.

³⁷ *Botting v. Martin*, 1 Camp. 317; *Mollett v. Brayne*, 2 Camp. 103; *Doe d. Read v. Ridout*, 5 Taunt. 519. See the discussion of these and other cases in *Browne, Stat. of Frauds*, § 45. The same view is apparently taken in *Logan v. Barr*, 4 Har. (Del.) 564.

require greater formalities for the extinction of the interest than for its creation.³⁸ In New York it has been decided that the statutory provision requiring a writing for the surrender of "any estate or interest in lands other than for a term not exceeding one year" does not require a writing if at the time of the surrender less than a year of the term remains outstanding.^{39, 40}

b. **By cancellation of lease.** It seems that, before the Statute of Frauds, a cancellation of the lease, in pursuance of an agreement by the parties, would have been sufficient as a surrender, this showing, as strongly as an oral surrender, the intention of the tenant of the particular estate to relinquish his interest to the reversioner, and the intention of the latter to accept the relinquishment.⁴¹ That the statute, however, renders the cancellation of the lease ineffective as a surrender is well settled,⁴² and the fact that the lease is found in the possession of the lessor in a cancelled state does not, it has been decided, warrant any inference that there was a written surrender which has been lost.⁴³ It is said by Chief Baron Gilbert in this regard that "the intent of the Statute of Frauds was to take away the manner they formerly had of transferring interests to lands, by signs, symbols, and words only; and therefore, as a livery of seisin on a parol feoffment was a sign of passing the freehold before the statute, but is now taken away by the statute, so I take it that the cancelling of a lease was a sign of a surrender before the statute, but is now taken away, unless there be a writing under the hand of the party."⁴⁴ According to one or two of the older authorities, indeed, it seems that a cancellation of a lease might under some circumstances have the effect of revesting the estate created thereby in the lessor, not as being equivalent to an oral surrender, but as destroying all evidence of the demise.⁴⁵

³⁸ *McKinney v. Reader*, 7 Watts Thomas, 9 Barn. & C. 288; *Rowan v. (Pa.)* 123. This view is approved in *Lytle*, 11 Wend. (N. Y.) 616.

Greider's Appeal, 5 Pa. 422, and an Indiana case is in accord therewith. ⁴³ *Doe d. Courtail v. Thomas*, 9 Barn. & C. 288.

Ross v. Schneider, 30 Ind. 423.

⁴⁴ *Magennis v. MacCulloch*, Gilb. Eq. Cas. 235.

^{39, 40} *Smith v. Devlin*, 23 N. Y. 363.
⁴¹ See *Magennis v. MacCulloch*, Gilb. Eq. Cas. 235.

⁴² *Roe d. Berkeley v. Archbishop of York*, 6 East, 86; *Ward v. Lumley*, 5 Hurl. & N. 87; *Doe d. Courtail v.*

⁴⁵ See *Anonymous*, Moore, 35, pl. 116; *Vin. Abr.*, *Faits (U)*; *Bac. Abr.*, *Leases (J)*. By some authorities such effect is to be given to the cancellation of a lease or other con-

But such a theory has been entirely repudiated in modern times, it being a positive rule, in almost every jurisdiction, that the cancellation of an instrument of conveyance, after its delivery, does not revest the estate in the maker thereof.⁴⁶

The question whether a cancellation of the lease was, before the Statute of Frauds, equivalent to an oral surrender, is of interest in those states in which there is no statutory requirement that a surrender be in writing. In Illinois, where such is the case, it was decided by the intermediate appellate court, quoting the above language of Chief Baron Gilbert, that a surrender may be made by cancellation.⁴⁷ But a different view has been taken in the highest court of the state, on the ground that the cancellation of a deed will not destroy its effect, though it is at the same time said that the cancellation of the lease may, in connection with the subsequent conduct of the parties, authorize a finding of a surrender, as a matter of fact.⁴⁸ In that state then, it appears that, while an oral surrender is valid, a cancellation is not, of itself, proof of an intention to surrender, and so equivalent to an oral surrender, but it must be accompanied by other evidence of such an intention, to make it effective for this purpose.

c. **Necessity of seal.** Since, at common law, a surrender of a present estate in land did not require any writing, and the Statute of Frauds contained no requirement of a seal, it seems clear that, in the absence of a local statutory requirement to that effect, there is no necessity of a seal to render such a surrender valid, and this is so even though the lease itself be under seal, at least if not required to be under seal.⁴⁹ In the case, however, of things lying

veyance when the subject thereof is a thing which lies in grant, as an incorporeal hereditament, but not when it is of a thing which lies in livery, the grant being in the former case regarded as the essential instrumentality of transfer. See *Moor v. Salter*, 3 Bulst. 79; *Miller v. Manwaring*, Cro. Car. 399; *Gilbert*, Evidence, 111, 112. But this position has been denied. *Bolton v. Bishop* of Carlisle, 2 H. Bl. 259. And there is evidently no such distinction at the present day, since corporeal things as well as incorporeal are transferred by grant. *Stewart v. Aston*, 8 Ir. C. L. 35. And see *Ward v. Lumley*, 5 Hurl. & N. 87.

⁴⁶ See cases cited in 2 *Tiffany*, Real Prop. p. 934, and 2 *Cyclopedia Law & Proc.* 187.

⁴⁷ *Beidler v. Fish*, 14 Ill. App. (14 Bradw.) 29.

⁴⁸ *Brewer v. National Bldg. Ass'n*, 166 Ill. 221, 46 N. E. 752, afg. 41 Ill. App. 223.

⁴⁹ *Co. Litt.* 338 a; *Farmer v. Rogers*, 2 Wils. 26; *Peters v. Barnes*, 16 Ind. 219; *Allen v. Jaquish*, 21 Wend. (N. Y.) 628. In *Roe v. Conway*, 74

in grant, such as incorporeal hereditaments, or future estates, a seal was at common law necessary to validate a surrender thereof, since no other mode of transfer of such an interest was recognized,⁵⁰ and it would seem that this requirement may be regarded as still existent, though an occasion for its application would, in this country at least, rarely arise.

d. **Necessity of acceptance.** At common law, a surrender, it was decided, is sufficient without any acceptance thereof by the person to whom it is made, the same rule being adopted as regards a surrender as was applied to other conveyances.⁵¹ In a number of states, on the other hand, the rule has been declared that a conveyance, except when made to an infant or other person not *sui juris*, is not valid until accepted by the grantee,⁵² and this rule would presumably apply in the case of a surrender. Even in jurisdictions where, as in England, an acceptance is not required, the grantee can repudiate the conveyance when it comes to his knowledge, and since he is ordinarily the only person interested in defeating a conveyance to him by way of surrender, the question whether his assent is necessary in the first place is not a very practical one.

e. **Words of surrender.** While the words "surrender, grant and yield up" are ordinarily used in a formal instrument intended to take effect as a surrender, no particular words are necessary, it being sufficient that an intention to transfer the leasehold interest to the reversioner clearly appears.⁵³ Accordingly,

N. Y. 201, 30 Am. Rep. 298, however, contract. *Alschuler v. Schiff*, 164 it is said to be "a serious question Ill. 298, 45 N. E. 424. The common- whether a lease for ten years can be law authorities do not thus view a cancelled and surrendered by an in- surrender as a discharge of a con- strument not under seal." The stat- tract, but, as above stated, regard it ute of that state requires a seal in as a reconveyance of the estate the case of a lease only when it is of created by the demise.

a freehold interest, and contains no express requirement of a seal on a ⁵⁰ Co. Litt. 338 a; 1 Wms. Saund. 236 a, note 9.

surrender. In Illinois it has been ⁵¹ Sheppard's Touchstone (Pres- decided that the rule forbidding the ton's Ed.) 307; *Thompson v. Leach*, 2 Vent. 198.

modification of a sealed contract by ⁵² See decisions cited 2 Tiffany, parol does not prevent a valid sur- Real Prop. § 407, note.

render not under seal, though the ⁵³ Sheppard's Touchstone, 306; lease was under seal, for the reason *Farmer v. Rogers*, 2 Wils. 26; *Wed-* that such rule does not apply in the *dall v. Capes*, 1 Mees. & W. 50; *Ap-*

case of the absolute discharge of a

an instrument in form a lease of the premises by the tenant to the landlord has been regarded as sufficient as a surrender,⁵⁴ as has what was in terms an "agreement" for the relinquishment of the leasehold, it being intended to take effect as a surrender.⁵⁵ Apparently, in England, where a mortgage transfers the legal estate to the mortgagee, a mortgage of the leasehold by the tenant to his landlord would take effect as a surrender,⁵⁶ but such a result could not follow in any jurisdiction where a mortgage does not transfer the legal title.⁵⁷

A recital in a second lease to one already a tenant under a previous lease, that the previous lease has been surrendered, is not, it has been decided, sufficient as an express surrender of the previous lease, for the reason that the recital may be satisfied on the theory that the second lease operates, as hereafter explained, as a surrender of the first by operation of law, and it does not purport itself to be a relinquishment of the interest under a prior lease.⁵⁸ In Iowa it appears to have been considered that a recital in a receipt for rent that the lease has been surrendered is valid evidence of a surrender,⁵⁹ but it is perhaps questionable whether the statute of that state requires a surrender to be in writing signed by the maker thereof.⁶⁰

f. Transfer of possession. In California it has apparently been decided that an express surrender is not effective as such if the tenant making it retains possession of the premises.⁶¹ There

peal of Greider, 5 Pa. 422, 47 Am. Dec. 413.

⁵⁴ Loyd v. Langford, 2 Mod. 174; Smith v. Mapleback, 1 Term R. 441; Shepard v. Spaulding, 45 Mass. (4 Mete.) 416.

⁵⁵ Harris v. Hancock, 91 N. Y. 340; Allen v. Jaquish, 21 Wend. (N. Y.) 628.

⁵⁶ See Cottee v. Richardson, 7 Exch. 143.

⁵⁷ See Breese v. Bange, 2 E. D. Smith (N. Y.) 474.

⁵⁸ Roe d. Berkeley v. Archbishop of York, 6 East, 86.

⁵⁹ Jenkins v. Clyde Coal Co., 82 Iowa, 618, 48 N. W. 970.

⁶⁰ The only statutory provision in

that state which might be regarded as bearing on the subject appears to be that excluding evidence of a contract for the creation or transfer of any interest in lands, except leases for a term not exceeding one year, if not in writing and signed by the party charged (Ann. Code, § 4625). This provision, however, seems to be regarded as applying to conveyances as well as contracts to convey (see Hughes v. Lindsey, 31 Iowa, 332; Wickham v. Henthorn, 91 Iowa, 242, 59 N. W. 276), and consequently might be regarded as applying to a surrender.

⁶¹ Kower v. Gluck, 33 Cal. 401. And see Coburn v. Goodall, 72 Cal.

is little, if any, common-law authority for this view,⁶² and there are authorities opposed thereto.⁶³ It seems that a conveyance by way of surrender, like most other forms of conveyance at the present time, should operate to transfer the title, irrespective of the grantor's retention of possession. If the tenant, after executing and delivering a deed of surrender, still occupies the premises by permission of the surrenderee he is, it is true, a tenant of the latter, but his tenancy is not, it seems, under the surrendered lease, but is under a new demise. Even at common law an estate for life, which could ordinarily be transferred only by livery of seisin, could be surrendered without livery,⁶⁴ and, *a fortiori*, it would seem, a term of years could be surrendered without any equivalent formality. The English decision, before referred to, that a surrender is valid without any acceptance thereof,⁶⁵ clearly implies that no transfer of possession is necessary.

g. Surrender in futuro. It is asserted in a modern English case, without any statement of the reasons for such a view, that a surrender cannot be made to take effect *in futuro*,⁶⁶ the actual

498, 19 Pac. 190, 1 Am. St. Rep. 75. See, also *Forgotson v. Becker*, 39 Misc. 816, 81 N. Y. Supp. 319, apparently to the same effect.

⁶² In *Vin. Abr., Surrender (G) 35*, it is said that "it is not properly a surrender, but where he who surrenders gives possession to him who takes by surrender;" citing *Bro. Abr., Surrender*, pl. 13, which in turn cites *Y. B. 22 Hen. 6. 51*. The passage in the year book merely says that it was agreed by the judges, with one exception, that "If I enfeof two persons to hold to them and to the heirs of one, and he who has the freehold surrenders to his cotenant, this surrender is void by reason of the joint possession;" while *Brooke* says that "if I enfeof two, to have to them and the heirs of one, he who has the freehold cannot surrender to the other by reason of the joint possession, for the freehold cannot merge in the reversion by reason that he who has the fee is jointly

seised of the possession, for one cannot properly surrender but where he who surrenders gives possession to him who takes by the surrender." Whatever may be the meaning of these latter statements, they evidently do not support the general statement made by *Viner*.

⁶³ *Sheppard's Touchstone*, at p. 307, says: "The actual entry of the surrenderee into the land is not necessary." To the same effect is *Bro. Abr., Surrender*, pl. 50; *Vin. Abr., Trespass (S) 9*. And compare *Lord Hale's note to Co. Litt. 57* that "if tenant for years surrenders and still continues possession, he is tenant at sufferance or disseisor at election."

⁶⁴ *Co. Litt. 50 a*; 2 *Blackst. Comm.* 326. See *McLaughlin v. Kennedy*, 49 N. J. Law, 519, 10 *Atl.* 391.

⁶⁵ *Thompson v. Leach*, 2 *Vent.* 198.

⁶⁶ *Doe d. Murrell v. Milward*, 3 *Mees. & W.* 328, per *Parke, B.*

decision being, however, merely that a notice by the lessee of an intention to give up possession at a certain date, though assented to by the lessor, did not constitute a surrender. To apparently the same effect as the above *dictum* is that of Coke that "he who hath a lease for twenty years cannot surrender the last ten years by any express surrender, saving to him the first ten years."⁶⁷ On the other hand, it is asserted by writers of authority that a surrender may be made subject to a condition precedent,⁶⁸ and a surrender subject to such a condition is necessarily, so long as the condition is unsatisfied, one to take effect *in futuro*. In New York it has been decided that a surrender may be made to take effect *in futuro*, and this effect was given to a mere agreement by the lessee that, if he failed to make certain improvements by the date named, he would "then relinquish the contract,"⁶⁹ language which might, perhaps, as well have been construed as a mere agreement to make a surrender *in futuro*.⁷⁰ In New Jersey, also, it has been decided that a surrender may be made to take effect *in futuro*.⁷¹

The view that a surrender cannot be made to take place *in futuro* is presumably based on the theory that a surrender, in its very nature, implies a *present* yielding up of the particular estate. In any case, however, if the instrument is in terms a transfer of the particular estate to the reversioner, to take effect in possession from and after a time or event named, it will, it seems, so operate, and, upon the arrival of such time or the happening of the event named, the particular estate will become vested in the reversioner, and will be merged.⁷² There is no

⁶⁷ Ives' Case, 5 Coke, 11 a.

Kenzie v. City of Lexington, 34 Ky.

⁶⁸ The statement in Sheppard's Touchstone, 307, repeated by Mr. Preston in his annotations thereto, that a surrender may be on a condition precedent or subsequent, is quoted with approval in Doe d. Bidulph v. Poole, 11 Q. B. 713.

(4 Dana) 129.

⁶⁹ Allen v. Jaquish, 21 Wend. (N. Y.) 628.

⁷¹ Mundy v. Warner, 61 N. J. Law, 395, 39 Atl. 697. The syllabus says that the agreement was to "surrender possession" at a certain date, but the court speaks of it as an agreement "to surrender the term."

⁷⁰ An agreement by the lessor to accept the lessee's proposition to surrender provided he would pay the rent due was apparently regarded as not constituting a surrender. Mc-

An agreement to surrender possession in the future has, in England, apparently, been regarded as not effective as a surrender. Weddall v. Capes, 1 Mees. & W. 50.

⁷² In Harrison v. Middleton, 11 Grat. (Va.) 527, it was held that an

question that a surrender may be made subject to a condition subsequent, the effect of the condition being to revest the leasehold interest in the tenant upon the happening of the contingency named.⁷³

h. Surrender for purpose of new lease. It has been said, in an English case, that where a surrender in fact is so expressed as to show that the intention of the parties is to make the surrender only in consideration of the grant of a new lease to the same lessee, the sound construction of the instrument, in order to effectuate this intention, would make the surrender conditioned to be void in case the new lease is for any reason void.⁷⁴ The rule, however, appears to be different if such intention is not expressed in the instrument of surrender.⁷⁵ In a case in New York it was decided that, after an express surrender, the fact that a new lease, given in place of the former lease, was void, did not render the surrender nugatory, the new lease not being the only consideration for the surrender of the former lease; and it was at the same time said that the former lease could be reinstated only by a suit in equity on the ground of failure of consideration, fraud, or mistake.⁷⁶

§ 190. Surrender by operation of law.

a. General nature. The provision of the English Statute of Frauds, requiring a surrender to be in writing, excepts from its scope surrenders "by act and operation of law." A like exception is found in most of the statutes in this country bearing on the subject.⁷⁷ But even in states where there is no express

agreement under seal by which the tenant agreed to "surrender" the premises at a certain date rendered him a mere tenant at will or at sufferance after that date. That a future interest may be created in a term of years, see Gray, *Perpetuities* (2d Ed.) § 809 et seq.; 2 Preston, *Abstracts of Title*, 6, 144. Merger could not take place until such interest becomes a vested estate by the happening of the contingency or arrival of the time named, the law of merger not applying to executory interests. See 3 Preston, *Conveyancing*, 55, 493.

73 Co. Litt. 218b; Sheppard's Touchstone, 307.

74 Doe d. Egremont v. Courtenay, 11 Q. B. 702. See, also, Doe d. Bidulph v. Poole, 11 Q. B. 713.

75 Doe d. Murray v. Bridges, 1 Barn. & Adol. 847.

76 Clarke v. Barnes, 76 N. Y. 301, 32 Am. Rep. 306.

77 See the statutes above referred to of Arkansas, California, Florida, Massachusetts, Michigan, Minnesota,

provision in that regard, the doctrine of surrender by operation of law is recognized,⁷⁸ as it is in states where there is apparently no restriction imposed on the making of an oral surrender.⁷⁹

The courts have considered that there is a surrender by "act and operation of law" when transactions have taken place between the reversioner and the tenant of the particular estate, the landlord and tenant, which create a condition of facts inconsistent with the continued operation of the lease. The effect thus given to the transactions of the parties has been stated to be based on the theory of estoppel,⁸⁰ but all the elements of an estoppel are certainly not present in every case of such a surrender. Occasionally the theory seems to be asserted that the acts of the parties thus operate as a surrender because they show an agreement that the leasehold interest shall be surrendered,⁸¹ but a surrender cannot properly be regarded as taking place by operation of law when it takes place by agreement of the parties, even though such agreement is manifested by acts and not by words;⁸² and even in jurisdictions where, owing to the absence of a statute requiring a surrender to be in writing, the mere acts of the parties might effect a surrender as showing an agreement to that effect, this would be properly termed an express surrender rather than one by operation of law. It is more satisfactory, perhaps, to regard the various decisions on the subject as involving an application of the principle of estoppel,

Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Vermont, Utah, Wisconsin. National Union Bldg. Ass'n, 166 Ill. 221, 46 N. E. 752; Meeker v. Spalsbury, 66 N. J. Law, 60, 48 Atl. 1026; Bedford v. Terhune, 30 N. Y. 453, 86

⁷⁸ See Otis v. McMillan, 70 Ala. 46; Woodward v. Lindley, 43 Ind. 333; Withers v. Larrabee, 48 Me. 570; Brown v. Cairns, 63 Kan. 584, 66 Pac. 639 (semble). Am. Dec. 394; Tobener v. Miller, 68 Mo. App. 569; Hart v. Pratt, 19 Wash. 560, 53 Pac. 711.

⁷⁹ See Ledsinger v. Burke, 113 Ga. 74, 38 S. E. 313; Brown v. Cairns, 107 Iowa, 727, 77 N. W. 478; Ladd v. Smith, 6 Or. 316; Edwards v. Hale, 37 W. Va. 193, 16 S. E. 487. ⁸² So in Felker v. Richardson, 67 N. H. 509, 32 Atl. 830, it is said, per Carpenter, J., "A surrender by agreement, whether express or implied, is the act, not of the law, but of the parties. To constitute a surrender by operation of law, overt

⁸⁰ See Lyon v. Reed, 13 Mees. & W. 285. acts of both parties inconsistent with the continuance of the term are essential."

⁸¹ See e. g., Talbot v. Whipple, 96 Mass. (14 Allen) 177; Brewer v.

somewhat modified to suit what the courts may have considered the exigencies of the case. The transactions which have been regarded as giving a rise to a surrender by act and operation of law are of various distinct classes, and they will be considered accordingly.

b. **Acceptance of new interest—**(1) **Acceptance of lease—**
 (a) **The general doctrine.** If the tenant accepts from the landlord a new lease, to take effect during the continuance of the interest created by the previous lease, this is regarded as effecting a surrender by operation of law on the theory that, by the acceptance of the new lease, the tenant becomes a party to an act the validity of which he is estopped to dispute, but which cannot be valid if the estate created by the first lease continues to exist.⁸³ This view of the effect of the acceptance of a second lease was fully recognized before the Statute of Frauds,⁸⁴ and therefore cannot be regarded, as may perhaps other instances of surrender by operation of law, in the light of an attempt to carry out the agreement of the parties, though not expressed in writing, and thus to avoid the operation of the statute.

In the case of a so-called "lease in fee," which is properly a conveyance in fee, reserving a rent, there can obviously be no surrender, since there is no reversion, but the subsequent taking of a new lease by the grantee has been regarded as a release of all rights under the former conveyance.⁸⁵

In order that the new lease result in a surrender, it need not be for as great a term as the first lease,⁸⁶ since it is the tenant's acceptance of a new, inconsistent interest which is the controlling consideration.⁸⁷ And for the same reason, though the second

⁸³ *Lyon v. Reed*, 13 Mees. & W. Steward, Plowd. 107 b; *Ives v. Sams*, 285; *Otis v. McMillan*, 70 Ala. 46; *Cro. Eliz.* 522; *Com. Dig.*, Surrender Welcome v. Hess, 90 Cal. 507, 27 Pac. (ii).

369; *Flagg v. Dow*, 99 Mass. 18; ⁸⁵ *Springstein v. Schermerhorn*, 12 Johns. (N. Y.) 357.

Enyeart v. Davis, 17 Neb. 228, 22 N. W. 449; *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580; *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 449; *Wade v. South Penn. Oil Co.*, 120; *Edwards v. Hale*, 37 W. Va. 193, 45 W. Va. 380, 32 S. E. 169. 16 S. E. 487.

⁸⁷ *Ives' Case*, 5 Coke, 11 a; *Hutch-*

⁸⁴ *Perkins*, § 617; *Sheppard's Touchstone*, 301; *Fulmerston v. Ins v. Martin*, *Cro. Eliz.* 605.

lease is not to begin till some time named in the future, there is an immediate surrender of the interest under the first lease. But a new lease which is not to take effect until after the end of the existing term would not effect a surrender of such term, since there is no inconsistency in the interests created by the two leases.⁸⁸ If it is uncertain whether the interest created by the new lease will begin before the end of the existing term, as when it is subject to a condition precedent, which may or may not occur before that time, the second lease will not, it seems, effect a surrender until the contingency actually happens, and consequently the surrender will operate only on the residue of the term then outstanding.⁸⁹

It has been decided in this country that a surrender will result from the making of a new oral lease, provided it is valid as such, although the original lease was in writing or even under seal.⁹⁰ This was the rule in England before the Statute of Frauds,⁹¹ and, in spite of the *dictum* that "it would be most dangerous to allow a term created by an express demise to be thus got rid of by parol evidence,"⁹² there are modern cases in that country to the same effect, though without any direct consideration of the question.⁹³ Thus, it has there been decided that where the tenant agreed with the landlord that the latter should give a new lease to him and to another, and they entered pending the execution of the new lease, they became tenants at will or from year to year, with the result that the term previously existing in the single

⁸⁸ Bac. Abr., Leases (S) 2, 1; lease. There the court, however, *Tracy v. Albany Exch. Co.*, 7 N. Y. (3 Seld.) 472. discusses the question as one of the modification of a contract by a subsequent agreement, and there is no reference to the doctrine of an implied surrender. That a new oral lease is insufficient in such case, see *Leavitt v. Stern*, 159 Ill. 526, 42 N. E. 869, ante, note 5 a.

⁸⁹ Bac. Abr., Leases (S) 2, 1; Anonymous, 4 Leon. 30.

⁹⁰ *Schiefflin v. Carpenter*, 15 Wend. (N. Y.) 400; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120. See *Evans v. McKanna*, 89 Iowa, 362, 56 N. W. 527, 48 Am. St. Rep. 390; *Nachbour v. Wiener*, 34 Ill. App. 237. In *Andre v. Graebner*, 126 Mich. 116, 85 N. W. 464, an oral agreement between the lessor and lessee for a term of years that the holding should be from month to month was given effect as terminating the rights under the old

⁹¹ Com. Dig., Surrender (T 1.)

⁹² Per Pollock, C. B., in *Foquet v. Moor*, 7 Exch. 870. And to the same effect, see *Doe d. Huddleston v. Johnson*, McClel. & Y. 141.

⁹³ *Fenner v. Blake* [1900] 1 Q. B. 426; *Peter v. Kendal*, 6 Barn. & C. 703.

tenant was surrendered.⁹⁴ The view that a surrender may be thus effected by a new verbal lease is no doubt contrary to the spirit of the Statute of Frauds, but it seems to be a logical application of the general rule as to a surrender resulting from a new lease, and it is in accordance with the apparent tendency of the courts to enlarge the scope of the exception in the statute of surrender by operation of law.

The operation of a second lease as effecting a surrender of the term previously existing is not prevented by the fact that it is subject to a condition subsequent, which may cause a forfeiture of the interest created thereby, and if the condition is enforced both leases will thereafter be inoperative.⁹⁵

If the second lease covers but a part of the land covered by the first lease, there is a surrender as to such part and no more.⁹⁶

If one only of two or more joint lessees accepts a second lease, there is a surrender of his undivided interest, and not of the interests of the others, unless he was authorized to act for them.⁹⁷

(b) *Intention of parties.* Since a surrender by reason of the making and acceptance of a new lease takes place by operation of law, and not by the act of the parties, it would seem logically to follow that the intention of the parties is immaterial, and there are occasional *dicta* to that effect.⁹⁸ The view has, however, been asserted that the new lease does not result in a surrender when this is contrary to the apparent intention of the parties.⁹⁹ Thus, a contrary intention was inferred and given effect when to hold otherwise would have deprived the tenant of the benefit of the covenant in the prior lease for compensation for improvements erected by him.¹⁰⁰

⁹⁴ *Hamerton v. Stead*, 3 Barn. & C. 478. *Stafford*, 28 U. C. C. P. 229. And see *Seldon v. Buchannan*, 24 Ont. 349.

⁹⁵ *Co. Litt.* 218b; *Sheppard's Touchstone*, 301; *Bac. Abr., Leases* (S 2, 1); *Doe d. Biddulph v. Poole*, 11 Q. B. 13. ⁹⁷ *Sheppard's Touchstone*, 302.

⁹⁶ *Carnarvon v. Villebois*, 13 Mees. & W. 342; *Morrison v. Chadwick*, 7 C. B. 266; *Bac. Abr., Leases* (S 3). ⁹⁸ *Lyon v. Reed*, 13 Mees. & W. 285; *Brown v. Cairns*, 107 Iowa, 727, 77 N. W. 478; *Enyeart v. Davis*, 17 Neb. 228, 22 N. W. 449. ⁹⁹ *Smith v. Kerr*, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; *Witmark v. New York El. R. Co.*, 76 Hun, 302, 27 N. Y. Supp. 777; *Flagg v. Dow*, 99 Mass. 18 (semble); *Thomas v. Zumbalen*, 43 Mo. 471. ¹⁰⁰ *Van Rensselaer's Heirs v. Peniman*, 6 Wend. (N. Y.) 568. But

In England, while the courts have not gone to the same extent as the decisions last referred to in refusing to give the effect of a surrender to the making and acceptance of a new lease when a surrender was apparently not intended, they have gone so far as to hold that in order that the transaction may thus operate, the lease must be good and sufficient to pass an interest according to the intention of the parties.¹⁰¹ Thus, it has been decided that if the lease is made by a tenant for life, undertaking to act under a power, and the lease is not a valid execution of the power, a surrender does not result, although the lease was valid until the death of the tenant for life.¹⁰² In New York, likewise, it has been decided that if the second lease is intended to create a term, and, because not executed as required by the Statute of Frauds, it creates merely a tenancy from year to year, no surrender results,¹⁰³ and a like decision was made where there was an outstanding dower interest in one who did not join in the second lease.¹⁰⁴ Where the second lease was effected by fraud on the part of the lessor, it was held in that state that, in an action for rent, the lessee was entitled to equitable relief in the shape of the cancellation of the second lease and the re-establishment of the first lease.¹⁰⁵ If the second lease is void *ab initio*, its making and acceptance cannot result in a surrender of the first lease.¹⁰⁶

(c) **What constitutes new lease.** The question of what constitutes a new lease or demise for this purpose is one as to which the decisions are not entirely clear. A mere change in the amount of the rent by agreement is not the making of a new lease,¹⁰⁷ and

Jungerman v. Bovee, 19 Cal. 354, is apparently contra.

¹⁰¹ *Lloyde v. Gregory*, 1 Wm. Jones, 465; *Davison v. Stanley*, 4 Burrow, 2210.

¹⁰² *Doe d. Biddulph v. Poole*, 11 Q. B. 713; *Doe d. George v. Courtenay*, 11 Q. B. 702, per Coleridge, J.

¹⁰³ *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120; *Seymour v. Hughes*, 55 Misc. 248, 105 N. Y. Supp. 249.

¹⁰⁴ *Chamberlain v. Dunlop*, 126 N. Y. 45, 26 N. E. 236, 22 Am. St. Rep. 807.

¹⁰⁵ *Powell v. F. C. Lynde Co.*, 49 App. Div. 286, 64 N. Y. Supp. 153.

The prior lease had been "canceled," but since cancellation does not effect a surrender in view of the statutory requirement of a writing, this would seem to have been immaterial.

¹⁰⁶ *Roe d. Berkeley v. Archbishop of York*, 6 East, 86; *Easton v. Penny*, 67 Law T. (N. S.) 290.

¹⁰⁷ *Donellan v. Read*, 3 Barn. & Adol. 899; *Doe d. Monck v. Geikie*, 5 Q. B. 841; *Crowley v. Vitty*, Exch. 319; *Pronguey v. Gurney*, 37 U. C. Q. B. 347; *Oldewurtel v. Wiesenfeld*, 97 Md. 165, 54 Atl. 969, 99 Am. St. Rep. 427 (semble). In *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580,

consequently this does not of itself effect a surrender,¹⁰⁸ though it may be evidence, with other facts, to show a new demise and consequent surrender.¹⁰⁹ And it has been decided that a relinquishment, by the tenant to the landlord, of the possession of part of the premises, does not effect a surrender of the leasehold in the whole as involving a new demise, whether or not this is accompanied by a reduction in the amount of rent.¹¹⁰ An agreement for a new lease to be made in the future does not have the effect of a new lease in effecting a surrender of the existing tenancy.¹¹¹ And the same view has been taken of an agreement by the landlord not to disturb the tenant in his possession until a date subsequent to the end of the existing term, on the ground, it is said, that this was intended as an agreement merely, and not as a demise.¹¹² The same might be said, it would seem, of an agreement between the landlord and tenant that the former should quit at a certain date prior to the end of the term named in the original lease, but this has been decided, in the same jurisdiction, to involve a new demise, effecting a surrender of the term previously existing.¹¹³ In this country a new agreement, to the

92 N. W. 580, a different view appears to be taken.

¹⁰⁸ *Coe v. Hobby*, 72 N. Y. 141, 23 Am. St. Rep. 120; *Smith v. Kerr*, 103 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362; *Hurt v. Woodland*, 24 Md. 393; *Taylor v. Winters*, 6 Phila. (Pa.) 126; *Edwards v. Hale*, 37 W. Va. 193, 16 S. E. 487; *Donnellan v. Read*, 3 Barn. & Adol. 899; *Crowley v. Vitty*, 7 Exch. 319; *Clarke v. Moore*, 1 Jones & L. 723.

¹⁰⁹ *Jones v. Bridgman*, 39 Law T. (N. S.) 500; *Ex parte Vitale*, 47 Law T. (N. S.) 480. In *Conkling v. Tuttle*, 52 Mich. 630, 18 N. W. 391, where the lessor before the end of the term notified the lessee to quit, which the latter was about to do, but remained in possession on the lessor's promise to make repairs, there was, it was decided, a new lease with a valid stipulation for repairs. It rather appears, however, that the as-

serted termination of the old lease was based, not on the theory that the making of the stipulation as to repairs was equivalent to the making and acceptance of a new lease, but rather on the theory that the notice to quit and the lessee's acquiescence therein effected a termination of the lease. But this would seem to involve a violation of the statute as to oral surrenders. The term "surrender" is not used in the opinion.

¹¹⁰ *Holme v. Brunskill*, 3 Q. B. Div. 495.

¹¹¹ *John v. Jenkins*, 1 Crompt. & M. 227; *Sheppard's Touchstone*, 301.

¹¹² *Sidebotham v. Holland* [1895] 1 Q. B. 378.

¹¹³ *Fenner v. Blake* [1900] 1 Q. B. 426. This case in effect overrules *Doe d. Huddleston v. Johnston*, McCl. & Y. 141, though it makes no reference thereto.

effect that the landlord should have the option of terminating the lease by notice, has been regarded as not involving the making of a new demise effecting a surrender,¹¹⁴ but it may be questioned whether such a subsequent modification of the possible length of the term can be given effect otherwise than as a new demise.

(d) **New lease to assignee of leasehold.** The doctrine that the acceptance by the tenant of a new lease from the landlord effects a surrender of the original leasehold estate finds an occasional application in connection with the question whether a lessee who has assigned is still liable on his covenants. If the original tenancy is in full force, the lessee remains liable on the covenants entered into by him in connection therewith, such as that for rent,^{114a} while, if the assignee can be regarded as receiving from the landlord a new lease, a surrender occurs, and the lessee is no longer liable on his covenants. The mere fact that the landlord, after the making of the assignment, in some way recognizes the assignee as holding, not under the old tenancy, but under a new one, may be asserted by the tenant as the making of a new lease, so as to effect the surrender. It is sometimes said that the lessee is relieved from liability under his covenants if the landlord accepts the assignee "as his tenant," but this is incorrect. The landlord almost invariably accepts the assignee as his tenant, and yet the continuing liability of the lessee is generally recognized. The landlord must, in order to thus relieve the lessee from liability, not only accept the assignee as his tenant, but must also, tacitly or expressly, accept him as a tenant holding under a new demise. that is, he must in effect make a new demise to him.

The cases are generally to the effect that the mere acceptance by the landlord of the rent from the assignee does not involve a new demise, so as to effect a surrender,^{114b} and it is difficult

¹¹⁴ *Coe v. Hobby*, 72 N. Y. 141, 28 983; *Harris v. Heackman*, 62 Iowa, Am. Rep. 120. See *Seymour v. Hughes*, 55 Misc. 248, 105 N. Y. Supp. 249, to the effect that ordinarily a mere modification of the terms of the lease does not involve a surrender.

^{114a} See ante, § 157 a (2).

^{114b} *Copeland v. Watts*, 1 Starkie, 95; *Bonetti v. Treat*, 91 Cal. 233, 27 45 Mo. App. 590; *Edwards v. Spald-Pac*, 612, 13 L. R. A. 418; *Questa v. Goldsmith*, 1 Ga. App. 48, 57 S. E. Minn. 381, 59 N. W. 310; *Bouscaren*

to see how any other view could obtain. The assignee is bound to pay the rent, and the acceptance from him of such payment involves at most merely the recognition of such liability already existing. To construe such action on the part of the landlord as indicating an intention on his part to create a new tenancy, exactly similar to the former tenancy, without any possible object in so doing, seems wholly unwarrantable. As a matter of fact, a landlord accepts payment of the rent from whatever persons offer to pay it, and the idea that in so doing he may be creating a new tenancy does not occur to him. There are, however, cases to the effect that the acceptance of rent from the lessee's assignee does effect a surrender, relieving the lessee from liability on his covenants.^{114c} Occasionally, the fact that the acceptance of rent from the assignee is accompanied by an oral agreement to release the lessee from liability has been regarded as showing a surrender,^{114d} on the theory, presumably, that this shows a new demise

v. Brown, 40 Neb. 722, 59 N. W. 385, 42 Am. St. Rep. 692; *Hunt v. Gardner*, 39 N. J. Law, 530; *Creveling v. De Hart*, 54 N. J. Law, 338, 23 Atl. 611; *Wilson v. Lester*, 64 Barb. (N. Y.) 431; *Wallace v. Dinning*, 11 Misc. 317, 32 N. Y. Supp. 159; *Frank v. Maguire*, 42 Pa. 77; *Adams v. Burke*, 21 R. I. 126, 42 Atl. 515. So when there is a change of tenants consequently upon a change in the membership of the firm, to the original members of which the lease was made. *Graham v. Whichelo*, 1 Crompt. & M. 188; *Beall v. White*, 94 U. S. 382, 24 Law. Ed. 173; *Laughran v. Smith*, 75 N. Y. 205; *Doty v. Gilbert*, 43 Mich. 203, 5 N. W. 89. And the fact that the lessor recognizes the new members as tenants otherwise than by acceptance of rent from them has properly no greater effect. See *Gault v. Shepard*, 14 Ont. App. 203.

^{114c} This appears to be the purport of *Fry v. Patridge*, 73 Ill. 51; *Clemens v. Broomfield*, 19 Mo. 118; *Hutcheson v. Jones*, 79 Mo. 496; *Kin-*

sey v. Minnick, 43 Md. 112. And see cases cited ante, § 181 a, note 659.

In *Whicher v. Cottrell*, 165 Mass. 351, 43 N. E. 114, it is said that the fact that the landlord in that case received rent from the lessee's vendee did not effect a termination of the tenancy, since the lessor continued to claim the lessee as vendee and made out bills for rent against him, thus implying that otherwise the receipt of rent from him would have had that effect.

^{114d} *People's Sav. Bank v. Alexander*, 140 Pa. 22, 21 Atl. 248; *Wallace v. Kennelly*, 47 N. J. Law, 242; *Vandekar v. Reeves*, 40 Hun (N. Y.) 430; *Golding v. Brennan*, 183 Mass. 286, 67 N. E. 239. See *Dietz v. Kucks* (Cal.) 45 Pac. 832.

Evidence that, at the time the lessee informed the landlord of his intention to assign the lease, the landlord said, in referring to certain royalties due as rent from the lessee, that he would get them from the assignee, was held to be admissible

to the assignee. In one case a finding of a new demise was regarded as justified when the lessor not only accepted rent from the assignee, but also made repairs at his request, and, on his abandonment of the premises, bought his personal property, crediting the price on the rent, and made no demand on the lessee till after the end of the term.^{114c} And likewise, the fact that, the lessee having disposed of a half interest in the premises to another, he paid one-half only of the rent subsequently due, and referred the lessor to such other for the other half, and that all subsequent bills for rent were thereafter made out one-half against such other, who paid accordingly, was regarded as sufficient evidence of a surrender as to one-half the premises.^{114f}

The action of the landlord in suing the lessee's assignee on the covenant for rent in the lease, at the instigation of the lessee, has been decided not to show an election to accept the assignee as lessee.^{114g} In this last case there is a *dictum* that if such an action against the assignee be brought by the landlord "of his own motion," it might perhaps show such an election. But it seems most questionable whether such an effect should in any case be given to the mere bringing of an action against the assignee on the covenant for rent. It has been the law for many years that the landlord may sue either the lessee or his assignee on such a covenant, or may sue both of them,^{114h} and it has never before been suggested that by first suing the assignee he loses the right to sue the lessee. Indeed, the fact that he sues on the covenant in the instrument of lease would seem of itself to be a strong evidence that he regards the lease as still in existence.

The giving of a receipt for rent by the landlord in the name of the person to whom the possession has been transferred has been said to be evidence of a recognition of him as lessee,¹¹⁴ⁱ but this is not conclusive,^{114j} and it would seem to be entitled to but

as tending to show that he intended to make his own terms with the incoming tenants, regardless of the lease, instead of treating him as assignee. *De Hart v. Creveling*, 57 N. J. Law, 642, 32 Atl. 212.

^{114c} *Colton v. Gorham*, 72 Iowa, 234, 33 N. W. 76.

^{114f} *Fry v. Patridge*, 73 Ill. 51.

^{114g} *Whitcomb v. Cummings*, 68 N. & M. 188. H. 67, 38 Atl. 503.

^{114h} See *Brett v. Cumberland*, Cro. Jac. 521; *Bachelour v. Gage*, Cro. Car. 188; *Sutliff v. Atwood*, 15 Ohio St. 186; *Whetstone v. McCartney*, 32 Mo. 430, and ante, § 181 b.

¹¹⁴ⁱ *Laurance v. Faux*, 2 Fost. & F. 435.

^{114j} *Graham v. Whichelo*, 1 Crompt.

little weight, when such person is the lessee's assignee, since the receipt would naturally be given to the person who is under a primary obligation to pay the rent and who pays it.^{114k} That a receipt for rent given to the assignee recites that the letting is for a month only, while the original lease was for a longer time, is evidence, as against the landlord, of a new demise,^{114l} and in one case this effect seems to have been given to an agreement with the new tenant making the rent payable monthly instead of quarterly as in the original lease.^{114m}

In one case it is decided that the landlord's assent to an assignment by the lessee effects a surrender by operation of law.¹¹⁴ⁿ This is, it is submitted, incorrect.^{114o}

(2) **Acceptance of different class of interest.** Not only is a surrender effected by operation of law on the tenant's acceptance of a new lease inconsistent with the previous lease, but this result also follows on his acceptance of any other interest in the premises inconsistent with such lease, as when "a lessee for years accepts a grant of a rent, common, estovers, herbage, or the like, for life or years, out of the same lands."¹¹⁵ It has even been decided that a tenant, by agreeing orally thereafter to hold, not as tenant, but merely as a servant of the lessor, effects a surrender by operation of law.¹¹⁶ Since, however, as servant, one takes no interest in the premises, it is somewhat difficult to perceive such an inconsistency between the new agreement and the pre-existing lease as to have this effect. The new agreement seems to involve in effect an oral surrender, invalid under the statute, accompanied by a contract as to the future personal relations of the parties.¹¹⁷

There are decisions to the effect that a contract for the sale of the leased premises by the landlord to the tenant effects a

^{114k} See *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220, 82 N. W. 893; *Wilson v. Lester*, 64 Barb. (N. Y.) 431.

^{114l} *Wallace v. Kennelly*, 47 N. J. Law, 242.

^{114m} *Murray v. Shave*, 9 N. Y. Super. Ct. (2 Duer) 182.

¹¹⁴ⁿ *Bowen v. Haskell*, 53 Minn. 480, 55 N. W. 629.

^{114o} See ante, § 157 a (2) at notes 297-299.

¹¹⁵ Bac. Abr., Leases (S) 2, 1.

¹¹⁶ *Peter v. Kendal*, 6 Barn. & C. 703; *Lambert v. McDonnell*, 15 Ir. C. L. 136.

¹¹⁷ The cases cited appear not to be in accord with *Gybson v. Searls*, Cro. Jac. 84, 177, in which it was decided that there was no surrender of the lease of a manor as a result of the lessee's acceptance of the office of bailiff of the manor.

surrender by operation of law.¹¹⁸ In England it has been decided that such a contract does not ordinarily have that effect, for the reason that it is impliedly subject to a condition that the vendor shall have a good title, the opinion being expressed, however, that a surrender would, in the absence of such a condition, result as from a new demise, on the ground that one taking possession under a contract for the sale of land is a tenant at will,¹¹⁹ a view as to the effect of such holding which has been occasionally asserted there and in this country.¹²⁰

c. **Transfer of possession to landlord**—(1) **The general doctrine.** A second mode of surrender by operation of law, and one which frequently occurs, results from the relinquishment of possession by the tenant and the resumption of possession by the landlord, whether this is by or without agreement between the parties.¹²¹ The theory of such a surrender would seem to be that the reversioning of possession in the landlord to the exclusion of the tenant, by the action of both parties, being inconsistent with the continuance of an outstanding leasehold in the tenant, both are estopped to assert that the relation of landlord and tenant still exists. Such a surrender may be of either the whole or of merely a portion of the premises.¹²²

¹¹⁸ *Lewis v. Angermiller*, 89 Hun, 81 Mo. 241; *Graham v. Anderson*, 3 65, 35 N. Y. Supp. 69. This decision seems to be based largely, however, on the fact that this was what the parties intended. A similar decision is made in *Denison's Ex'rs v. Wertz*, 7 Serg. & R. (Pa.) 372, and *Doe d. McPherson v. Hunter*, 4 U. C. Q. B. 449.

¹¹⁹ *Doe d. Gray v. Stanion*, 1 Mees. & W. 695.

¹²⁰ See ante, § 43 a at note 5.

¹²¹ *Grimman v. Legge*, 8 Barn & C. 324; *Dodd v. Acklom*, 6 Man. & G. 672; *Phene v. Popplewell*, 12 C. B. (N. S.) 334; *Shahan v. Herzberg*, 73 Ala. 59; *Hart v. Pratt*, 19 Wash. 560, 53 Pac. 711; *Lamar v. McNamée*, 10 Gill. & J. (Md.) 116, 32 Am. Dec. 152; *Talbot v. Whipple*, 96 Mass. (14 Allen) 177; *Williams v. Jones*, 64 Ky. (1 Bush) 621; *Prior v. Kiso*,

81 Mo. 241; *Graham v. Anderson*, 3 Har. (Del.) 364; *Dennis v. Miller*, 63 N. J. Law, 320, 53 Atl. 394; *Clator v. Otto*, 38 W. Va. 89, 18 S. E. 378; *Goldsmith v. Darling*, 92 Wis. 363, 66 N. W. 397; *Elliott v. Aiken*, 45 N. H. 30; *Kelly v. Noxon*, 64 Hun, 281, 18 N. Y. Supp. 909; *Elgutter v. Drishaus*, 44 Neb. 378, 63 N. W. 19. In *Tully v. Dunn*, 42 Ala. 262, 94 Am. Dec. 646, it was held that if the lessee failed to take possession, the lessor might "re-enter" and so terminate the lease. This appears to come within the same doctrine, it being presumably immaterial whether the lessee refrains from taking possession or relinquishes it after taking it.

¹²² See *Hewitt v. Hornbuckle*, 97 Ill. App. 97; *Smith v. Pendergast*, 26 Minn. 318, 3 N. W. 978; *Biess v.*

The question whether there is an agreement for such transfer of possession is entirely immaterial. The tenant may give his landlord possession by agreement, but more frequently a surrender occurs as a result of the relinquishment of possession by the tenant and the resumption of possession by the landlord, either for the sake of protecting the premises from injury, or of saving himself from loss owing to his inability to collect the rent from the tenant. That the landlord may thus take possession on the tenant's abandonment seems to be generally conceded,¹²³ but the abandonment must be of a permanent character, and the landlord cannot resume control merely because the tenant has temporarily vacated the premises.¹²⁴

(2) **Resumption by landlord of possession necessary.** The mere abandonment of possession by the tenant, however permanent he may intend this to be, cannot effect a surrender, relieving the tenant from his obligations under the lease, unless the landlord does resume, that is, accept, possession.¹²⁵ The tenant

Jenkins, 129 Mo. 647, 31 S. W. 938; Peters v. Newkirk, 6 Cow. (N. Y.) 103.

¹²³ See *Shaban v. Herzberg*, 73 Ala. 59; *Crawley v. Mullins*, 48 Mo. 517; *Packer v. Cockayne*, 3 G. Greene (Iowa) 111; *Haller v. Squire*, 91 Iowa, 10, 58 N. W. 921; *Kiplinger v. Greene*, 61 Mich. 340, 28 N. W. 121, 1 Am. St. Rep. 584; *Torrans v. Stricklin*, 52 N. C. (7 Jones Law) 50; *Pier v. Carr*, 69 Pa. 326; *Zigler v. McClellan*, 15 Or. 499, 16 Pac. 179. See ante, § 3 b (2), at notes 50-55.

¹²⁴ *Larkin v. Avery*, 23 Conn. 304; *Hough v. Brown*, 104 Mich. 109, 62 N. W. 143; *McKinney v. Reader*, 7 Watts (Pa.) 123; *Aye v. Philadelphia Co.*, 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; *Chancey v. Smith*, 25 W. Va. 404, 52 Am. Rep. 217.

¹²⁵ *Meyer v. Smith*, 33 Ark. 627; *Lockwood v. Lockwood*, 22 Conn. 425; *Stobie v. Dills*, 62 Ill. 433; *Biggs v. Stueler*, 93 Md. 100, 48 Atl. 727; *Rol-*

ins v. Moody, 72 Me. 135; *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 13 L. R. A. 83, 24 Am. St. Rep. 146; *Lucy v. Wilkins*, 33 Minn. 441, 23 N. W. 861; *Kerr v. Clark*, 19 Mo. 132; *Laughran v. Smith*, 75 N. Y. 205; *Reeves v. McComesky*, 168 Pa. 571, 32 Atl. 96; *Barlow v. Walnwright*, 22 Vt. 88, 52 Am. Dec. 79.

In *Teller v. Boyle*, 132 Pa. 56, 18 Atl. 1069, it was decided that an allegation, as a defense to an action for rent, that the lessee had surrendered the premises, was of no avail without a further averment that the lessor accepted the surrender and released him. Perhaps a different view might have been taken if the averment had been of the surrender, not of the premises, but of the leasehold interest. The common-law precedents seem ordinarily to have contained an averment of acceptance or assent by the lessor (see *Peto v. Pemberton*, Cro. Car. 101, 1 Wms. Saund, 236 a, note), but

may, by assigning to another, relieve himself from the obligations arising out of privity of estate, but not those arising from privity of contract, and he can relieve himself from neither by merely leaving the premises, without any action on the part of the landlord. This principle is sometimes asserted by a statement that a surrender is invalid or nugatory unless accepted by the landlord, but this, is to be observed, involves a use of the word "surrender" in its nontechnical sense, before referred to, of a relinquishment of possession, as distinguished from its technical sense of a yielding up of the leasehold estate. Indeed, in England, and presumably in a number of states in this country, as before stated, a surrender, using the term in its technical sense, if express, is valid, though not accepted, until repudiated by the person to whom made. Such a use of the term surrender in its nontechnical sense, of abandonment, or relinquishment of possession, with the corresponding use of the word "acceptance" as meaning resumption of possession by the landlord, is extremely frequent in connection with that mode of surrender by operation of law which we are now discussing, with the unfortunate result of tending to obscure both the proper meaning of the term and the nature of such surrender.

The resumption of possession may be by another person on behalf of the landlord, provided he has authority for this purpose, and the effect is the same as if it were by the landlord directly.¹²⁶ This is sometimes expressed by saying that a surrender may be made to an agent of the landlord, or may be accepted by such agent, but this again involves the use of the term surrender in the nontechnical sense above referred to. A surrender, using the term in its technical sense, can obviously not be made to any

since a surrender was valid at common law without acceptance, until disaffirmed by the surrenderee (Thompson v. Leach, 2 Vent. 207), an averment of acceptance would seem to have been superfluous until the lessor undertook to disaffirm. The case last cited appears to be to this effect.

¹²⁶ Paget v. Electrical Engineering Co., 85 Minn. 311, 88 N. W. 844; Blake v. Dick, 15 Mont. 236, 38 Pac.

1072, 48 Am. St. Rep. 671; Peche v. Sloane, 16 App. Div. 458, 45 N. Y. Supp. 37; De Morat v. Falkenhagen, 148 Pa. 393, 23 Atl. 1125, 33 Am. St. Rep. 834; Lovejoy v. McCarty, 94 Wis. 341, 68 N. W. 1003; Hart v. Pratt, 19 Wash. 560, 53 Pac. 711; Amory v. Kannoisky, 117 Mass. 351, 19 Am. Rep. 416; Goldsmith v. Schroeder, 93 App. Div. 206, 87 N. Y. Supp. 558.

person other than the landlord, since he alone has the reversion. An agent merely authorized to collect rent for the landlord has no authority, it has been decided, to thus resume possession in his behalf.¹²⁷

(3) **What constitutes resumption of possession.** A question frequently arises as to what constitutes a resumption of possession by the landlord, on the abandonment of the premises by the tenant, sufficient to effect a surrender. It may be necessary for the landlord to assume some measure of control over the property to protect it from injury, or he may desire to utilize it in order to recoup himself for the loss of the stipulated rent, and yet in neither of these cases does he usually desire to preclude himself from asserting a personal liability on the covenant for the payment of rent.

The fact that the landlord enters and cares for the premises after the tenant's abandonment is not regarded as showing a resumption of exclusive possession, effecting a surrender,¹²⁸ nor does the making of repairs in itself have that effect.¹²⁹ The question is whether the possession taken by him is of an exclusive character, with the apparent intention of occupying and controlling the premises as his own, to the exclusion of the tenant, in case the latter desires to return,¹³⁰ and this is ordinarily a question of fact.¹³¹

¹²⁷ *Blake v. Dick*, 15 Mont. 236, 38 National Union Bldg. Ass'n, 166 Ill. Pac. 1072, 48 Am. St. Rep. 671; 221, 46 N. E. 752; *Livermore v. Ed-woodward v. Lindley*, 43 Ind. 333. dy's Adm'r, 33 Mo. 547; *Sessinghaus*

¹²⁸ *Joslin v. McLean*, 99 Mich. 480, v. Knocke, 127 Mo. App. 300, 105 S. 58 N. W. 467; *Duffy v. Day*, 42 Mo. W. 283; *Pier v. Carr*, 69 Pa. 326; App. 638; *Breuckmann v. Twibill*, 89 Breuckmann v. Twibill, 89 Pa. 58; Pa. 58; *Requa v. Domestic Pub. Co.*, Texas Loan Agency v. Fleming, 92 11 Misc. 322, 32 N. Y. Supp. 125. So Tex. 458, 49 S. W. 1039, 44 L. R. the cleaning of the windows by A. 279.

the landlord has been decided not ¹³⁰ *Welcome v. Hess*, 90 Cal. 507, to have such an effect. *Milling v.* 27 Pac. 369, 25 Am. St. Rep. 145; *Becker*, 96 Pa. 182. Nor does the *Duffy v. Day*, 42 Mo. App. 638; *Meek-er v. Spalsbury*, 66 N. J. Law, 60, 48 Atl. 1026.

Chandler v. Hinds, 135 Wis. 43, 115 N. W. 339. ¹³¹ *Hays v. Goldman*, 71 Ark. 251, 72 S. W. 563; *Carson v. Arvantes*, 10 So. 713; *Haynes v. Aldrich*, 133 Colo. App. 382, 50 Pac. 1080; *Okie* N. Y. 287, 31 N. E. 94, 16 L. R. A. v. Pearson, 23 App. D. C. 170; *Brewer* 183, 28 Am. St. Rep. 636; *Brewer v.* v. National Bldg. Ass'n, 166 Ill. 221,

When the tenant, upon abandoning the premises, sends the key to the landlord, the fact that the latter accepts and retains it, instead of sending it back, does not necessarily show a resumption by him of exclusive possession, so as to effect a surrender.^{132, 133} And the case is the same when the key is left at

46 N. E. 752; *Armour Packing Co. v. Des Moines Pork Co.*, 116 Iowa, 723, 89 N. W. 196, 93 Am. St. Rep. 270; *Sander v. Holstein Commission Co.*, 118 Mo. App. 29, 121 Mo. App. 293, 99 S. W. 12; *Wood v. Welz*, 40 App. Div. 202, 57 N. Y. Supp. 1121; *Underhill v. Collins*, 32 N. Y. St. Rep. 961, 10 N. Y. Supp. 680; *White v. Berry*, 24 R. I. 74, 52 Atl. 682; *Hart v. Pratt*, 19 Wash. 560, 53 Pac. 711; *Kneeland v. Schmidt*, 78 Wis. 345, 47 N. W. 438, 11 L. R. A. 498; *Reeve v. Bird*, 1 Crompt. M. & R. 31. See *Stott v. Chamberlain* (S. D.) 114 N. W. 683, ante, note 5 a.

That the landlord made no answer to the tenant's statement that he intended to leave on a certain day, and subsequently, after the tenant had left, demanded that the tenant remove his sign, and placed theatre posters in the windows, was regarded as evidence to support a finding of acceptance of the premises. *Lafferty v. Hawes*, 63 Minn. 13, 65 N. W. 87. Where the lessees wrote the lessor that they could not work the farm, and that the latter might rent it to some one else, and the lessor, without replying, took charge of the place and controlled it for a year, and induced a subtenant to take up a rent note executed to the lessees and make a new note to him, and did not notify the lessees that he was managing the premises for them, or that he expected them to make up any deficiency in the rents, it was held that a surrender was shown. *William-*

son v. Crossett, 62 Ark. 393, 36 S. W. 27. Evidence that, on the burning of the building on the premises, the lessee moved and failed to rebuild, and a few days after the fire the landlord sold the property without any expression of objection by the tenant, who was in the neighborhood, was held sufficient to justify a finding of a surrender. *Zigler v. McClellan*, 15 Or. 499, 16 Pac. 179. That the lessor, after the tenant's abandonment of the premises, granted a right of way to the city for the use of the public, was held not to show an acceptance, a license "for people" to pass for the same purpose having been previously given by the tenant. *Pierson v. Hughes*, 87 N. Y. Supp. 223. That immediately after the abandonment of the premises by the tenant the landlord notified the surety, and offered him the possession, and demanded the unpaid rent of him, is not evidence of a surrender of the leasehold. *Lucy v. Wilkins*, 33 Minn. 441, 23 N. W. 861. And that the landlord collected rent from a subtenant of part of the premises was held not to show a resumption of possession for this purpose. *Texas Loan Agency v. Fleming*, 92 Tex. 458, 49 S. W. 1039, 44 L. R. A. 279.

^{132, 133} *Oastler v. Henderson*, 2 Q. B. Div. 575; *Thomas v. Nelson*, 69 N. Y. 118; *Daggett v. Champney*, 122 App. Div. 254, 106 N. Y. Supp. 892; *Withers v. Larrabee*, 48 Me. 570; *Joslin v. McLean*, 99 Mich. 480, 58 N. W. 467; *Ledsinger v. Burke*, 113 Ga. 74,

the landlord's residence or place of business,¹³⁴ or is given by the tenant to a third person, who is not authorized to receive it, so that the landlord must either take charge of it or run the risk of its loss.¹³⁵ The fact that the landlord, at the time of obtaining or accepting control of the key, or previously thereto, states or explicitly shows that he has no intention of regarding the tenancy as terminated, or of releasing the tenant from his obligations under the lease, is sufficient of itself to prevent such result.^{136, 137} On the other hand, the acceptance of the key may be considered with other facts as tending to show a resumption of possession by the landlord, and a consequent termination of the tenancy.¹³⁸ And the fact that after abandonment by the tenant the landlord asked him for the key, and retained it, has been regarded as conclusively showing a resumption of exclusive possession.¹³⁹

That the landlord, after the tenant's abandonment of the premises, makes efforts, by posting notices or otherwise, to make

38 S. E. 313; *Prentiss v. Warne*, 10 Mo. 601; *Buck v. Lewis*, 46 Mo. App. 227; *Martin v. Stearns*, 52 Iowa, 345, 3 N. W. 92, 35 Am. Rep. 278; *Ladd v. Smith*, 6 Or. 316; *Milling v. Becker*, 96 Pa. 182; *Newton v. Speare Laundering Co.*, 19 R. I. 546, 37 Atl. 11.

¹³⁴ *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576; *Lucy v. Wilkins*, 33 Minn. 441, 23 N. W. 861; *Tolle v. Orth*, 75 Ind. 298, 39 Am. Rep. 147; *Durfee v. United Stores*, 24 R. I. 254, 52 Atl. 1087; *Chandler v. Hinds*, 135 Wis. 43, 115 N. W. 339.

¹³⁵ *Lucy v. Wilkins*, 33 Minn. 441, 23 N. W. 861; *Douglass v. Seiferd*, 18 Misc. 188, 41 N. Y. Supp. 289; *Barkley v. McCue*, 25 Misc. 738, 55 N. Y. Supp. 608; *Obendorfer v. Meacham*, 110 N. Y. Supp. 340; *Blake v. Dick*, 15 Mont. 236, 38 Pac. 1072, 48 Am. St. Rep. 671; *Lane v. Nelson*, 167 Pa. 602, 31 Atl. 864.

^{136, 137} *Withers v. Larrabee*, 48 Me. 570; *Scott v. Beecher*, 91 Mich. 590, 52 N. W. 20; *Auer v. Penn*, 99 Pa. 370, 44 Am. Rep. 114; *Morgan v.*

Smith, 70 N. Y. 537; *Townsend v. Albers*, 3 E. D. Smith (N. Y.) 560; *Spies v. Voss*, 30 N. Y. St. Rep. 548, 9 N. Y. Supp. 532; *Dorrance v. Bonesteel*, 51 App. Div. 129, 64 N. Y. Supp. 307; *Bowen v. Clarke*, 22 Or. 566, 30 Pac. 430, 29 Am. St. Rep. 625; *Nelson v. Thompson*, 23 Minn. 508; *Landt v. Schneider*, 31 Mont. 15, 77 Pac. 307.

¹³⁸ *Phene v. Popplewell*, 12 C. B. (N. S.) 334; *Elliott v. Aiken*, 45 N. H. 30; *Hesseltine v. Seavey*, 16 Me. 212; *Buckingham Apartment House Co. v. Dafoe*, 73 Minn. 268, 80 N. W. 974; *Hegeman v. McArthur*, 1 E. D. Smith (N. Y.) 147; *Bowen v. Clarke*, 22 Or. 566, 30 Pac. 430, 29 Am. St. Rep. 625; *Brewer v. National Union Bldg. Ass'n*, 166 Ill. 221, 46 N. E. 752; *Ewing v. Barnard*, 84 N. Y. Supp. 137; *Feust v. Craig*, 109 N. Y. Supp. 742.

¹³⁹ *Harris v. Dub*, 57 Ga. 77; *Ledsinger v. Burke*, 113 Ga. 74, 38 S. E. 313.

a lease to another, does not of itself show a resumption of possession terminating the tenancy,¹⁴⁰ nor does the fact that such efforts are accompanied by assertions on his part that the tenant has given up his lease have that effect.¹⁴¹ And a like view has been taken of his action in offering the premises for sale, with the right in the purchaser to immediate possession.¹⁴²

(4) **Reletting by landlord to another.** The question whether, upon the tenant's abandonment of the premises, the landlord may lease them to another without thereby causing a surrender of the lease, and consequent termination of the tenant's liability for rent, is one of great practical interest, upon which the authorities are not in accord. There are a number of decisions to the effect that the landlord may so "relet" to another and still hold the former tenant.¹⁴³ By others it is regarded as necessary, in order that such reletting shall not effect a surrender, that the landlord, before making the new lease, inform the tenant that he is about to do so on the latter's account, that is, that the purpose is to reduce, but not necessarily to extinguish, the latter's lia-

¹⁴⁰ *Walls v. Atcheson*, 3 Bing. 462; *Ill. App. 609*; *Humiston, Keeling & Oastler v. Henderson*, 2 Q. B. Div. Co. v. *Wheeler*, 175 Ill. 514, 51 575; *Gaines v. McAdam*, 79 Ill. App. N. E. 893, 67 Am. St. Rep. 201; *Vincent v. Frelich*, 50 La. Ann. 232; *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421, 56 N. E. 378, 23 So. 373, 69 Am. St. Rep. 436; *Scott v. Beecher*, 91 Mich. 590, 52 807, 75 Am. St. Rep. 181; *Higgins v. Street (Okla.)* 92 Pac. 153; 48, 58 N. W. 467; *Buck v. Lewis*, 46 Mo. App. 227; *Blake v. Dick*, 15 3 N. W. 92, 35 Am. Rep. 278; *Stewart v. Sprague*, 71 Mich. 50, 38 N. St. Rep. 671; *Haynes v. Aldrich*, 133 N. Y. 287, 31 N. E. 94, 16 W. 673; *Id.*, 76 Mich. 184, 42 N. L. R. A. 183, 28 Am. St. Rep. 636; 566, 30 Pac. 430, 29 Am. St. Rep. 625; *Dorrance v. Bonesteel*, 51 App. Div. Merrill v. *Willis*, 51 Neb. 162, 70 N. 129, 64 N. Y. Supp. 307; *Feust v. W. 914*; *Schelky v. Koch*, 119 N. C. Craig, 107 N. Y. Supp. 637; *Lane v. 80, 25 S. E. 713*; *Auer v. Hoffman*, Nelson, 167 Pa. 602, 31 Atl. 864. 132 Wis. 620, 112 N. W. 1090. And compare *Eimermann v. Nathan*, 116 see *Brown v. Cairns*, 63 Kan. 584, Wis. 124, 92 N. W. 550. 66 Pac. 639. That the landlord al-

¹⁴¹ *Milling v. Becker*, 96 Pa. 182; *Gaines v. McAdam*, 79 Ill. App. 261.

¹⁴² *Reeves v. McComeskey*, 168 Pa. 571, 32 Atl. 96.

¹⁴³ *Auer v. Penn.* 99 Pa. 370, 44 Am. Rep. 114; *Bradley v. Walker*, 93 602, 40 S. E. 702.

bility for rent.¹⁴⁴ By still another line of decisions it is adjudged that the reletting will terminate the liabilities under the previous lease, without any suggestion being made that a notice to the previous tenant would prevent this result.¹⁴⁵ In two quite recent cases it is decided that a written notice by the landlord of his intention to relet, to which the tenant fails to reply, is not sufficient to prevent the operation of such a reletting as a resumption of exclusive possession, since there is in such case no element of assent by the tenant to a reletting.¹⁴⁶ In case the reletting is regarded as showing a resumption of the possession, the surrender is to be regarded as taking place, not at the time of the tenant's relinquishment of possession, but at the time of the reletting.¹⁴⁷

In reference to this question, of the effect of such reletting by the landlord to a third person, as being equivalent to a resump-

¹⁴⁴ *Brown v. Cairns*, 107 Iowa, 727, N. W. 304, 114 Am. St. Rep. 715; 77 N. W. 478; *Alsup v. Banks*, 68 Matthews' Adm'r v. Tobener, 39 Mo. Miss. 664, 9 So. 895, 13 L. R. A. 598, 115; *Dagett v. Champney*, 122 App. 24 Am. St. Rep. 294; *Brown v. Div. 254*, 106 N. Y. Supp. 892; *Pelton v. Place*, 71 Vt. 430, 46 Atl. 63, 76 (semble); *Williamson v. Crossett*, 62 Am. St. Rep. 782; *Witman v. Wa-* Ark. 393, 36 S. W. 27; *Hayes v. Gold-* try, 31 Wis. 638.

¹⁴⁶ *Gray v. Kaufman Dairy & Ice Cream Co.*, 162 N. Y. 388, 56 N. E. 903, 76 Am. St. Rep. 327, 49 L. R. A. 580; *Biggs v. Stueler*, 93 Md. 100, 48 Atl. 727. In the first of the above cases the court distinguishes the case of *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576, on the ground not only that there the communication of the landlord's purpose was verbal, but also, it seems, on the ground that it was previous to the tenant's abandonment, and that such abandonment was in effect an acceptance of the landlord's proposition to relet for account of the tenant. See, as to the Maryland case, the comments thereon in *Oldewurtel v. Wiesenfeld*, 97 Md. 165, 54 Atl. 969, 99 Am. St. Rep. 427.

¹⁴⁵ *Oastler v. Henderson*, 2 Q. B. Div. 575; *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145, distinguishing *Respini v. Porta*, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488; *Rice v. Dudley*, 65 Ala. 68; *Heseltine v. Seavey*, 16 Me. 212; *Haycock v. Johnston*, 97 Minn. 289, 106

¹⁴⁷ *Oastler v. Henderson*, 2 Q. B. Div. 575; *Schuisler v. Amcs*, 16 Ala. 73, 50 Am. Dec. 168; *Marseilles v.*

tion of the possession of the premises, it may be said that, while it seems fair that, if a tenant abandons the premises, and is either not accessible to suit, or is of doubtful pecuniary responsibility, the landlord should have the privilege of avoiding a possible loss of the whole rent by leasing to another, without thereby precluding himself from recovering from the original tenant any deficiency yet remaining, it is difficult to harmonize such a view with well settled legal principles. The act of the landlord in undertaking to lease to another, without the former tenant's consent, is necessarily an assumption of absolute control of the premises, excluding any rights of possession in the other. The landlord, by giving the second lease, in effect asserts that he alone is entitled to control the possession of the premises. Furthermore, looking at the matter from a somewhat different standpoint, it is necessary, if the second lease, given without the tenant's consent, is to be regarded as valid to confer present rights of possession, that the operation of the former lease shall have come to an end, since two distinct persons cannot each be entitled to the exclusive possession of the same premises. As has been remarked in this connection "if the former tenant brings ejectment against the new tenant, what defense can the new tenant have,—except that plaintiff's right has ceased?"¹⁴⁸ In what has been said above it is assumed that the reletting is without the consent of the former tenant. The cases which assert that the reletting does not result in a surrender seem usually to be based on the view that, since this is for the tenant's benefit, as reducing his liability for rent, his assent thereto is to be presumed, and this is no doubt the view of those cases which assert the landlord's right to relet provided he first notify the tenant. But there is nothing in the nature of their relations from which any authority in the landlord thus to act for the tenant can be inferred, nor can such inference properly be drawn from the fact that the tenant has vacated the premises, or that the landlord notified the tenant of his purpose to act for him. Even the tenant's express consent to the making of a new lease by the landlord cannot well deprive such action on the latter's part of the effect of a resumption of possession by him, unless the reletting can be regarded as legally the act of the

Kerr, 6 Whart. (Pa.) 500, 37 Am. Dec. 430,

¹⁴⁸ *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145,

tenant, in which case it must take effect as a sublease or assignment of the existing leasehold, since that is all which is within the tenant's control. The only alternative seems to be to regard the transaction as the substitution of a new tenant by agreement, accompanied by a transfer of possession, which, as we shall presently see, in itself effects a surrender by operation of law,^{148a} but this does not harmonize with the actual facts of the case. As regards the question of fairness to the landlord, there seems no more reason that the tenant's abandonment of the premises should give the landlord a right to relet than that his mere default in performance of his covenants, without abandonment, should have that effect, and that the latter is not the case, in the absence of a statute or express provision in the lease authorizing a forfeiture, is unquestionable. In either case, that of a default in rent accompanied by abandonment, or that of a default in rent alone, it may be desirable for the landlord to be able to get rent for the premises from another tenant, without terminating the liability of the previous tenant.

As the lease may expressly provide that the tenant's personal liability for the sums reserved as rent shall continue even after forfeiture for nonpayment,¹⁴⁹ so the lease may, it appears, validly provide that, upon the premises becoming vacant, the landlord may re-enter and relet, and apply the rent so received upon the rent reserved under the first lease,¹⁵⁰ the liability of the former tenant being thus retained in spite of the new lease. Such a provision is to be upheld, apparently, either on the theory that the landlord is thereby made agent for the tenant to make an assignment or sublease on behalf of the latter, in case of the latter's vacation of the premises, or on the theory that the first lease is terminated by the vacation and re-entry. On the latter theory,

^{148a} See post, § 190 d.

¹⁴⁹ See ante, § 182 j.

¹⁵⁰ *Jones v. Rushmore*, 67 N. J. Law, 157, 50 Atl. 587; *Hurley v. Sehring*, 43 N. Y. St. Rep. 240, 17 N. Y. Supp. 7; *Ogden v. Rowe*, 3 E. D. Smith (N. Y.) 312; *James v. Coe*, 32 Misc. 674, 66 N. Y. Supp. 509; *McElroy's Estate v. Brooke*, 104 Ill. App. 220. But *Schwartz v. Brucato*, 37 App. Div. 202, 68 N. Y. Supp. 289,

is to the effect, apparently, that in spite of such a provision the reletting terminates the lease. In that case the landlord relet, giving possession to the new lessee a few days before the time at which the latter was to begin to pay rent as an inducement to take the lease, and it was held that the former tenant was discharged from the time of such entry by the new lessee.

the tenant's continuing liability for the sums thereafter becoming due is not, strictly speaking, a liability for rent, but is purely contractual in character.^{150a}

(5) **Relinquishment of possession on landlord's demand.** Without reference to any subsequent resumption of possession by the landlord, it is sufficient, according to some cases, that the abandonment or relinquishment of possession by the tenant is in accordance with a previous demand or request for possession by the landlord, it thus being immaterial whether the landlord's expression of assent to the relinquishment is previous to or after its occurrence.¹⁵¹ It is on this theory, it seems, that when the landlord told the tenant that he wished to erect a building on the land, and, the tenant making no objection, the building was erected, the facts were decided to constitute a surrender as to that part of the land occupied by the building.¹⁵² On the other hand it has been held that a mere statement by the landlord that if the tenant, who had desired to be relieved from the lease, would move out immediately, to which the tenant replied merely that he would "see what he could do," did not justify the tenant in moving out two days later and asserting a surrender.¹⁵³ And a notice to the tenant to move "on or before" the last day of the term cannot be regarded as a continuing offer to accept the premises at any time at which the tenant may choose to leave.¹⁵⁴

The fact that the landlord authorized the tenant to quit possession and that the latter thereupon did quit has, in two or three jurisdictions, been decided not to effect a surrender of the leasehold.¹⁵⁵ There seems, however, little distinction in principle in

^{150a} See ante, § 182 j, at note 951.

¹⁵¹ *Boyd v. George*, 2 Neb. Unoff. 420, 89 N. W. 271; *Conkling v. Tuttle*, 52 Mich. 630, 18 N. W. 391; *Patchin's Ex'r v. Dickerman*, 31 Vt. 666; *Crane v. Edwards*, 80 App. Div. 333, 80 N. Y. Supp. 747 (semble); *Eimermann v. Nathan*, 116 Wis. 124, 92 N. W. 550 (semble).

¹⁵² *Smith v. Pendergast*, 26 Minn. 318, 3 N. W. 978. In *Browder v. Phinney*, 37 Wash. 70, 79 Pac. 598, a somewhat similar case on the facts, the tenant, having allowed the landlord to make improvements on the

supposition that the tenancy was to be regarded as at an end, was regarded as precluded from denying that he had consented to the termination of the tenancy.

¹⁵³ *Kelly v. Noxon*, 64 Hun, 281, 18 N. Y. Supp. 909. And see *Morris v. Dayton*, 84 N. Y. Supp. 392.

¹⁵⁴ *Koehler v. Scheider*, 16 Daly, 235, 10 N. Y. Supp. 101.

¹⁵⁵ *Felker v. Richardson*, 67 N. H. 509, 32 Atl. 830; *Whittaker v. Barker*, 1 Crompt. & M. 113; *Lamar v. Mamee*, 10 Gill. & J. (Md.) 116, 32 Am. Dec. 152. But *Stanley v. Koehl-*

this regard between a request to the tenant to quit and a permission to quit, and, presumably, in these jurisdictions, the tenant could not assert a surrender even though he yielded possession on a demand therefor.

d. New lease to third person. A third mode of surrender by operation of law occurs in the case of a new lease by the landlord to a third person, accompanied by the former tenant's relinquishment of possession in favor of such third person. The question whether such a new lease and relinquishment of possession would thus operate was at one time the subject of considerable question in England,¹⁵⁶ but, by later cases there, it seems to be regarded as settled that, when a tenant assents to the making of a lease to another, and yields possession to the new lessee, there is a surrender by operation of law,¹⁵⁷ the theory thereof being explained as follows: "As far as the landlord is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the tenant's term. As far as the new tenant is concerned, the same is true. As far as the owner of the particular estate in question is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession, and so enabling the new tenant to enter."¹⁵⁸ In this country, likewise, it has been stated that "an unconditional agreement between a landlord and a third person, with the assent of the tenant, during the term, to rent the premises to such third person, followed by a change of possession and payment of rent by the tenant, will amount to a valid surrender of the old lease, and the acceptance thereof by the landlord,"¹⁵⁹ and there are

er, 1 Hilt. (N. Y.) 354, seems to be contra. That the lessor by mistake wrote the lessee that the lease would expire a year earlier than its actual date of expiration was held not to justify the lessee in then relinquishing possession. *Auer v. Hoffman*, 132 Wis. 620, 112 N. W. 1090.

¹⁵⁶ See *Lyon v. Reed*, 13 Mees. & W. 285, and the full statement of the English cases in the notes to the *Duchess of Kingston's Case* in 2

Smith's Leading Cases (8th Am. Ed. p. 784 et seq.).

¹⁵⁷ *Nickells v. Atherstone*, 10 Q. B. 944; *Davison v. Gent*, 1 Hurl. & N. 744. The doctrine of these cases has been adopted in Canada. *Crocker v. Sowden*, 33 U. C. Q. B. 397; *Acheson v. McMurray*, 41 U. C. Q. B. 484.

¹⁵⁸ Per Denman, C. J., in *Nickells v. Atherstone*, 10 Q. B. 944.

¹⁵⁹ *Morgan v. McCollister*, 110 Ala. 319, 20 So. 54; *Hoerd v. Hahne*, 91

cases applying such a doctrine.¹⁶⁰ In one state the courts have questioned the validity of such a mode of surrender, without, however, positively deciding the question.¹⁶¹

The requirement of relinquishment of possession to the new lessee is ignored in a number of cases in which a surrender has been regarded as resulting from the recognition by the landlord, with the tenant's consent, express or implied, of a subtenant in possession as his own immediate tenant, that is, from what is in effect the making of a demise, with the tenant's consent, to the subtenant.¹⁶² These cases can be reconciled with the requirement

Ill. App. 514. The statement was quoted from Taylor, Landl. & Ten. § 509, where *Whitney v. Meyers*, 8 N. Y. Super. Ct. (1 Duer) 266, is cited as authority. In this latter case it is said that if it was agreed between the lessor, the lessee and a third person that the former would accept the third person as tenant in lieu of the lessee for the residue of the term, and accept rent from him monthly in advance instead of quarterly, as provided in the lease, and if this agreement was carried out by the former lessee yielding possession to such third person, and by the latter taking possession and paying rent accordingly, and the latter accepting rent from him, there was a surrender by operation of law, citing *Bailey v. Delaplaine*, 3 N. Y. Super Ct. (1 Sandf.) 5, where the lessor in chief called on the sublessor to pay the rent, producing the sublease on which was endorsed an order by the sublessor to pay the rent to the lessee in chief, and forbade the sublessee to pay any more rent to the sublessor, saying that he had taken the latter's place, and he collected the rent under the sublease accordingly, and this was regarded as a surrender of the sublease by operation of law. *Silva v. Bair*, 141 Cal. 599, 75 Pac. 162, seems to involve a surren-

der of this character, though the court speaks of a rescission of the lease.

¹⁶⁰ *Dills v. Stobie*, 81 Ill. 202; *Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. 476, 21 L. R. A. 489, 36 Am. St. Rep. 486; *Amory v. Kannoffsky*, 117 Mass. 351, 19 Am. Rep. 416; *Commercial Hotel Co. v. Brill*, 123 Wis. 638, 101 N. W. 1101 (semble).

In *Number 121 Madison Ave. v. Osgood*, 44 N. Y. St. Rep. 489, 18 N. Y. Supp. 126, the tenant of a flat, whose lease terminated in the fall, but who had a right of renewal, was told by the landlord that the latter could lease it to another for the summer months and for several years longer if the tenant would relinquish the right of renewal, and this the tenant consented to do, desiring to be rid of the rent for the summer months. Thereupon the landlord did lease to another, but only from the fall. It was held that an agreement by the landlord to terminate the tenancy at the commencement of the summer, relieving the tenant from rent for the summer months, could be inferred. The theory of the decision does not appear.

¹⁶¹ See *Hunt v. Gardner*, 39 N. J. Law, 533; *Decker v. Hartshorn*, 60 N. J. Law, 548, 38 Atl. 678.

¹⁶² *Stimmel v. Waters*, 65 Ky. (2

that the new lease to a third person must be accompanied by a transfer of possession, only on the theory that the transfer of possession may be prior to such lease, and may be made without any reference thereto. There is at least one decision in which, even though the new lease was to a person not a subtenant, the necessity of a transfer of possession was apparently not recognized,¹⁶³ though a later case in the same jurisdiction seems to be to the effect that such transfer is necessary.¹⁶⁴ In a quite recent English case it is explicitly decided that an actual change of possession is necessary in order that a new lease to a third person may result in a surrender, and that a mere oral assent by the tenant to a lease made to another, without any relinquishment of possession, is insufficient for this purpose, although the lease is actually made, it being remarked that the contrary view "would be a most dangerous doctrine; it would practically amount to a repeal of the Statute of Frauds."¹⁶⁵

That the landlord accepts the payment of rent from the subtenant does not of itself establish a new demise to the latter.¹⁶⁶ But it has been decided that there was a surrender of the leasehold created by the original lease when the tenant told the landlord that if the latter accepted rent from the subtenant he must release him,

Bush) 282; Snyder v. Parker, 75 Mo. App. 529; Bailey v. Delaplaine, 3 N. Y. Super. Ct. (1 Sandf.) 5; Dills v. Stobie, 81 Ill. 202 (semble); Amory v. Kanoffsky, 117 Mass. 351, 19 Am. Rep. 416; Thomas v. Cook, 2 Barn. & Ald. 119.

¹⁶³ Logan v. Anderson, 2 Doug. (Mich.) 101. In Donkersley v. Levy, 38 Mich. 54, 31 Am. Rep. 301, it was decided that where the lessor made a new lease to a third person which the latter accepted, and the latter then subleased to the prior tenant, the previous lease was surrendered by operation of law.

¹⁶⁴ Fish v. Thompson, 129 Mich. 313, 88 N. W. 896.

¹⁶⁵ Wallis v. Hands [1893] 2 Ch. 75, per Chitty, J. In this case it is said that there was, in Thomas v.

Cook, 2 Barn. & Ald. 119, supra, a change of possession, "the old tenant having gone out of possession when the head landlord accepted the subtenant as his tenant." The report of the earlier case says nothing with reference to a change of possession.

¹⁶⁶ Decker v. Hartshorn, 60 N. J. Law, 548, 38 Atl. 678; Lovejoy v. McCarty, 94 Wis. 341, 68 N. W. 1003; Holman v. De Lin-River-Finley Co., 30 Or. 428, 47 Pac. 708; Bacon v. Brown, 9 Conn. 334, 23 Am. Dec. 358; Ballou v. Baxter, 28 N. Y. St. Rep. 431, 8 N. Y. Supp. 15; Bless v. Jenkins, 129 Mo. 647, 31 S. W. 938; Doe d. Hull v. Wood, 14 Mees. & W. 682. See Cuesta v. Goldsmith, 1 Ga. App. 48, 57 S. E. 983; Americus Mfg. & Imp. Co. v. Hightower, 3 Ga. App. 65, 59 S. E. 309.

the tenant, and, the landlord having stated that he would continue to take rent from the subtenant, and that the tenant could give up his lease, the tenant thereupon delivered his written instrument of lease to the landlord, who receipted therefor, and thereafter was paid his rent by the former subtenant.¹⁶⁷ A surrender was also regarded as shown by the fact that, the original lessor having produced the sublease, on which was endorsed an order by the sublessor on the subtenant to pay the rent to the lessor, demanded that the subtenant pay the rent to him, and it was so paid as it became due.¹⁶⁸

In a leading English case on this branch of the law,¹⁶⁹ in which it was decided that, when a subtenant in possession is, with the assent of the tenant, accepted by the chief landlord as his tenant, there is a surrender by operation of law of the tenant's interest, the question whether the original tenant assented to the acceptance of the subtenant as tenant in his place was left to the jury, and a finding of such assent was regarded as justified, on the ground that such assent was clearly for his benefit, presumably because he was thereby relieved from his liability for rent. In another case it was decided that the prior tenant's assent to the making of a new demise, to one to whom he had previously transferred the possession of the premises, might be inferred from the possession of the original instrument of lease by the latter, or from the landlord's possession of such instrument in a canceled condition, this being in accordance with the usage of the landlord in case of the renewal of a lease.¹⁷⁰

There is, in one state, apparently a decision that the making of a lease by the landlord to a third person, even without the consent of the tenant, express or implied, effects a surrender.¹⁷¹ Such a view appears most questionable.¹⁷²

¹⁶⁷ *Amory v. Kannoisky*, 117 Mass. 351, 19 Am. Rep. 416.

¹⁶⁸ *Bailey v. Delaplaine*, 3 N. Y. Super. Ct. (1 Sandf.) 5.

¹⁶⁹ *Davison v. Gent*, 1 Hurl. & N. 744.

¹⁷⁰ *Walker v. Richardson*, 2 Mees. & W. 882.

¹⁷¹ *Hawthorne v. Coursen*, 18 Misc. 447, 41 N. Y. Supp. 995.

¹⁷² The word "surrender" is not used, it being merely said, without any discussion, that the effect of the new lease was "to release the plaintiff from all further obligations under his lease," but the case is cited under the head of "surrender" by Judge McAdam, who delivered the opinion, in his work on "Landlord & Tenant" (3d Ed. p. 1286).

In an English case¹⁷³ it was decided that where the tenants of two distinct tracts of land under different landlords agreed to exchange their holdings, and, some days thereafter, a person who represented both landlords assented to the transaction, there was a surrender of each holding by operation of law.

There is one decision that the new lease, in order to effect a surrender, must be valid so as to convey to the lessee the interest which it professes to convey,¹⁷⁴ thus applying to a surrender, resulting from a demise to a third person accompanied by a change of possession, the rule which is applied in the case of a surrender by reason of a new lease to the tenant. This view seems, however, questionable, since the reason for applying the rule in the latter case, the protection of the tenant from the possibility of losing a valuable leasehold in exchange for one of little value, is not existent in the former case, where the tenant expects nothing under the new demise, and is not ordinarily concerned in the degree of benefit accruing to the new lessee thereunder.¹⁷⁵

Even though the new lease is absolutely void, the new lessee, being in possession by the consent of the landlord, is at least a tenant at will, and this would seem to be sufficient to effect a surrender of the previous leasehold.

That the landlord's consent to a substitution of another lessee

¹⁷³ *Bess v. Williams*, 2 Crompt. M. & R. 581.

In *Prettyman v. Hartly*, 77 Ill. 265, the fact that a tenant exchanged a portion of the land leased to him for a like portion leased by the same landlord to another, he to pay, however, a different rent for the land so taken from that paid for the land exchanged, was apparently regarded as taking each portion from out the operation of the lease in which it was included, and as subjecting it to a verbal lease similar to the original lease to the person to whom it was transferred.

¹⁷⁴ *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400. Here the second lease was invalid under the statute of frauds. This decision is cited approvingly in *Whitney v. Meyers*, 8 N. Y. Super. Ct. (1 Duer) 266.

¹⁷⁵ In *Smith v. Niver*, 2 Barb. (N. Y.) 180, 47 Am. Dec. 305, it is said by Harris, P. J., "It has never, I apprehend, been decided that a lessor who has consented to a change of tenancy, and permitted a change of occupation, and received rent from the new tenant as an original and not as a subtenant, can afterwards charge the original tenant for rent accruing during the occupation of the new tenant. If the case of *Schieffelin v. Carpenter* (15 Wend. [N. Y.] 400) is to be regarded as an authority maintaining this position, I think it is in that respect wholly unsupported either by principle or adjudged cases. The landlord cannot at the same time have two original tenants holding under distinct, independent leases."

was obtained by fraud has been held to vitiate the surrender, and to leave the former liable for rent as before.¹⁷⁶

The new lease to a third party may, it has been recognized, be by an agent acting for the landlord.¹⁷⁷ There is a decision, however, that an agent authorized to lease premises and collect rents has no authority to consent to a "substitution of tenants."¹⁷⁸ This seems questionable.

§ 191. Effect of surrender.

a. **As between the parties.** A surrender by the tenant has the effect of terminating all his interest under the lease, since the interest is thereby transferred to the landlord.¹⁷⁹ And, furthermore, it terminates all future liability under the covenants of the lease,¹⁸⁰ the most ordinary application of this principle

¹⁷⁶ *Bruce v. Ruler*, 2 Man. & R. 3.

¹⁷⁷ See *Bess v. Williams*, 2 Crompt. M. & R. 581; *Amory v. Kannoffsky*, 117 Mass. 351, 19 Am. Rep. 416.

¹⁷⁸ *Wallace v. Dinniny*, 11 Misc. 317, 32 N. Y. Supp. 159.

¹⁷⁹ Co. Litt. § 338 b; *Bain v. Clark*, 10 Johns (N. Y.) 424; *Harris v. Hiscock*, 91 N. Y. 340; *Appeal of Greider*, 5 Pa. 422, 47 Am. Dec. 413; *Terstegge v. First German Mut. Benev. Soc.*, 92 Ind. 82, 47 Am. Rep. 135; *Deane v. Caldwell*, 127 Mass. 242.

¹⁸⁰ *Platt, Covenants*, 585; *American Bonding Co. v. Pueblo Inv. Co.* (C. C. A.) 150 Fed. 17, 9 L. R. A. (N. S.) 557; *Deane v. Caldwell*, 127 Mass. 242; *Snowhill v. Reed*, 49 N. J. Law, 292, 10 Atl. 737, 60 Am. Rep. 615. See *Herrman v. Laemmle*, 56 Misc. 549, 107 N. Y. Supp. 73.

In *Hunt v. Gardner*, 39 N. J. Law, 530, *Beasley, C. J.*, says: "The authorities are not clear with regard to the operation of a surrender in law on the lease and its covenants, but I think it is sufficiently indicated that such operation destroys the privity of contract between the lessor and lessee, as well as the privity of estate;" and after referring to two cases as supporting that view

proceeds. "Although, perhaps, the point is not directly decided in any English case, the tenor of the judicial language in all the important decisions on the subject of a surrender by act of the law have a similar tendency." If the question could have been regarded as doubtful at that time (1877), it may now be regarded as settled by the numerous cases denying recovery for rent after such a surrender. See authorities cited ante, § 182 g. In no other case has it been suggested that the effect of a surrender by operation of law might be different from that of an express surrender.

Since the interest of the tenant is terminated by the surrender, he cannot, when sued on notes given by him in consideration of the lessor's acceptance of a surrender, assert in defense that the lease provided for an abatement of rent if the premises were destroyed by fire and that they were so destroyed before the maturity of the notes. *Brooks v. Cutter*, 119 Mass. 132. But it has been held to be a good defense, at least in part, to a suit by a tenant against the landlord for a sum agreed to be paid by the latter for giving up the prem-

occurring in the case of a covenant to pay rent, which ceases to be effective after a surrender.¹⁸¹ The surrender does not ordinarily affect liabilities which have already accrued,¹⁸² such as that for past due rent.¹⁸³⁻¹⁸⁵

Since a surrender divests all property rights of the tenant in the land, he cannot thereafter assert any claim to growing crops as against the landlord.¹⁸⁶ But crops which have been cut, like other personal chattels which are on the premises but not a part thereof, still remain the property of the tenant.¹⁸⁷

b. **As against third persons.** Lord Coke, after noticing that as between the parties to a surrender the estate is absolutely "drowned," says: "But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath, in consideration of law, a continuance."¹⁸⁸ And this doctrine, that a surrender does not divest the rights of persons not parties thereto, has been generally recognized.^{188a} So it has been held that a

ises to him, that the lessee, in leaving, removed parts of the buildings, since such an agreement imported that the premises were to be left in substantially the condition in which they were at the time of the agreement. *Dowing v. DeKlyn*, 1 E. D. Smith (N. Y.) 563.

¹⁸¹ See ante, § 182 g.

The landlord, having accepted a surrender, cannot recover for the cost of improvements made by him for which he expected to be compensated by the rents. *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145.

¹⁸² *Bro. Abr.*, Surrender, pl. 24; *Sperry v. Miller*, 16 N. Y. 407; *McGregor v. Board of Education*, 107 N. Y. 511, 14 N. E. 420; *Cohen v. Witteman*, 100 App. Div. 338, 91 N. Y. Supp. 439. But see *Geddis v. Folliett*, 16 S. D. 610, 94 N. W. 431, apparently to the contrary. As to the effect of a surrender upon liability for waste previously committed, see

ante, § 109 b (1), at notes 771-773.

¹⁸³⁻¹⁸⁵ See ante, § 182 g, at notes 895, 896.

¹⁸⁶ See post, § 251 c (4).

¹⁸⁷ *Griswold v. Morse*, 59 N. Y. 211 (semble).

¹⁸⁸ *Co. Litt.* 338 b. He goes on to give various instances, among which he mentions "If tenant for life grant a rent charge, and after surrender, yet the rent remaineth." See, also, *Doe d. Beadon v. Pyke*, 5 Maule & S. 146.

^{188a} In *Doscher v. Shaw*, 52 N. Y. 602, the tenant having made a sublease for five years for a purpose prohibited by the original lease, the landlord gave the subtenant a written license to use the premises for this purpose "for and during the said period" in consideration of a yearly sum to be paid to him, and it was held that the fact that the sublessee afterwards surrendered his sublease did not affect his continuing liability under his contract. The decision

tenant, after mortgaging his leasehold interest,¹⁸⁹ or after a lien in favor of another has otherwise arisen on such interest,¹⁹⁰ cannot, by surrendering his interest, affect the rights of the lienor. And the right of one, to whom the tenant has sold or mortgaged removable fixtures, to remove them, is not affected by a surrender of the leasehold, though this is sufficient to terminate the right of removal as against the tenant.¹⁹¹ But where a vendee or mortgagee of crops growing on the premises asserted the invalidity of a surrender as against him, it was apparently held that his rights were subject to the right which the landlord would have had, if there had been no surrender, to distrain his crops for rent,¹⁹² in other words, that he could not assert at the same time that the surrender was valid and invalid.

It has been decided in England that, if the lessor transfers the reversion, reserving the rent, the lessee may surrender the leasehold to the holder of the reversion and thereby destroy the right to rent.¹⁹³ This is based on the theory that otherwise the lessee would be deprived of his right to surrender by an agreement to which he was not a party, and the analogy was suggested of a building contract, the parties to which would not be precluded from rescinding it by the fact that the builder has assigned to another his right to the money to be received thereunder. In this country, on the other hand, it has in one case been decided that the assignee of the rent without the reversion cannot be affected by a surrender made by the lessee, if the latter has at the time notice of the assignment of the rent.¹⁹⁴ In this last case it is said that the landlord, accepting a surrender, valid as against

here, however, was based upon the construction of the contract, and not upon the doctrine referred to in the text.

¹⁸⁹ *Firth v. Rowe*, 53 N. J. Eq. 520, 32 Atl. 1064; *Allen v. Brown*, 60 Barb. (N. Y.) 39.

¹⁹⁰ *Dobschuetz v. Holliday*, 82 Ill. 371 (mechanic's lien). So it was held in *Farnum v. Hefner*, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174, that the lien of an execution on the leasehold could not be affected by the tenant's assent to a forfeiture in favor of his landlord. Such assent to a forfeiture is in effect a surren-

der. See *Dobschuetz v. Holliday*, 82 Ill. 371, supra.

¹⁹¹ *London & Westminster Loan & Discount Co. v. Drake*, 6 C. B. (N. S.) 798; *Saint v. Pilley*, L. R. 10 Exch. 137; *Adams v. Goddard*, 48 Me. 212.

¹⁹² *Clements v. Matthews*, 11 Q. B. Div. 808.

¹⁹³ *Southwell v. Scotter*, 49 Law J. Q. B. 356. Compare *Wood v. Londonderry*, 10 Beav. 465.

¹⁹⁴ *Wittmann v. Watry*, 45 Wis. 491. There is no discussion, and merely a reference to 1 Parsons, Contracts, c. 10, § 7, pl. 6, which the

the assignee of the rent, would be liable in damages to the latter.¹⁹⁵

The rule that a surrender shall not affect the rights of third persons receives its most frequent application in favor of a sublessee. Thus, a surrender by a tenant to his landlord does not affect the subtenant's right of possession, but the chief landlord, the surrenderee, becomes, in favor of the subtenant, the latter's landlord, with no other or greater rights to possession than belonged to the tenant in chief, the surrenderor.¹⁹⁶ Accordingly, one holding under a sublease from year to year is entitled to the ordinary notice required to terminate such a tenancy, before dispossession by the landlord, to whom the sublessor has surrendered, and notice merely of the surrender is not sufficient for this purpose.¹⁹⁷ In accordance with the same doctrine a sublessee cannot, by a surrender by the lessee, be deprived of the benefit of a covenant of the sublease. So it was decided that, where a lessee covenanted with a sublessee of part of the premises leased to him, to perform all the covenants of the original lease, he could not, by taking a new lease after making the sublease, avoid the effect of a covenant of the original lease restricting his right to build on a part of the premises not subleased.¹⁹⁸ And the sublessee's rights as to fixtures and improvements are not affected by the surrender.¹⁹⁹ Likewise it has been decided that if a sublessee remains in possession after a surrender by his landlord to the head landlord, his chattels cannot be subjected to a distress made

present writer is unable to locate in that work.

¹⁹⁵ In *Southwell v. Scotter*, 49 Law J. Q. B. 356, the judges refuse to consider this question.

¹⁹⁶ *Pike v. Eyre*, 9 Barn. & C. 909; *Mitchell v. Young*, 80 Ark. 441, 97 S. W. 454, 7 L. R. A. (N. S.) 221, 17 Am. St. Rep. 89; *Eten v. Luyster*, 60 N. Y. 252; *Weiss v. Mendelson*, 24 Misc. 692, 53 N. Y. Supp. 803; *McKenzie v. City of Lexington*, 34 Ky. (4 Dana) 129; *Krider v. Ramsay*, 79 N. C. 354; *Moskowitz v. Diringen*, 48 Misc. 543, 96 N. Y. Supp. 173; *Oshinsky v. Greenberg*, 39 Misc. 342, 79 N. Y. Supp. 853; *Pratt v. H. M. Richards Jewelry Co.*, 69 Pa. 53, 8

Am. Rep. 212; *Hessel v. Johnson*, 129 Pa. 173, 18 Atl. 754, 5 L. R. A. 851, 15 Am. St. Rep. 716; *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. 948. The subtenant being thus entitled to remain in possession, the landlord can obviously not demand an increased rent as the price of allowing him to remain. *Ritzler v. Raether*, 10 Daly (N. Y.) 286.

¹⁹⁷ *Mellor v. Watkins*, L. R. 9 Q. B. 400; *Pleasant v. Benson*, 14 East, 234.

¹⁹⁸ *Piggott v. Stratton*, 1 De Gex, F. & J. 33.

¹⁹⁹ *Morrison v. Sohn*, 90 Mo. App. 76.

by the latter for the collection of rent from one to whom the head landlord leased after the surrender.^{199a}

At common law the doctrine obtained that if a lessee for years, who had sublet for a less term, surrendered his term to the landlord, his estate being gone, the reversion on the under lease was no longer in existence, and the subtenant was regarded as relieved from liability on the covenants of the sublease. This doctrine, which is elsewhere considered,²⁰⁰ was changed in England by statute, so far as concerns a surrender made for the purpose of obtaining a renewal of the lease,²⁰¹ the effect of the statute being to place the person, to whom the new lease is granted by the head landlord, in the position of a transferee of the subreversion.²⁰² And such was apparently held to be the case in one state in this country, without reference to the statute, the doctrine of the merger of the subreversion being regarded as inapplicable as being contrary to the intention of the parties.²⁰³

There is a decision to the effect that if, after surrender by the tenant, he collects, as the landlord's agent, rent subsequently accruing under the sublease, a periodic tenancy is created as between the subtenant and the head landlord.²⁰⁴

A surrender by the tenant is not effective, as against his subtenant, merely because the landlord, instead of taking a surrender, might have enforced a forfeiture against the tenant for breach of condition, the effect of which would have been to terminate all rights of the subtenant.²⁰⁵ And so the fact that the sublease was in violation of a covenant or condition in the original lease against subletting is, it seems, immaterial in this regard, since the sublease is nevertheless valid.²⁰⁶

One who accepts possession from his lessee by way of surrender, not knowing that the latter has previously accepted a lease of the premises from another, does not, it has been decided, become tenant of that other as being the lessee's successor in interest.²⁰⁷

^{199a} *Hessel v. Johnson*, 129 Pa. 173, 18 Atl. 754, 5 L. R. A. 851, 15 Am. St. Rep. 716.

²⁰⁰ See ante, § 12 g (11).

²⁰¹ 4 Geo. 2, c. 28, § 6.

²⁰² *Cousins v. Phillips*, 3 Hurl. & C. 892.

²⁰³ *Hessel v. Johnson*, 129 Pa. 173, 18 Atl. 754, 5 L. R. A. 851, 15 Am. St. Rep. 716.

²⁰⁴ *Simmons v. Pope*, 84 N. Y. Supp. 973.

²⁰⁵ *Great Western R. Co. v. Smith*, 2 Ch. Div. 235, *afid.* 3 App. Cas. 165.

²⁰⁶ See *Brown v. Butler*, 4 Phila. (Pa.) 71; *Shermer v. Paciello*, 161 Pa. 691, 28 Atl. 995. See ante, § 152 j (2).

²⁰⁷ *Freeman v. Ogden*, 40 N. Y. 105.

CHAPTER XIX.

FORFEITURE OF THE LEASEHOLD.

- § 192. By disclaimer of tenancy.
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 - i. Walver of right to assert forfeiture.
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 - (b) Acceptance of rent.
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 - (f) Language recognizing tenancy.
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 - (2) Delay in assertion of forfeiture.
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- j. Assertion and enforcement of forfeiture.
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- l. Relief against forfeiture.
 - (1) General rule
 - (2) Fraud, mistake, accident and surprise.
 - (3) Nonpayment of money.
 - (4) Persons in favor of and against whom relief given.

§ 192. By disclaimer of tenancy.

At common law, the tenant of a particular estate, by an assertion of record that the fee was in a stranger, or in himself, forfeited his estate, and the case was the same, it seems, when a tenant for years asserted of record a right to a freehold estate, either by way of action or defense.¹ Likewise, at common law, a tenant forfeited his estate if he made a tortious alienation, that is, if by feoffment, fine or recovery, he undertook to convey an interest of greater duration than that to which he was entitled, this involving a repudiation of the tenancy and derogating from the rights of the reversioner.² A tortious alienation, in the common-law sense, never occurs at the present time, a conveyance by grant or under the Statute of Uses conveying only such an estate as the grantor has,³ and it being expressly provided in a number of states that this shall be the effect of a conveyance in every case.⁴

As regards a forfeiture by the tenant's assertion that the freehold is in himself or in a third person, many courts in this country have gone even beyond the doctrine stated in the older books, they holding, or appearing to hold, that the assertion of an adverse title in the tenant or in a third person, that is, a denial of the existence of the relation of tenancy between the tenant and the landlord, will effect a forfeiture of the tenant's estate, without reference to how such assertion is made, that is, whether made by record, in writing, or verbally,⁵ and that in such case

¹ Co. Litt. 251 b; Bac. Abr., Estate for Life (C); Leases (T 2). Kent's Comm. 106. See *Worthington v. Lee*, 61 Md. 530; *Griffin v. Fel-*

² Litt. § 415; Co. Litt. 251 b; 2 Blackst. Comm. 274; 1 Hayes, Conveyancing, 28. lows, 81 Pa. 114.

³ Co. Litt. 332 a; 2 Sanders, Uses & Trusts (5th Ed.) 51, 64, 77; Good-⁴ See 1 Stimson, Am. St. Law, § 1402 B; 4 Kent's Comm. 83; cases cited 1 Tiffany, Real Prop. § 32, note 105.

⁵ *Peyton v. Stith*, 30 U. S. (5 Pet.) 485; *Woodward v. Brown*, 38 U. S.

the landlord may recover possession without having given any notice to quit.⁶ This view has been, in terms, based upon the theory that an assertion of an adverse title by the tenant has the effect of rendering his possession adverse to the landlord, thereby starting the running of the statute of limitations against the latter, and that the statute cannot begin to run unless the landlord has an immediate right of action to recover possession.⁷ In two or three jurisdictions, on the other hand, the courts have apparently adopted the common-law rule that, in order to work a forfeiture, the disclaimer must be by record, and that a disclaimer, or assertion of title in another, if *in pais*, will not have that effect.⁸

(13 Pet.) 1; *Walden v. Bodley*, 39 U. S. (14 Pet.) 156; *Wallace v. Ocean Grove Camp Meeting Ass'n*, 78 C. C. A. 406, 148 Fed. 672; *Barnewell v. Stephens*, 142 Ala. 609, 38 So. 662; *Fusselman v. Worthington*, 14 Ill. 135; *Doty v. Burdick*, 83 Ill. 473; *Tobin v. Young*, 124 Ind. 507, 24 N. E. 121; *Goodman v. Malcolm*, 5 Kan. App. 285, 48 Pac. 439; *Campbell v. Proctor*, 6 Me. (6 Greenl.) 12; *Springs v. Schenck*, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552; *Schwoebel v. Fugina*, 14 N. D. 375, 104 N. W. 848; *Clark v. Everly*, 8 Watts & S. (Pa.) 226; *Duke v. Harper*, 14 Tenn. (6 Yerg.) 280, 27 Am. Dec. 462; *Hall v. Haywood*, 77 Tex. 4, 13 S. W. 612; *Wilkey Lodge v. Paris*, 31 Tex. Civ. App. 632, 73 S. W. 69; *Evans v. Enloe*, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22. In *Clark v. Everly*, 8 Watts & S. (Pa.) 226, *Gibson, C. J.*, apparently considers that there is a disclaimer involving a forfeiture when the tenant claims that the reversion has passed to him.

⁶ *Woodward v. Brown*, 38 U. S. (13 Pet.) 1; *Sims v. Cooper*, 106 Ind. 87, 5 N. E. 726; *Bates v. Austin*, 9 Ky. (2 A. K. Marsh.) 270, 12 Am. Dec. 395; *Meramon's Heirs v. Caldwell's Heirs*, 47 Ky. (8 B. Mon.) 32, 46 Am.

Dec. 537; *Bodwell Granite Co. v. Lane*, 83 Me. 168, 21 Atl. 829, 23 Am. St. Rep. 765; *Stephens v. Brown*, 56 Mo. 23; *Jackson v. Wheeler*, 6 Johns. (N. Y.) 272; *Calhoun v. Perrin*, 2 Brev. (S. C.) 247; *Duke v. Harper*, 14 Tenn. (6 Yerg.) 280, 27 Am. Dec. 462; *Wadsworthville Poor School v. Meetze*, 4 Rich. Law (S. C.) 50.

⁷ *Willison v. Watkins*, 28 U. S. (3 Pet.) 43; *Tillotson v. Doe*, 5 Ala. 407, 39 Am. Dec. 330; *Wells v. Sheerer*, 78 Ala. 142; *Dahm v. Barlow*, 93 Ala. 120, 9 So. 598; *Fortier v. Bal-lance*, 10 Ill. (5 Gilm.) 41; *Farrow's Heirs v. Edmundson*, 43 Ky. (4 B. Mon.) 605, 41 Am. Dec. 250; *Trustees of Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 18 S. E. 257, 891, 42 Am. St. Rep. 854. In *Snyder v. Harding*, 34 Wash. 286, 75 Pac. 812, the action of the lessee in asserting a claim to the land in fee was regarded as involving a declaration of a rescission, which was accepted if the landlord brought suit for the land. See ante, § 187, note 501.

⁸ *De Lancey v. Ganong*, 9 N. Y. (5 Seld.) 1; *Jackson v. Kisselbrack*, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341; *Rossee v. Jarvis*, 15 Wis. 571, 82 Am. Dec. 698; *Gale v. Oil Run Petroleum*

There has been but little discussion of what will constitute a disclaimer by the tenant for this purpose. An attornment to a third person is, it seems, effectual as a disclaimer, in those states in which the disclaimer is not required to be by record.⁹ It has, however, apparently been decided that a mere denial by the tenant that the landlord is entitled to all the rent, on the ground that the reversion is in part in another, is not a sufficient disclaimer within the rule,¹⁰ and the same view was taken of the action of the tenant in purchasing a one-third interest from a third person, the tenant continuing to acknowledge the tenancy as to a two-thirds interest.¹¹ It would seem that, though a conveyance by a tenant, purporting to be of an estate in fee simple, cannot, at the present day, have a tortious effect as transferring a greater estate than he has, it may be a cause of forfeiture as involving a disclaimer of the tenancy.¹²

Even in jurisdictions in which a disclaimer must, in order to effect a forfeiture, be of record, the actual transfer of the possession by the tenant to an adverse claimant will, it seems, have the same result.¹³

Although there has been a disclaimer authorizing the landlord to enforce a forfeiture, this right has been regarded as lost if he subsequently recognizes the tenant as his tenant.¹⁴

Co., 6 W. Va. 200 (semble). In *Dillon v. Parker*, 33 Ky. (3 Dana) 101, it is said that the tenant's claim to hold adversely to the landlord, without any attornment to another or act of disclaimer, is not a cause for forfeiture. In England, however, as above stated, the disclaimer must be by record.

⁹ *Newman v. Rutter*, 8 Watts (Pa.) 51.

That in England the disclaimer must be of record to effect a forfeiture, see *Doe d. Graves v. Wells*, 10 Adol. & E. 427; and that such is the case in Canada, see *Doe d. Daniels v. Weese*, 5 U. C. Q. B. 589.

¹¹ *Dahm v. Barlow*, 93 Ala. 120, 9 So. 598, 12 L. R. A. 134.

⁹ *Fortier v. Ballance*, 10 Ill. (5 Gilm.) 41; *Blue v. Sayre*, 32 Ky. (2 Dana) 213. In *McCarney v. Auer*, 50 Mo. 395, an attornment to a third person seems to be regarded as bringing the case within the operation of the statute prohibiting an assignment and providing for a for-

¹² It is so decided in *Trustees of Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 18 S. E. 257, 891, 42 Am. St. Rep. 854.

¹³ See *Doe d. Ellerbrock v. Flynn*, 1 Crompt. M. & R. 137, commented on in *Doe d. Graves v. Wells*, 10 Adol. & E. 427. See, also, *Kyle v. Stocks*, 31 U. C. Q. B. 47.

¹⁴ *Dahm v. Barlow*, 93 Ala. 120, 9

By the English decisions a periodic tenant, if he disclaims or repudiates the relation of landlord and tenant, loses his right to a notice to quit from the landlord, and gives the latter a right to elect to terminate the tenancy immediately, since "a notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy, there can be no necessity for a notice to end that which he says has no existence."¹⁵ To have this effect the disclaimer need not be in writing,¹⁶ but it must involve an assertion of title in the tenant himself or in another.¹⁷ A claim by the tenant that he holds the premises at a "customary rent," with a denial of the landlord's right to raise the rent, has been regarded as a sufficient assertion of title in the tenant to come within the operation of the rule,¹⁸ but a different view has been taken of a claim by the tenant that he is entitled to continue holding under the landlord at a reduced rent,¹⁹ and of a claim by him that he has bought the property, accompanied by a statement of readiness to pay for it.²⁰ So the tenant may always demand that one claiming as landlord shall show that he is such.²¹

An attornment by the tenant to a third person is a disclaimer entitling the landlord to terminate the tenancy without notice,²² and the same view has been taken of the tenant's refusal to pay rent because a third person named has ordered him not to pay,²³ or because his "connection as a tenant" with the landlord has ceased and he "now pays his rent" to the latter's brother,²⁴ as well as of a claim to hold the land for the life of a third person named.²⁵ On the other hand, a mere refusal to pay rent,²⁶ or a refusal to pay until he learns who is entitled thereto,²⁷ or until a

So. 598, 12 L. R. A. 134; *Douglass v. Parker*, 32 Kan. 593, 5 Pac. 178.

¹⁵ *Best, C. J.*, in *Doe d. Calvert v. Frowd*, 4 Bing. 557.

¹⁶ *Doe d. Gray v. Stanion*, 1 Mees. & W. 703; *Doe d. Graves v. Wells*, 10 Adol. & E. 427.

¹⁷ *Doe d. Williams v. Cooper*, 1 Man. & G. 135.

¹⁸ *Vivian v. Moat*, 16 Ch. Div. 730.

¹⁹ *Hunt v. Allgood*, 10 C. B. (N. S.) 253.

²⁰ *Doe d. Gray v. Stanion*, 1 Mees. & W. 695.

²¹ *Doe d. Lewis v. Cawdor*, 1 Crompt. M. & R. 398.

²² *Throgmorton v. Whelpdale*, Bull. N. P. 96; *Doe d. Davies v. Evans*, 9 Mees. & W. 48.

²³ *Doe d. Whitehead v. Pittman*, 2 Nev. & M. 673.

²⁴ *Doe d. Grubb v. Grubb*, 10 Barn. & C. 816.

²⁵ *Doe d. Hughes v. Bucknell*, 8 Car. & P. 566.

²⁶ *Doe d. Gray v. Stanion*, 1 Mees. & W. 703.

²⁷ *Jones v. Mills*, 10 C. B. (N. S.) 788.

pending suit as to the ownership is settled,²⁸ is not a disclaimer within the rule. The question whether, in any particular case, there has been a disclaimer defeating the tenant's right to notice to quit is a question of law for the court, the jury passing, it seems, upon the meaning of the words used.²⁹ The landlord, by recognizing the relation as still continuing, precludes himself from thereafter asserting the tenant's act of disclaimer.³⁰

The doctrine that, in the case of a periodic tenancy, the landlord may, upon a disclaimer by the tenant, re-enter without giving any notice to quit, has been not infrequently asserted in this country,³¹ and a like rule has been applied in the case of a tenancy at will,³² which, in a number of states, is, as before stated,³³ ordinarily terminable only on notice. It seems, likewise, that, by such disclaimer, the tenant at will would lose all right to have a demand for possession made by the landlord before the bringing by the latter of an action of ejectment.³⁴

§ 193. Under statute.

a. **For breach of stipulation of lease.** As elsewhere stated³⁵ the breach by a tenant of a mere stipulation or covenant, contained

²⁸ Doe d. Williams v. Pasquali, bin, 85 N. C. 108; Emerick v. Taven-
Peake's N. P. 259. er, 9 Grat. (Va.) 220, 58 Am. Dec. 217.

²⁹ Doe d. Bennett v. Long, 9 Car. & Compare Reeder v. Bell, 70 Ky. (7
P. 773; Doe d. Williams v. Cooper, 1 Bush) 255.
Man. & G. 135.

³⁰ Doe d. David v. Williams, 7 Car. 342, 17 Pac. 237, 7 Am. St. Rep. 177;
& P. 322. Von Glahn v. Brennan, 81 Cal. 261,

³¹ Smith v. Ogg Shaw, 16 Cal. 88; 22 Pac. 596; Jackson v. Wheeler, 6
Eberwine v. Cook, 74 Ind. 377; Johns. (N. Y.) 272; Jackson v.
Brown v. Keller, 32 Ill. 151, 83 Am. French, 3 Wend. (N. Y.) 337, 20 Am.
Dec. 258; Herrell v. Sizeland, 81 Ill. Dec. 699; Tuttle v. Reynolds, 1
457; Douglass v. Anderson, 32 Kan. Vt. 80; Steinhauser v. Kuhn, 50
350, 4 Pac. 257; Fogle v. Chaney, Mich. 367, 15 N. W. 513; Amick v.
51 Ky. (12 B. Mon.) 138; Doe d. Brubaker, 101 Mo. 473, 14 S. W. 627.
Ross v. Garrison, 31 Ky. (1 Dana) ³² See post, § 196 b.

26; Petty v. Miller, 54 Ky. (15 B. ³³ Sims v. Cooper, 106 Ind. 87, 5 N.
Mon.) 591; Kunzie v. Wixom. 39 E. 726; Jackson v. Wheeler, 6 Johns.
Mich. 384, 33 Am. Rep. 403; Wolf v. (N. Y.) 272; Meramon's Heirs v.
Holton, 92 Mich. 136, 52 N. W. 459; Caldwell's Heirs, 47 Ky. (8 B. Mon.)
Cook v. Penrod, 111 Mo. App. 128, 85 32, 46 Am. Dec. 537.
S. W. 676; Head v. Head, 52 N. C. ³⁵ See post, § 194 b.
(7 Jones Law) 620; Vincent v. Cor-

in the instrument of lease, ordinarily gives the landlord no right to assert a forfeiture of the tenant's estate. In a number of states, however, statutes have been adopted introducing exceptions to this rule. In some the landlord is authorized to resume possession upon the tenant's failure to pay rent, such a provision being most frequently introduced as a part of a statute authorizing summary proceedings, and the nonpayment of rent being one of the grounds named for such a proceeding.³⁶ In a few states the nonpayment of rent is made a ground of forfeiture, without any reference to the mode of proceeding by which the forfeiture may be enforced.³⁷

In a few states the statute provides that the landlord may recover possession in case the tenant violates any stipulation of the lease, without reference to the presence or absence of language in the instrument of lease expressly making that a ground of forfeiture.³⁸ There are also to be found statutory provisions for forfeiture in case of assignment or subletting by persons to whom the premises are leased for but a short term.^{39, 40}

b. **For illegal use of premises.** The fact that the tenant uses the premises for an illegal purpose does not, in the absence of a statutory provision to that effect, give the landlord a right to terminate the tenancy.⁴¹ In a very considerable number of states

³⁶ See post, § 274 d, e.

³⁷ *Arizona* Rev. St. § 2693 (If rent unpaid for five days, landlord may re-enter); *Florida* Gen. St. 1906, § 2226 (On failure to pay rent, lessor may re-enter); *Illinois*, Hurd's Rev. St. 1905, c. 80, § 8 (On nonpayment of rent, landlord may sue in ejectment or unlawful detainer after notice that if not paid within five days lease will be terminated); *Indiana*, Burns' Ann. St. 1901, § 7093 (On nonpayment of rent, lease may be terminated by ten days' notice). See *Leary v. Meier*, 78 Ind. 393; *Kansas* Gen. St. 1905, §§ 4057, 4058 (On nonpayment of rent, landlord may terminate lease by notice); *Massachusetts* Rev. Laws 1902, c. 129, § 11 (On failure to pay rent reserved on written lease, fourteen

days' written notice sufficient to terminate lease, unless tenant, four days before return day of writ in action by landlord for possession, pays or tenders rent due with interest and costs).

³⁸ *Illinois*, Hurd's Rev. St. 1905, c. 80, § 9. See *Drew v. Mosbarger*, 104 Ill. App. 635. *Missouri* Rev. St. 1899, § 4108. See *Murphy v. Century Bldg. Co.*, 90 Mo. App. 621, where, though the statute in terms gives the landlord a "right to re-enter," it is apparently decided that he is liable in damages if he exercises the right.

^{39, 40} See ante, at note 215.

⁴¹ *Feret v. Hill*, 15 C. B. 207; *Milner v. Forman*, 37 N. J. Law, 55. As to the validity of a lease made for an illegal purpose, see ante, § 40.

the statute provides that the lease shall be void, or that the landlord may recover possession, in case of a specified use of an illegal character.⁴² The use of the premises for the illegal sale of liquor, their use for gambling, and their use for purposes of prostitution, are variously specified by these statutes as cause for such a proceeding.⁴³

⁴² The fact that the tenant has paid the rent in advance for the entire term does not affect the right of the landlord to assert a forfeiture under the local statute. *McGarvey v. Puckett*, 27 Ohio St. 669.

A statute authorizing the termination of the lease on account of the illegal use of the premises has been held to give one to whom the premises were conveyed after the act of forfeiture no right to assert a right of re-entry on account thereof. *Small v. Clark*, 97 Me. 304, 54 Atl. 758.

⁴³ *Colorado*, Mills' Ann. St. 1891, § 1513 (Unlawful sale of liquor cause of forfeiture); *Connecticut* Gen. St. 1902, § 1085 (If tenant convicted of keeping gambling house or house of prostitution, lease is void, the lessor may recover possession by summary proceeding); *Iowa* Code 1897, §§ 2426, 4940 (Violation of liquor law or keeping house of ill fame authorizes landlord to terminate lease and demand possession within three days, and after the three days he may recover possession by forcible entry and detainer); *Kansas* Gen. St. 1905, § 3779 (If tenant violates liquor law, right of possession reverts to the lessor, who may enter without process or may avail himself of remedy provided for forcible detainer); *Maine* Rev. St. 1903, c. 22, § 4 (Tenant using building in violation of liquor law, landlord may enter without process or under forcible entry

and detainer process); *Massachusetts* Rev. Laws 1902, c. 101, § 10 (Use of premises for prostitution, gaming or selling liquor annuls lease and causes right of possession to revert in owner, who may re-enter or bring summary proceedings); *Michigan* Comp. Laws 1897, § 5398 (Any sale or gift of liquor shall, at option of lessor, forfeit lease; if lessee keeps house of ill fame or prostitution or gaming house, lease becomes void at lessor's option, and he has same remedy to recover possession as against tenant holding over); *Nebraska* Comp. St. 1905, § 7875 (Use of premises by tenant as brothel shall be held good cause on the part of the lessor to avoid the lease and to re-enter); *New Jersey*, 2 Gen. St. p. 1923, § 34 (If lessee uses premises for prostitution, lease shall be void, and landlord may enter and has same remedies to recover possession as against tenant holding over); *New York* Code Civ. Proc. § 2231 (5) (Where the demised premises, or any part thereof, are used or occupied as a bawdy house or house of assignation for lewd persons, or for any illegal trade or manufacture or other illegal business); *Ohio* Rev. St. 1906, § 4361 (Unlawful sale or giving away of intoxicating liquors forfeits lease); *Oregon*, Bell & C. Codes, § 1948 (if lessee, or other person with his assent, uses premises for gambling, lessor may terminate lease and recover possession by ac-

Statutes providing that certain illegal uses named shall render the lease void, or shall give a right of re-entry to the landlord, have been held to invalidate the lease only at the option of the landlord.⁴⁴ Were it otherwise, as has been remarked, the tenant could, at will, by making an illegal use of the premises, relieve himself from liability under the lease.⁴⁵

It has been decided in one jurisdiction that an illegal use of the premises by a subtenant, without the principal tenant's knowledge, would render the interest of the subtenant only subject to forfeiture in favor of his landlord, and would not enable the head landlord to assert a forfeiture against the principal tenant.⁴⁶

c. **On desertion of premises.** It was provided by the statute 11 Geo. 2, c. 19, § 16, that if a tenant holding lands at a rent equal to three-fourths of the yearly value, and in arrear for one-half year's rent, should desert the premises and leave them uncultivated or unoccupied, so as no sufficient distress could be had to countervail the arrears of rent, two justices of the peace might, upon the landlord's request, after posting a notice on the premises, and the lapse of fourteen days, put the landlord in possession, and that thereupon the lease should be void. This statute has been adopted with but little change in at least three states in this country,⁴⁷ and in others there are provisions, more or less similar thereto, giving the landlord a right to possession upon the ten-

tion before justice of the peace); *Rhode Island* Gen. Laws 1896, c. 92, § 4 (If tenant uses premises for prostitution, gambling or sale of liquor, lease is annulled, and right of possession reverts in lessor, without any act on his part, and he may re-enter). See *Pettis v. Jennings*, 10 R. I. 70. *Tennessee*, Shannon's Code, § 6769 (If lessee keeps house of ill fame, lease is void at lessor's option, and he may recover possession as when tenant holds over); *Utah* Comp. Laws 1907, § 3575 (If tenant maintains unlawful business or suffers or maintains nuisance about premises, he is guilty of unlawful detainer); *Washington*, Ball. Ann. Codes & St. § 5527 (5) (same as Utah).

⁴⁴ *Trask v. Wheeler*, 89 Mass. (7 Allen) 109; *Almy v. Greene*, 13 R. I. 350, 43 Am. Rep. 32; *Small v. Clark*, 97 Me. 304, 54 Atl. 758.

⁴⁵ *Chapman, J.*, in *Trask v. Wheeler*, 89 Mass. (7 Allen) 109.

⁴⁶ *O'Connell v. McGrath*, 96 Mass. (14 Allen) 289; *Healy v. Trant*, 81 Mass. (15 Gray) 312. Aliter, under the Massachusetts statute, if the principal tenant makes a sublease for the purpose of conducting the unlawful business. *Prescott v. Kyle*, 103 Mass. 381.

⁴⁷ *Mississippi* Code 1906, § 2884 (No particular amount of rent required to be due); *New Jersey*, 2 Gen. St. p. 1918, § 10; *South Carolina* Civ. Code, §§ 2418-2420.

ant's desertion of the premises without leaving sufficient thereon to pay the rent.⁴⁸

There are but few decisions reported under either the English statute or its counterparts in this country. In jurisdictions in which the landlord has, under another provision, a right to proceed summarily for possession in case of nonpayment of rent, without reference to the desertion of the premises, the particular provision here under consideration would seem to be useless, and by electing to proceed thereunder the landlord would assume the burden of showing the premises to be deserted. Furthermore, by the weight of the modern decisions,⁴⁹ the landlord has, upon such desertion of the premises by the tenant, without reference to the statute, the right to resume possession without resort to legal process.

It has been decided in England that the premises were deserted, within the statute, when the tenant of a house had for several months ceased to reside or carry on business there, and his furniture had been removed under a distress, and there was no person in charge or sleeping on the premises.⁵⁰ But a different view was taken when the tenant's wife and children were occupying the premises, though there was no furniture there except a few chairs, lent by a neighbor.⁵¹

d. **For improper use of premises.** The statute of Gloucester provides that a tenant of a limited estate committing waste upon the property shall thereby forfeit his estate, and there are similar provisions in a number of states. These statutes have been discussed in an earlier part of this work.⁵²

⁴⁸ *North Carolina* Revisal 1905, § 2786 (No particular amount of rent required to be due, and landlord himself to post the notice and then take possession); *West Virginia* Code 1906, § 3399 (same).
⁴⁹ See ante, § 3 b (2), notes 50-55; § 190 c (1), note 123.
⁵⁰ Ex parte Pilton, 1 Barn. & Ald. 369.
⁵¹ Ashcroft v. Bourne, 3 Barn. & Adol. 684. And see Freytag v. Anderson, 1 Rawle (Pa.) 73.
⁵² See ante, § 109 b (7).

⁴⁸ *North Carolina* Revisal 1905, § 2001 (If tenant who is in arrear for rent, or who has agreed to pay a crop rent, or who has given a lien on the crop, deserts the premises, the landlord may proceed against him as against over-holding tenant); *Pennsylvania* Act March 25, 1825 (Laws 1825, c. 68, § 2) (If lessee removes from premises in Philadelphia without leaving sufficient property thereon to secure payment of three months' rent, justices may give lessor possession); *Virginia* Code 1904,

A statutory provision that, if a thing is let for a particular purpose, the "letter" may treat the contract as rescinded upon the use of the thing for another purpose, has been held to apply to the "hiring of real property," and to authorize a landlord to terminate the tenancy upon the use of the premises for a purpose not intended.⁵³

§ 194. Under express condition subsequent.

a. **General considerations.** A forfeiture of the tenant's estate quite frequently takes place by reason of a breach by him of a condition subsequent contained in the instrument of lease.

While certain words are said to be appropriate for the creation of a condition, such as "on condition" and "provided,"⁵⁴ no particular words are required, it being purely a question of the intention of the parties, as gathered from the whole instrument, to create a condition.⁵⁵

An oral condition subsequent, it has been decided, cannot, under the "parol evidence rule," be engrafted upon a lease which has been incorporated in a written instrument.⁵⁶

At common law the breach of a condition subsequent was ordinarily availed of by a grantor or lessor by means of a "re-entry" upon the land, and for this reason the clause containing such a provision is frequently referred to as a "proviso for re-entry," or "clause of re-entry," although at the present day an actual re-entry is not, in the majority of cases at least, necessary in order to enforce a forfeiture upon a violation of the condition.⁵⁷

It is not infrequently said that a proviso for re-entry, or, as it may as well be called, a condition subsequent, or a provision for forfeiture, will be construed strictly in favor of the tenant, thus applying the general rule that forfeitures are not favored by the courts.⁵⁸ Such a rule is, however, to be applied only when there

⁵³ *Isom v. Rex Crude Oil Co.*, 147 Cal. 659, 82 Pac. 317. *Barn. & Adol.* 715, 720; *Kansas City Elevator Co. v. Union Pac. Ry. Co.*, 3

⁵⁴ *Litt.* §§ 328-331; *Portington's Case*, 10 Coke, 35a, 41b. *McCrary*, 463, 17 Fed. 200; *Sauer v. Meyer*, 87 Cal. 34, 25 Pac. 153; *Camp*

⁵⁵ See cases cited 1 *Tiffany*, *Real Prop.* § 68, note 463. *v. Scott*, 47 Conn. 366; *Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. 476,

⁵⁶ *Morris v. Healy Lumber Co.*, 46 Wash. 686, 91 Pac. 186, 123 Am. St. Rep. 955. *21 L. R. A.* 489, 36 Am. St. Rep. 486; *Meni v. Rathbone*, 21 Ind. 454; *Miller v. Havens*, 51 Mich. 482, 16 N. W. 865;

⁵⁷ See post, § 194 j. *Wakefield v. Sunday Lake Min. Co.*,

⁵⁸ See *Doe d. Polk v. Marchetti*, 1 85 Mich. 605, 49 N. W. 135; *Jackson*

is some obscurity in the language used, and the construction must accord with the apparent intent of the parties, so far as this may appear.⁵⁹ And its application must, it seems, be considerably restricted when the condition takes the form of a right of re-entry for breach of a covenant of the lease.⁶⁰

b. Condition distinguished from covenant. A condition, on breach of which the tenant's interest may be terminated, is to be distinguished from a covenant, a breach of which cannot, in the absence of a statutory provision to the contrary,⁶¹ affect the tenant's interest, but merely gives the landlord a right of action for damages,⁶² or, occasionally, a right to an injunction,⁶³ or a de-

v. Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; *Eaton v. Wilcox*, 42 Hun (N. Y. 61. See *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N. E. 502. Applying this principle, a condition of forfeiture "if any of the within payments remain unpaid" was construed to refer to a whole payment, and not to apply when a part thereof was paid. *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 603.

⁵⁹ *Goodtitle v. Saville*, 16 East, 87; *Doe d. Davis v. Elsam*, *Moody & M.* 189; *Doe d. Muston v. Gladwin*, 6 Q. B. 953; *Faylor v. Brice*, 7 Ind. App. 551, 34 N. E. 833.

⁶⁰ "We must construe the covenant without regard to the proviso for re-entry, for its construction must be the same in an action for damages for breach of the covenant as in an action for the recovery of land on the ground that the proviso for re-entry has come into operation by reason of such breach." *Jessel, M. R.*, in *Bristol v. Westcott*, 12 Ch. Div. 461. That a covenant is, in case of doubt, to be construed in favor of the covenantee, see ante, § 58 a, at note 112.

⁶¹ See ante, § 193 a.

⁶² *Bac. Abr.*, Rent (K 4); *Buckner v. Warren*, 41 Ark. 532, 48 Am. Rep. 46; *Van Valkenburgh*

v. Peyton, 7 Ill. (2 Gilm.) 44; *People v. Gilbert*, 64 Ill. App. 203; *Brown's Adm'rs v. Bragg*, 22 Ind. 122; *Jackson v. McClallen*, 8 Cow. (N. Y.) 295; *Jackson v. Harrison*, 17 Johns. (N. Y.) 66; *Eldridge v. Bell*, 64 Iowa, 125, 19 N. W. 879; *De Lancey v. Ganong*, 9 N. Y. (5 Seld.) 9; *Simmons v. Jarman*, 122 N. C. 195, 29 S. E. 332; *Ocean Grove Camp Meeting Ass'n v. Sanders*, 68 N. J. Law, 631, 54 Atl. 448; *Johnson v. Gurley*, 52 Tex. 222; *Ewing v. Miles*, 12 Tex. Civ. App. 19, 33 S. W. 235; *Thompson v. Christie*, 138 Pa. 230, 20 Atl. 934, 11 L. R. A. 236. So a breach of an agreement to pay rent does not, at common law, give to the lessor any right to assert a forfeiture. *Buckner v. Warren*, 41 Ark. 532, 48 Am. Rep. 46; *Beal v. Bass*, 86 Me. 325, 29 Atl. 1088; *Bartlett v. Greenleaf*, 77 Mass. (11 Gray) 98; *Tarlotting v. Bokern*, 95 Mo. 541, 8 S. W. 547; *Jackson v. McClallen*, 8 Cow. (N. Y.) 295.

But in *Hall v. Smith*, 16 Minn. 58 (Gil. 46), though there was no condition of re-entry, relief was given, upon the lessee's breach of covenants to pay rent and to make improvements, by an order giving possession to the lessor unless the lessee performed the covenants. And in

cree for specific performance.^{63a} The question whether, in a particular case, a provision of the lease constitutes a covenant or a condition is not infrequently a question of some difficulty.

Mere words of agreement, not contemplating a termination of the lessee's interest upon his default, create a covenant and not a condition.^{63b} But a clause reading "it is stipulated and conditioned" has been construed as creating a condition,⁶⁴ as has a clause "provided always and it is further covenanted."⁶⁵ A clause providing for the termination of the lessee's interest at the election of the lessor, upon a default by the lessee, though in the form of a mere stipulation, has been regarded as a condition, since it provides for a forfeiture in case of default.⁶⁶ And one by which the lessee "agrees to forfeit the lease" in a certain contingency has apparently received the same construction.⁶⁷ But an agreement by the lessee to relinquish possession upon a certain contingency or upon a demand has, by the weight of authority, been

Kentucky River Nav. Co. v. Com., 76 Ky. (13 Bush) 435, it was held that, at the request of the state, equity might "rescind" a lease of public property upon the lessee's breach of its covenants; citing a civil-law authority (*Caffin v. Scott*, 7 Rob. [La.] 205). Also, in *Wray-Austin Machinery Co. v. Flower*, 140 Mich. 452, 103 N. W. 873, it is said that if it is provided that the lease shall not be assigned, an assignment works a forfeiture. The Michigan cases cited do not support the statement. In *Crawley v. Mullins*, 48 Mo. 517, there was a lease of a mill for one year with a covenant by the lessee to run it in a proper manner and to divide the proceeds, in consideration of which the lessor gave the lessee the use of a dwelling, and it was held that the abandonment of the mill terminated the lease of the dwelling. It is said that "possession of the property was given to enable the defendant to run the mill; there was no other consideration, and by abandoning the mill the substance of

the lease was destroyed. A retention of the house would be a fraud upon the plaintiff." It might have been considered, it would seem, that a mere license to use the house, and not a lease thereof, was granted.

⁶³ See ante, §§ 123 1, 152 k.

^{63a} See post, §§ 233, 268, 271 l.

^{63b} *Shaw v. Coffin*, 14 C. B. (N. S.) 372; *Phillips v. Tucker*, 3 Ind. 132; *Gould v. Bugbee*, 72 Mass. (6 Gray) 371; *Wilson v. Owens*, 1 Ind. T. 163, 38 S. W. 976; *McKnight v. Kreutz*, 51 Pa. 232, 88 Am. Dec. 579; *Johnson v. Gurley*, 52 Tex. 222. And see cases cited ante, note 62. But see *White v. Naerup*, 57 Ill. App. 114.

⁶⁴ *Doe d. Henniker v. Watt*, 8 Barn. & C. 308, 1 Man. & R. 694.

⁶⁵ *Co. Litt.* 203 b; *Simpson v. Titterell*, Cro. Eliz. 242; *Pembroke v. Berkley*, Cro. Eliz. 384.

⁶⁶ *Horton v. New York Cent. R. Co.*, 12 Abb. N. C. (N. Y.) 30; *Beach v. Nixon*, 9 N. Y. (5 Seld.) 35.

⁶⁷ *Winn v. State*, 55 Ark. 360, 18 S. W. 375.

regarded differently.⁶⁸ Where a clause provides for the doing of things by both parties, as when the lessee agrees to give up part of the premises on a reduction of rent by the lessor, there is created, it seems, a covenant and not a condition.⁶⁹

Although a breach of covenant does not in itself give to the landlord any right to terminate the tenant's interest, the instrument of lease frequently, and indeed ordinarily, contains a clause entitling the landlord to terminate the tenant's interest, or, as it would be usually expressed, to "re-enter," upon the breach by the tenant of some particular covenant or covenants, or of any of the covenants contained therein,⁷⁰ such a clause, in effect, constituting a condition, to be read in connection with the covenant or covenants to which it refers. Whether such clause of re-entry applies to any particular covenant which may have been broken is a question of construction, and the courts will, in case of doubt, it seems, construe the condition as not so applying,⁷¹ in accordance with the general policy adverse to forfeiture.⁷²

There are English *dicta* to the effect that a clause of re-entry expressed to take effect upon the lessee's failure to "perform" his covenants extends to breaches of affirmative covenants only, and not to those of a negative character, which only bind him to refrain from certain acts,⁷³ but there is a late decision to a contrary ef-

⁶⁸ Doe d. Willson v. Phillips, 2 Bing. 13; Wheeler v. Dascomb, 57 Mass. (3 Cush.) 285; Sloan v. Cantrell, 45 Tenn. (5 Cold.) 571; Dennison v. Read, 33 Ky. (3 Dana) 586; Bergland v. Frawley, 72 Wis. 559, 40 N. W. 372. The contrary is assumed in Simons v. Marshall, 3 G. Greene (Iowa) 502; Walker v. Dowling, 24 Ky. Law Rep. 179, 68 S. W. 135. And see Hackett v. Marmet Co., 3 C. C. A. 76, 52 Fed. 268, 17 L. R. A. 804.

⁶⁹ Doe d. Willson v. Phillips, 2 Bing. 13, per Burrough, J. In Ellis v. Fitzpatrick, 3 Ind. T. 567, 64 S. W. 567, it was decided that where a lease was from month to month "until terminated by the option of either party or by failure to pay rent," non-payment of rent forfeits the lease.

⁷⁰ See Winn v. State, 55 Ark. 360, 48 S. W. 375; Kew v. Trainor, 150 Ill. 150, 37 N. E. 223; Wheeler v. Earle, 59 Mass. (5 Cush.) 31, 51 Am. Dec. 41; Post v. Moran, 10 Daly (N. Y.) 502; Hand v. Suravitz, 148 Pa. 202, 23 Atl. 1117, 30 Wkly. Notes 115. It is immaterial that the covenant is written and the re-entry clause is printed. Heiple v. Reinhart, 100 Iowa, 525, 69 N. W. 871.

⁷¹ See Heiple v. Reed (Iowa) 65 N. W. 331; Doe d. Spencer v. Godwin, 4 Maule & S. 265.

⁷² See ante, at note 58.

⁷³ There are dicta to that effect in West v. Dobb, L. R. 5 Q. B. 460; Hyde v. Warden, 3 Exch. Div. 72; Evans v. Davis, 10 Ch. Div. 747. Contra, per Kay and Lopes, J. J., in Barrow v. Isaacs [1891] 1 Q. B. 417. In

fect.⁷⁴ A clause giving a right of re-entry if the lessee "do or cause to be done" an act in breach of a covenant has been held not to apply to a breach by mere omission, such as a failure to repair.⁷⁵ Any question of this sort may be avoided by providing for a right of re-entry on failure to "observe" or "keep" any of the covenants,⁷⁶ or on "breach" of any of the covenants,⁷⁷ these words being unquestionably applicable alike to positive and negative covenants.

The mere fact that a clause of re-entry, applying in terms to a breach of any of the covenants, undertakes to enumerate them, but omits one, will not, it has been held, prevent it from applying to that one.⁷⁸ A clause of re-entry so applying to the breach of any of the covenants may apply to a covenant for the payment of rent, it appears, though a prior clause expressly gives a right of re-entry after a certain period of default in rent.⁷⁹ A provision for forfeiture in case of a failure in one respect cannot be extended by implication to a failure to perform an independent stipulation.⁸⁰ And a provision for re-entry in case the tenant "fail in any of the foregoing promises" does not apply to an implied covenant to farm properly.⁸¹ That the words of a covenant against a particular act have been erased in the instrument as executed

Doe d. Polk v. Marchetti, 1 Barn. & Adol. 715, a clause of re-entry on default in performance of any covenant for thirty days after notice was held not to extend to a negative covenant not to make alterations, as the provision for notice was plainly inapplicable thereto.

⁷⁴ *Harman v. Ainslie* [1904] 1 K. B. 698.

⁷⁵ *Doe d. Abdy v. Stevens*, 3 Barn. & Adol. 299. But see *Wheeler v. Earle*, 59 Mass. (5 Cush.) 31, 51 Am. Dec. 41.

⁷⁶ *Timms v. Baker*, 49 Law T. (N. S.) 106; *Croft v. Lumley*, 6 H. L. Cas. 672; *Barrow v. Isaacs* [1891] 1 Q. B. 417; *Wheeler v. Earle*, 59 Mass. (5 Cush.) 31, 51 Am. Dec. 41 ("perform and observe"); *West Shore R. Co. v. Wenner*, 70 N. J. Law, 233, 57

Atl. 408, 103 Am. St. Rep. 801. Or if lessee "fail, refuse or neglect to carry out terms of lease." *Longhi v. Samson*, 46 U. C. Q. B. 446.

⁷⁷ Per *Blackburn, J.*, in *Wadham v. Postmaster General*, L. R. 6 Q. B. 644.

⁷⁸ *Doe d. Antrobus v. Jepson*, 3 Barn. & Adol. 402.

⁷⁹ It is decided in *Van Rensselaer v. Jewett*, 2 N. Y. (2 Comst.) 141.

⁸⁰ *Burnes v. McCubbin*, 3 Kan. 221, 87 Am. Dec. 468.

⁸¹ *Hough v. Brown*, 104 Mich. 109, 62 N. W. 143; *Somers v. Loose*, 127 Mich. 77, 86 N. W. 386.

A "provision" as to the sale of produce is a covenant within a condition of re-entry for breach of covenants. *Vincent v. Crane*, 134 Mich. 700, 97 N. W. 34.

does not, it has been decided, affect the validity of a condition of re-entry upon the doing of such act.⁸²

c. **Condition distinguished from limitation.** A condition subsequent, on a breach of which by the tenant his estate may be terminated by the landlord, is to be distinguished from a "special (or collateral) limitation," by which the tenant's estate is limited to continue only until the happening of some contingent event, in which case the tenant's estate terminates on such event without any action on the part of the landlord.^{83,84} In both cases the duration of the estate is subject to a contingent event, but while in the case of a condition the words providing for its termination upon a contingency are not regarded as a part of the original limitation of the estate, and consequently the mere happening of the event does not terminate the estate, but action on the part of the landlord is necessary for this purpose, in the case of a special limitation, on the other hand, the words of contingency are regarded as a part of the original limitation of the estate, and consequently the estate necessarily terminates immediately upon the happening of the contingency, without any action by either party.

d. **Forfeiture dependent on landlord's election.** It was at one time the law in England that, in case of a lease for years, a provision that the lease should become "void" upon a default by the tenant in the performance of any particular stipulation, had the effect of terminating the tenancy immediately, without any action by the landlord,⁸⁵ the courts thus in effect regarding such a pro-

⁸² Pond v. Holbrook, 32 Minn. 291, 20 N. W. 232.

^{83, 84} See ante, § 12 d. See, for illustrations of the distinction, Beach v. Nixon, 9 N. Y. (5 Seld.) 35; Penoyer v. Brown, 13 Abb. N. C. (N. Y.) 82, and cases cited post, notes 86-88.

In Elliott v. Stone, 67 Mass. (1 Gray) 571, it was decided that a provision in a lease for payment of rent quarterly in advance, with a condition that if rent was not so paid the lessee should leave the premises, was regarded as making such payment a condition precedent to the vesting of the estate from quarter to quarter; but it was decided in the

same state that such a stipulation did not constitute a conditional limitation of the tenancy, terminating it without any action by the landlord upon nonpayment of rent. Elliott v. Stone, 66 Mass. (12 Cush.) 174; Sprague v. Quinn, 108 Mass. 553.

In Smith v. Hill, 63 Cal. 51, a provision that the tenancy should terminate upon a sale by the lessor was treated as a condition. See ante, § 12 e.

⁸⁵ Pennant's Case, 3 Coke, 64 a; Finch v. Throckmorton, Cro. Eliz. 220; Mulcarny v. Eyres, Cro. Car. 511.

vision not as a condition, but as a special limitation. This view has now, however, been repudiated in that country, it being recognized that the effect thereof was to enable the tenant, desiring to terminate the lease, to do so by merely making a default, he thus taking advantage of his own wrong. The rule now recognized there, and in most parts of this country, is that, even though the instrument of lease provides that the lease shall become void or terminate upon the breach of a stipulation by the lessee, such a breach does not terminate the tenancy until the landlord has in some way signified his election that it shall do so.⁸⁶ And such election by the landlord is *a fortiori* necessary in the case of a lease which provides for a right of re-entry or a forfeiture on breach of a condition.⁸⁷ The same principle has been applied in the case of

- ⁸⁶ Rede v. Farr, 6 Maule & S. 121; Arnsby v. Woodward, 6 Barn. & C. 519; Jones v. Carter, 15 Mees. & W. 718; Davenport v. Reg., 3 App. Cas. 115; Dermott v. Wallach, 68 U. S. (1 Wall.) 64 (dictum); Wildman v. Taylor, 4 Ben. 42, Fed. Cas. No. 17,654; Boston El. R. Co. v. Grace & Hyde Co., 50 C. C. A. 239, 112 Fed. 279; Bowman v. Foot, 29 Conn. 331; Grommes v. St. Paul Trust Co., 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248 (dictum); Brown v. Cairns, 63 Kan. 584, 66 Pac. 639; Hartford Wheel Club v. Travellers' Ins. Co., 78 Conn. 355, 62 Atl. 207; English v. Yates, 205 Pa. 106, 54 Atl. 503; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196; Western Bank v. Kyle, 6 Gill (Md.) 343 (dictum); Cartwright v. Gardner, 59 Mass. (5 Cush.) 273; Shattuck v. Lovejoy, 74 Mass. (8 Gray) 204; Walker v. Engler, 30 Mo. 130; Clark v. Jones, 1 Denio (N. Y.) 516, 43 Am. Dec. 706; Horton v. New York Cent. R. Co., 12 Abb. N. C. (N. Y.) 30; Williams v. Beach Pirates Chemical Engine Co., 73 N. J. Law, 446, 63 Atl. 990; Crevelling v. West End Iron Co., 51 N. J. Law, 34, 16 Atl. 184; Phelps v. Ches-
- son, 34 N. C. (12 Ired. Law) 194; Wills v. Manufacturers' Natural Gas Co., 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603; Ray v. Western Pennsylvania Natural Gas Co., 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922; Cochran v. Pew, 159 Pa. 184, 28 Atl. 219; Caruthers v. McBurney, 35 Tenn. (3 Sneed) 590 (dictum); Brady v. Nagle (Tex. Civ. App.) 29 S. W. 943; Deaton v. Taylor, 90 Va. 219, 17 S. E. 944.
- Occasionally it is said that breach of a "clause" or of a "covenant" does not terminate the lease except at the option of the landlord. Webster v. Nichols, 104 Ill. 160; Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758; Holman v. De Lin-River Finley Co., 30 Or. 428, 47 Pac. 708. These statements are probably meant as assertions of the rule above stated. A mere stipulation or covenant, not accompanied by a condition, cannot terminate a lease, even at the landlord's election, in the absence of a statutory provision that it shall have that effect. Ante, § 194 b.
- ⁸⁷ Read v. Tuttle, 35 Conn. 25, 95 Am. Dec. 216; Smith v. Miller, 49 N.

a provision that on default by the lessee he should surrender possession.⁸⁸ The effect of these various decisions seems to be that, whatever the language used, whether that adapted to the creation of a special limitation or a condition subsequent, it will, if the contingency referred to is in default by the tenant, be construed as creating an estate on condition subsequent, and not one on special limitation. In two or three states, however, the former English rule appears to be still adhered to, the provision that the lease shall be void or shall terminate operating according to its literal meaning.⁸⁹

J. Law, 521, 13 Atl. 39; Fifty Associates v. Howland, 52 Mass. (11 Metc.) 99. Crean v. McMahon, 106 Md. 507, 68 Atl. 265.

⁸⁸ Proctor v. Keith, 51 Ky. (12 B. Mon.) 252. But in Walker v. Dowling, 24 Ky. Law Rep. 179, 68 S. W. 135, it is decided that in such a case the default *ipso facto* terminated the lease, so as to authorize forcible detainer proceedings.

When it is expressly provided that the lease shall terminate on a certain contingency at the option of the lessor, there is obviously a condition and not a limitation. Beach v. Nixon, 9 N. Y. (5 Seld.) 35; Low v. Thompson, 58 Misc. 541, 109 N. Y. Supp. 750.

⁸⁹ In Maryland, in Shanfelter v. Horner, 81 Md. 621, 32 Atl. 184, it is said that if the instrument provides that the term shall come to an end on breach of a condition subsequent, it does so *ipso facto*. And Cooke v. Brice, 20 Md. 397, is to that effect. In Morrison v. Smith, 90 Md. 76, 44 Atl. 1031, it was decided, on a construction of the instrument, that the lease was to be void only at the election of the lessor, implying that it would be absolutely void on the tenant's default, if so intended. Western Bank v. Kyle, 6 Gill (Md.) 343, contains a dictum in accord with the modern English rule. Compare

In New York there are decisions clearly in accord with the modern English rule. Clark v. Jones, 1 Denio (N. Y.) 516, 43 Am. Dec. 706; Stuyvesant v. Davis, 9 Paige (N. Y.) 427; Chautauqua Assembly v. Alling, 46 Hun (N. Y.) 582; Horton v. New York Cent. R. Co., 12 Abb. N. C. (N. Y.) 30; Cohen v. Afro-American Realty Co., 58 Misc. 199, 108 N. Y. Supp. 998. But there are at least dicta by the court of appeals contra. Parmelee v. Oswego & S. R. Co., 6 N. Y. (2 Seld.) 74; Alleghany Oil Co. v. Bradford Oil Co., 21 Hun, 26, 86 N. Y. 638. And see Estelle v. Dinsbeer, 9 Misc. 487, 30 N. Y. Supp. 243; In re Schoelkopf, 54 Misc. 31, 105 N. Y. Supp. 477, apparently to this effect.

In Kansas, when a lease provided that the landlord might declare the lease at an end and retake possession on default in the rent, to be paid in advance, and the landlord notified the tenant, in case he should fail to pay the rent in advance, to remove from the premises within thirty days, it was held that the tenant, failing so to pay, could remove from the premises and so relieve himself from further rent. The court says that the notice from

e. **Conditions against particular acts**—(1) **Nonpayment of rent.** It is not feasible to state all the acts or defaults which may, by express provision in the lease, be made ground for forfeiture of the tenant's interest. The more important of them only can be specifically referred to.

The failure to pay rent is frequently made a ground of forfeiture.⁹⁰ The failure need not be "willful," it has been said, in order to come within the clause of forfeiture.⁹¹

Though, as we shall see, the landlord must, at common law, make a demand before sunset of the day on which the rent is due, in order to be able to assert a forfeiture for non-payment,⁹² he cannot actually assert the forfeiture until after midnight on that day, there being, until then, no breach of the condition.⁹³ And if the lease provides for forfeiture in case the rent remains unpaid a certain period of time after it becomes due, he cannot assert the forfeiture till after the end of such period.⁹⁴

the landlord presumably meant something. But it is, it may be remarked, difficult to see how it could change what was previously a condition into what was in legal effect a limitation. *King v. Davies*, 2 Kan. App. 634, 42 Pac. 942. Compare *Brown v. Cairns*, 63 Kan. 584, 66 Pac. 639.

In *Gartland v. Hickman*, 56 W. Va. 75, 49 S. E. 14, 67 L. R. A. 694, it is said to have been decided in *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901, that a breach of a condition *ipso facto* terminates the lease. It was, however, decided in the earlier case merely that no re-entry is necessary, an indication of intention to treat the tenancy as terminated being sufficient.

Andrews v. Erwin, 25 Ky. Law Rep. 1791, 78 S. W. 902, is also, perhaps, to the effect that the tenancy may expire, without any election by the landlord, by force of such a provision upon a default by the tenant.

And see *Ft. Worth & D. C. R. Co. v. Wooldridge* (Tex.) 108 S. W. 1159, apparently to a like effect.

⁹⁰ See e. g., *Losch v. Pickett*, 36 Kan. 216, 12 Pac. 822; *Morrill v. De la Granja*, 99 Mass. 383; *Winston v. Franklin Academy*, 28 Miss. (6 Cushm.) 118, 61 Am. Dec. 540; *Hosford v. Ballard*, 39 N. Y. 147; *Christie's Appeal*, 85 Pa. 463; *Follin v. Coogan*, 12 Rich. Law (S. C.) 44.

⁹¹ *Randolph v. Mitchell* (Tex. Civ. App.) 51 S. W. 297.

⁹² See post, § 194 f (1).

⁹³ *Co. Litt.* 202 a; *New York Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 217. See ante, § 172 h.

⁹⁴ *Phillips v. Bridge*, L. R. 9 C. P. 48; *Jones v. Reed*, 15 N. H. 68. Where the lease provided for a discount in case of payment within five days after the rent became due, it was held that there could be no re-entry until after such five days. *White v. McMurray*, 2 Brewst. (Pa.) 484.

The fact that a debtor has a valid claim against his creditor, to the full extent of the debt, is not ordinarily regarded as constituting a payment of the debt,⁹⁵ and so, it would seem, the existence of a claim in favor of the tenant against the landlord to the amount of the rent due should not prevent a forfeiture for nonpayment, unless the parties have agreed that it shall extinguish the claim for rent. There are decisions to this effect,⁹⁶ and also to the contrary.⁹⁷

A tender of the rent when due will, if kept good, no doubt exclude a right of forfeiture for nonpayment, and a tender made even after the rent day might, in a number of jurisdictions, have that effect.^{97a} It was in one case decided that there could be no forfeiture on account of failure to pay an installment of rent when due, owing to the fact that the landlord resided out of the state and had no agent within it, it being tendered five days later, as soon as the landlord came to the city in which the premises were located.^{97b} And likewise it was held that a forfeiture was not permissible on account of nonpayment of rent in advance, as provided by the lease, when for many years the lessor had called for the rent and had given no notice that he would cease to so do.^{97c}

⁹⁵ See cases cited 22 Am. & Eng. Enc. Law (2d Ed.) 576.

⁹⁶ *Borden v. Sackett*, 113 Mass. 214; *Fillebrown v. Hoar*, 124 Mass. 580; *Faylor v. Brice*, 7 Ind. App. 551, 34 N. E. 833. See *Morrill v. De la Granja*, 99 Mass. 383.

⁹⁷ *Collins v. Karatopsky*, 36 Ark. 328; *Wilcoxon v. Hybarger*, 1 Ind. T. 138, 38 S. W. 669; *New York El. R. Co. v. Manhattan R. Co.*, 63 How. Pr. (N. Y.) 14.

In *Tipton v. Roberts*, 48 Wash. 391, 93 Pac. 906, it was held that when the lessee made repairs necessary to make the premises tenantable and, deducting the amount of his expenditures in this regard from the amount of rent due, gave a check for the balance, and this was retained by the lessor for more than two months, there could be no forfeiture as for nonpayment. It is not ex-

plained why the lessor could not treat the check as a partial payment only.

In *Beardsley v. Morrison*, 18 Utah, 478, 56 Pac. 303, 72 Am. St. Rep. 795, it was held that when the lessor had agreed to make certain improvements, but refused to make them, whereupon the lessee purchased and placed on the premises lumber, equal in value to the rent due, in order to make the improvements himself, since the lessee had the right in such case to make the improvements and charge the cost to the lessor, this extinguished the claim for rent, so that a forfeiture could not be enforced.

^{97a} See post, at notes 352, 355.

^{97b} *Burnes v. McCubbin*, 3 Kan. 221, 87 Am. Dec. 468.

^{97c} *Kentucky Lumber Co. v. New-*

There can obviously be no forfeiture for nonpayment of rent when, by reason of an eviction, or for any other reason, there is no rent due.⁹⁸

At common law a right of forfeiture for nonpayment of rent may be exercised even though the rent is paid, if the payment is not made until after the time when it is due.⁹⁹

The question of the necessity of a demand for rent previous to the enforcement of a forfeiture by reason of its nonpayment, as well as that of the mode of enforcing a forfeiture, is hereafter considered.¹⁰⁰

(2) **Nonpayment of taxes.** A provision for forfeiture in case of nonpayment of taxes has been regarded as authorizing an assertion of the forfeiture in case the tenant fails to pay the taxes in the ordinary course of collection, before they become a burden on the landlord or upon the land.¹⁰¹ But the fact that the tenant refuses in good faith to pay more than a portion of the whole amount claimed, on the ground that he is advised that such portion only is legally due, has been held not to be ground for forfeiture.¹⁰² A forfeiture cannot be enforced, it has been held, for breach of a covenant to pay all taxes, or to refund to the lessor the amount of taxes paid by him, if the taxes paid by the lessor are refunded before the commencement of a suit to enforce the forfeiture.¹⁰³

According to some decisions a forfeiture for nonpayment of taxes cannot be enforced until there has been a demand by the landlord that they be paid.¹⁰⁴ But other cases are to the contrary.¹⁰⁵

ell, 32 Ky. Law Rep. 396, 105 S. W. 972. See post, § 194 i (3).

⁹⁸ See Blair v. Claxton, 18 N. Y. 529; Peck v. Hiler, 24 Barb. (N. Y.) 178.

⁹⁹ See post, at note 214.

¹⁰⁰ See post, § 194 f, j.

¹⁰¹ Allen v. Dent, 72 Tenn. (4 Lea) 676; Taylor v. Jermyn, 25 U. C. Q. B. 86. As to covenants to pay taxes, see ante, § 143.

¹⁰² New York El. R. Co. v. Manhattan R. Co., 63 How. Pr. (N. Y.) 14. See Eberts v. Fisher, 54 Mich. 294, 20 N. W. 80.

¹⁰³ Burnes v. McCubbin, 3 Kan. 221, 87 Am. Dec. 468.

¹⁰⁴ Kansas City Elevator Co. v. Union Pac. R. Co., 3 McCrary, 463, 17 Fed. 200; Bowman v. Foot, 29 Conn. 331 (dictum); Meni v. Rathbone, 21 Ind. 454; Eichenlaub v. Neil, 3 Ohio Dec. 365. In Carpenter v. Wilson, 100 Md. 13, 59 Atl. 186, this view is adopted and applied to a forfeiture for nonpayment of water rent.

¹⁰⁵ Davis v. Burrell, 10 C. B. 822; Taylor v. Jermyn, 25 U. C. Q. B. 86; Byrane v. Rogers, 8 Minn. 281 (Gil.

A tenant of a part of a building is entitled, it has been decided, to an apportionment of the water rates on the whole building, or to an ascertainment in some other way of the portion which is due with respect to his particular premises, before a forfeiture can be asserted against him for nonpayment.¹⁰⁶

(3) **Failure to repair.** In England, where the imposition upon the lessee of an obligation to repair is much more frequent than in this country, the instrument of lease ordinarily provides for a forfeiture upon a default in this respect. In order to enforce a forfeiture for this cause, it is not necessary that the landlord shall first have notified the tenant to repair.¹⁰⁷

It has been held that a provision for forfeiture in case the repairs are not executed to the satisfaction of a representative of the lessor does not authorize a forfeiture if the representative ought to be satisfied with the repairs as made.¹⁰⁸

It is no defense to the claim of forfeiture that the premises have become out of repair owing to their occupation by troops in time of war.¹⁰⁹

As before stated, there is a decision to the effect that a condition of re-entry, if the lessee "do or cause to be done" anything in violation of his covenants, does not apply in case of a mere failure to repair, though this involves the violation of a covenant.¹¹⁰

(4) **Assignment and subletting.** The act of the lessee in assigning, or in assigning without the lessor's assent, is frequently made a ground of forfeiture.¹¹¹ The condition against assignment is, in such case, it seems, to be construed in the same way as when there is merely a covenant against assignment.¹¹² For instance, it does

247); *Bacon v. Park*, 19 Utah. 246, 57 Pac. 28; *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248, 71 S. W. 696; *Garner v. Hannah*, 13 N. Y. Super. Ct. (6 Duer) 262, disapproving dictum in *Jackson v. Harrison*, 17 Johns. (N. Y.) 66.

¹⁰⁶ *Harford v. Taylor*, 181 Mass. 266, 63 N. E. 902.

¹⁰⁷ *Few v. Perkins*, L. R. 2 Exch. 92; *Baylis v. Le Gros*, 4 C. B. (N. S.) 537; *Connell v. Power*, 13 U. C. C. P. 91.

¹⁰⁸ *Doe d. Baker v. Jones*, 2 Car. & K. 743.

¹⁰⁹ *Moyer v. Mitchell*, 53 Md. 171.

¹¹⁰ See ante, at note 75.

¹¹¹ See e. g., *Brookes v. Drysdale*, 3 C. P. Div. 52; *Holland v. Cole*, 1 Hurl. & C. 67; *Kew v. Trainor*, 150 Ill. 150, 37 N. E. 223; *Eldredge v. Bell*, 64 Iowa, 125, 19 N. W. 879; *Indianapolis Mfg. & Carpenters' Union v. Cleveland, C., C. & I. R. Co.*, 45 Ind. 281; *Keeler v. Davis*, 12 N. Y. Super. Ct. (5 Duer) 507.

¹¹² See *Bristol Corp. v. Westcott*,

12 Ch. Div. 461.

not extend to an assignment by operation of law, as upon the death or bankruptcy of the lessee,¹¹³ unless expressly so provided. A voluntary assignment for the benefit of creditors has been decided not to be an assignment by operation of law within this exception.¹¹⁴

In states where a mortgage transfers the legal title, a mortgage by the lessee would be within such a forfeiture clause,¹¹⁵ but a mere equitable charge is not,¹¹⁶ nor would a mortgage be within such a clause in states where it creates a lien merely, without effecting a transfer of the legal title.¹¹⁷ A forfeiture is not incurred if the assignment turns out to be invalid.¹¹⁸ And there is no forfeiture if the instrument of assignment is not delivered.¹¹⁹

The common-law rule that a license to assign, once given, does away altogether with the condition against assignment, so that there is subsequently no restriction upon the right of assignment, has been elsewhere considered.¹²⁰

A condition against subletting, or what is its equivalent, a provision for forfeiture upon breach of the covenant against subletting, is not infrequently inserted in the instrument of lease. It has in England been decided that a mere agreement to sublet, if enforceable by specific performance, constitutes cause for forfeiture in such case.¹²¹

(5) **Bankruptcy.** In England there is quite frequently a provision for forfeiture upon the bankruptcy of the tenant, and such a provision has been decided to be perfectly valid.¹²²

A provision for forfeiture in case the lessee, or his executors, administrators or assigns, shall become bankrupt, has been held not to apply when the lessee becomes bankrupt after having assigned the term.¹²³ Such a provision was regarded as applicable

¹¹³ *Farnum v. Hefner*, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174; *Id.*, 92 Cal. 542, 28 Pac. 602.

¹¹⁴ *Holland v. Cole*, 1 Hurl. & C. 67.

¹¹⁵ See *Becker v. Werner*, 98 Pa. 555, and ante, § 152 c, note 87.

¹¹⁶ *Bowser v. Colby*, 1 Hare, 109.

¹¹⁷ See ante, § 152 c, note 88.

¹¹⁸ *Doe d. Lloyd v. Powell*, 5 Barn. & C. 308, 313.

¹¹⁹ *Farnum v. Hefner*, 92 Cal. 542, 28 Pac. 602.

¹²⁰ See ante, § 152 l.

¹²¹ *Eastern Tel. Co. v. Dent*, 78 Law T. (N. S.) 713, jt. affd. [1899] 1 Q. B. 835.

¹²² *Roe d. Hunter v. Galliers*, 2 Term R. 133; *Gray*, Restraints on Alienation of Prop. § 101.

¹²³ *Smith v. Gronow* [1891] 2 Q. B. 394.

in case of the bankruptcy of the survivor of certain executors to whom the tenant bequeathed the premises in trust.¹²⁴

(6) **Use and care of the premises.** There is not infrequently a provision for re-entry in case a particular use is made of the premises,¹²⁵ or in case it is used for a purpose other than that named.¹²⁶ It has been held that a provision for re-entry in case the lessee occupies the premises, or allows them to be occupied, for an unlawful purpose, applies when such occupation is by a subtenant.¹²⁷

Occasionally there is a provision for re-entry for failure to cultivate the premises in certain specified modes.¹²⁸ And so there may be such a provision in case the lessee fails to do certain things upon the premises.¹²⁹

(7) **Abandonment of the premises.** The instrument of lease sometimes stipulates for forfeiture in case of abandonment of the premises by the tenant.¹³⁰ Abandonment, it is said, is a question of intention, to be determined from the acts and declarations of the tenant.¹³¹

It was held that when the lease was executed with the understanding that the tenant should let furnished rooms, a vacancy did not occur within a provision for forfeiture in case of "vacancy" merely because the lessee went to reside in another building

¹²⁴ *Doe d. Bridgman v. David*, 1 434; *Wheeler v. Earle*, 59 Mass. (5 Crompt. M. & R. 405. Cush.) 31, 51 Am. Dec. 41. But in

¹²⁵ *Toleman v. Portbury*, L. R. 5 Healy v. Trant, 81 Mass. (15 Gray) Q. B. 288; *Mulligan v. Hollingsworth*, 99 Fed. 216; *Sell v. Branen*, 312, a different effect was given to a statute avoiding a lease for an unlawful use of the premises.

¹²⁶ *See Patton v. Bond*, 50 Iowa, 163 Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434; *Sommers v. Reynolds*, 508; *Prettyman v. Hartly*, 77 Ill. 265. 103 Mich. 307, 61 N. W. 501; *Shepard v. Briggs*, 26 Vt. 149.

¹²⁷ *Marsh v. Bristol*, 65 Mich. 378, 32 N. W. 645. A proviso for re-entry in case the premises are occupied otherwise than as a saloon and dwelling does not authorize a re-entry merely because a liquor license is refused the lessee. *Teller v. Boyle*, 132 Pa. 56, 18 Atl. 1069.

¹²⁸ *See Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437; *Jackson v. Elsworth*, 20 Johns. (N. Y.) 180; *Hagan v. Gaskill*, 42 N. J. Eq. 215, 6 Atl. 879.

¹²⁹ *Boston El. R. Co. v. Grace & Hyde Co.*, 50 C. C. A. 239, 112 Fed. 279; *Winn v. State*, 55 Ark. 360, 18 S. W. 375.

¹³⁰ *See Marshall v. Forest Oil Co.*, 198 Pa. 83, 47 Atl. 927.

¹³¹ *See Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437; *Jackson v. Elsworth*, 20 Johns. (N. Y.) 180; *Hagan v. Gaskill*, 42 N. J. Eq. 215, 6 Atl. 879.

for the purpose of taking table boarders, leaving lodgers in the one leased to him.¹³²

f. Demand of rent—(1) Necessity at common law. In order that the landlord may enforce a forfeiture for failure to pay rent, under a clause in the instrument of lease authorizing him so to do, it is, at common law, necessary that he shall previously have made a demand for the payment of the rent,¹³³ and this demand must be made in strict compliance with certain technical requirements.

The fact that the tenant has been in the habit of seeking the landlord to pay the rent does not relieve the landlord from the necessity of making formal demand as preliminary to a forfeiture.¹³⁴ In one state, however, it has been decided that where there had been repeated demands for the rent, and the claim had not been disputed, a compliance with the common-law formalities was unnecessary.¹³⁵ And a disclaimer by the tenant and assertion of title in himself has been held to dispense with the necessity of a demand.¹³⁶

The demand must be made on the very day on which the rent becomes due,¹³⁷ unless the lease provides that the right of re-

¹³² *Burhans v. Monier*, 38 App. Pa. 273, 50 Atl. 764, 88 Am. St. Rep. Div. 466, 56 N. Y. Supp. 632.

¹³³ *Bro. Abr.*, *Demaunde*, pl. 19; *Co. Litt.* 202 a; *Kidwelly v. Brand*, Plowd. 70; *Hill v. Kempshall*, 7 C. B. 975; *Wildman v. Taylor*, 4 Ben. 42, Fed. Cas. No. 17,654; *Bowman v. Foot*, 29 Conn. 331; *Cole v. Johnson*, 120 Iowa, 667, 94 N. W. 1113; *Chapman v. Wright*, 20 Ill. 120; *Jenkins v. Jenkins*, 63 Ind. 415, 30 Am. Rep. 229; *Chandler v. McGinning*, 8 Kan. App. 421, 55 Pac. 103; *Mac-kubin v. Wheteroft*, 4 Har. & McH. (Md.) 135; *Poterie Gas Co. v. Poterie*, 179 Pa. 68, 36 Atl. 232; *Parks v. Hays*, 92 Tenn. 161, 22 S. W. 3; *Godwin v. Harris*, 71 Neb. 59, 98 N. W. 439; *Willard v. Benton*, 57 Vt. 286; *Johnston v. Hargrove*, 81 Va. 118; *Bowyer v. Seymond*, 13 W. Va. 12.

¹³⁴ *Jackson v. Collins*, 11 Johns. (N. Y.) 1; *Jackson v. Vincent*, 4 Wend. (N. Y.) 633.

¹³⁵ *Co. Litt.* 202 a; *Doe d. Forster v. Windlass*, 7 Term R. 117; *Prout v. Roby*, 82 U. S. (15 Wall.) 471; *Chipman v. Emeric*, 3 Cal. 273; *Bawman v. Foot*, 29 Conn. 331; *Chapman v. Kirby*, 49 Ill. 211; *Goodwin v. Harris*, 71 Neb. 59, 98 N. W. 439;

¹³⁶ *Rea v. Eagle Transfer Co.*, 201 L. and Ten. 87.

entry shall accrue only if the rent remains unpaid a certain number of days after it becomes due, in which case the demand must be made on the last of the days a payment on which could save a forfeiture.¹³⁸ Furthermore, the demand must not only be made on that day, but it must also be made at such a convenient time before sunset that the money can be counted,¹³⁹ and a demand made earlier in the day, or at half past ten,¹⁴⁰ at one,¹⁴¹ or at three,¹⁴² o'clock, has been regarded as insufficient. The demand must, it seems, be continued till sunset, by the action of the person making it, either in remaining on the land till that time or in then returning thereto.¹⁴³

The demand must be made at the place named by the lease for the payment of the rent,¹⁴⁴ and if no place is named, then on

McCormick v. Connell, 6 Serg. & R. Chapman v. Harney, 100 Mass. 353; (Pa.) 151; Boyd v. Talbert, 12 Ohio, McQuesten v. Morgan, 34 N. H. 400; 212; Willard v. Benton, 57 Vt. 286. Johnston v. Hargrove, 81 Va. 118; ¹³⁸ Hill v. Grange, Plowd. 173; Jones v. Reed, 15 N. H. 68; Van Doe d. Wheeldon v. Paul, 3 Car. & Rensselaer v. Jewett, 2 N. Y. (2 P. 613; Acocks v. Phillips, 5 Hurl. Comst.) 141, 51 Am. Dec. 275; Smith & N. 183; Camp v. Scott, 47 Conn. v. Whitbeck, 13 Ohio St. 471. A showing that a demand was made 366; Johnston v. Hargrove, 81 Va. "in the afternoon" of the proper day is insufficient. Jackson v. Harrison, 17 Johns. (N. Y.) 66; Van Rensselaer v. Jewett, 2 N. Y. (2 Comst.) 141, 51 Am. Dec. 275; note (16) to Duppa v. Mayo, 1 Wms. Saund. 286 a.

In McQuesten v. Morgan, 34 N. H. 400, it is decided that the demand is not sufficient if made on an intermediate day, but it is suggested that it is good if made either on the day on which the rent falls due or on the last day on which it may be paid in order to save a forfeiture. The authorities do not generally state that the landlord has an option as to which of the two days he shall choose for the demand.

¹³⁹ Co. Litt. 202 a; Duppa v. Mayo, 1 Wms. Saund. 287; Tinckler v. Prentice, 4 Taunt. 549; Bowman v. Foot, 29 Conn. 331; Chadwick v. Parker, 44 Ill. 326; Jenkins v. Jenkins, 63 Ind. 415, 30 Am. Rep. 229;

100 Mass. 353; 34 N. H. 400; 81 Va. 118; 15 N. H. 68; 2 N. Y. (2 Comst.) 141, 51 Am. Dec. 275; Smith v. Whitbeck, 13 Ohio St. 471. A showing that a demand was made "in the afternoon" of the proper day is insufficient. Jackson v. Harrison, 17 Johns. (N. Y.) 66; Smith v. Whitbeck, 13 Ohio St. 471.

¹⁴⁰ Acocks v. Phillips, 5 Hurl. & N. 183.

¹⁴¹ Doe d. Wheeldon v. Paul, 3 Car. & P. 613; Jenkins v. Jenkins, 63 Ind. 415, 30 Am. Rep. 229; Smith v. Whitbeck, 13 Ohio St. 471.

¹⁴² Bacon v. Western Furniture Co., 53 Ind. 229.

¹⁴³ Wood v. Chivers, 4 Leon. 179. See Duppa v. Mayo, 1 Wms. Saund. 276; Fabian v. Winston, Cro. Eliz. 209; Smith v. Whitbeck, 13 Ohio St. 471; Doe d. Wheeldon v. Paul, 3 Car. & P. 613.

¹⁴⁴ Co. Litt. 202 a; Buskin v. Edwards, Cro. Eliz. 415; Bouroughe's Case, 4 Coke, 72a; Gage v. Bates, 40 Cal. 384; Bacon v. Western Furniture Co., 53 Ind. 229; Van Rensse-

the land, at the most notorious place thereupon,¹⁴⁵ this being the front door of the dwelling house, if there is one.¹⁴⁶ The fact that, at the time of the demand, neither the tenant nor any other person is present on the land to receive it, does not affect its validity,¹⁴⁷ and a demand has been decided to be good even though made of a stranger who happened to be upon the land.¹⁴⁸

The demand must be of the precise sum due,¹⁴⁹ and must disclose to what installment of rent it relates.¹⁵⁰ If more than one installment is due, it must relate to the last installment only.¹⁵¹

The demand may be made by either the landlord or by his authorized agent,¹⁵² and it has been decided that, if the demand is made by an agent, he need not show his authority, if not re-

laer v. Jewett, 2 N. Y. (2 Comst.) 141, 51 Am. Dec. 275; Willard v. Benton, 57 Vt. 286.

¹⁴⁵ Prout v. Roby, 82 U. S. (15 Wall.) 471; Chadwick v. Parker, 44 Ill. 326; Eichart v. Bargas, 51 Ky. (12 B. Mon.) 464; Chapman v. Harney, 100 Mass. 353; Van Rensselaer v. Jewett, 2 N. Y. (2 Comst.) 141, 51 Am. Dec. 275; Sperry v. Sperry, 8 N. H. 477; McQuesten v. Morgan, 34 N. Y. 400; McCormick v. Connell, 6 Serg. & R. (Pa.) 151, 9 Am. Dec. 415; Rea v. Eagle Transfer Co., 201 Pa. 273, 50 Atl. 764, 88 Am. St. Rep. 809; Willard v. Benton, 57 Vt. 286.

¹⁴⁶ Co. Litt. 201 b; McGlynn v. Moore, 25 Cal. 384, 85 Am. Dec. 133; Van Rensselaer v. Jewett, 2 N. Y. (2 Comst.) 141, 51 Am. Dec. 275; Smith v. Whitbeck, 13 Ohio St. 471; Johnston v. Hargrove, 81 Va. 118.

¹⁴⁷ Co. Litt. 202 a; Kidwelly v. Brand, Plowd. 70; Chapman v. Kirby, 49 Ill. 211; Prout v. Roby, 82 U. S. (15 Wall.) 471; Connor v. Bradley, 42 U. S. (1 How.) 217; Smith v. Whitbeck, 13 Ohio St. 471; McCormick v. Connell, 6 Serg. & R. (Pa.) 151, 9 Am. Dec. 415. In Mauser v. Dix, 8 De Gex, M. & G. 703, it was apparently considered that a demand off the premises was sufficient,

there being no person on the premises. In that case there was an express provision for a demand.

¹⁴⁸ Doe d. Brook v. Brydges, 2 Dowl. & R. 29.

¹⁴⁹ Fabian v. Winston, Cro. Eliz. 209; Doe d. Wheeldon v. Paul, 3 Car. & P. 613; Prout v. Roby, 82 U. S. (15 Wall.) 471; Wildman v. Taylor, 4 Ben. 42, Fed. Cas. No. 17,654; Gage v. Bates, 40 Cal. 384; Bacon v. Western Furniture Co., 53 Ind. 229; Nowell v. Wentworth, 58 N. H. 319; Van Rensselaer v. Jewett, 2 N. Y. (2 Comst.) 147, 51 Am. Dec. 275; McCormick v. Connell, 6 Serg. & R. (Pa.) 151, 9 Am. Dec. 415; Johnston v. Hargrove, 81 Va. 118.

¹⁵⁰ Fabian v. Winston, Cro. Eliz. 209. But in McLean v. Spratt, 20 Fla. 515, it was decided that a demand of the amount of rent due without naming the amount or specifying the period for which it was due was sufficient.

¹⁵¹ Scot v. Scot, Cro. Eliz. 73; Doe d. Wheeldon v. Paul, 3 Car. & P. 613; Buford v. Weigel, 3 Ohio Dec. 55.

¹⁵² Roe v. Davis, 7 East, 363; Van Rensselaer v. Jewett, 2 N. Y. (2 Comst.) 141, 51 Am. Dec. 275.

requested by the tenant so to do.¹⁵³ If the demand is made, not by the original lessor, but by a transferee of the reversion, he must notify the tenant of the transfer, in case the latter is unaware thereof.¹⁵⁴

The necessity of a demand may be dispensed with by an express stipulation to that effect, as that the landlord may re-enter for nonpayment of rent without any demand,¹⁵⁵ or without any "legal or formal demand,"¹⁵⁶ or, it has been decided, without any "previous notice."¹⁵⁷ And a provision authorizing a re-entry for nonpayment of rent within a certain time after it becomes due, "being demanded," has been regarded as dispensing with the common-law formalities as to the demand.¹⁵⁸ The same effect has been given to a provision that, on nonpayment of rent, the tenancy shall "at once and without notice of any kind" be determined.¹⁵⁹ In one case a demand was regarded as unnecessary because the rent was payable at the office of a firm who were the agents of the lessor for the collection of the rent.¹⁶⁰ The language of the in-

¹⁵³ *Roe d. West v. Davis*, 7 East, 363.

¹⁵⁴ *O'Connor v. Kelly*, 41 Cal. 432.

¹⁵⁵ *Dormer's Case*, 5 Coke, 40 a; *Goodright v. Cator*, 2 Doug. 477; *Doe d. Harris v. Masters*, 2 Barn. & C. 490; *Lewis v. Hughes*, 12 Colo. 208, 12 Pac. 621; *Eichart v. Bargas*, 51 Ky. (12 B. Mon.) 462; *Fifty Associates v. Howland*, 59 Mass. (5 Cush.) 214; *Sweeney v. Garrett*, 2 Dlsn. (Ohio) 601; *Van Rensselaer v. Jewett*, 2 N. Y. (2 Comst.) 141, 51 Am. Dec. 275.

¹⁵⁶ *Doe d. Harris v. Masters*, 2 Barn. & C. 490.

¹⁵⁷ *Pendill v. Union Min. Co.*, 64 Mich. 172, 31 N. W. 100; *Faylor v. Brice*, 7 Ind. App. 51, 34 N. E. 833.

¹⁵⁸ See *Phillips v. Bridge*, L. R. 9 C. P. 48, per Keating and Brett, J. J.

¹⁵⁹ *Shanfelter v. Horner*, 81 Md. 621, 32 Atl. 184. In this case the writer of the opinion appears to be under the impression that under

such a clause the tenancy terminates even without any assertion of his rights by the landlord.

¹⁶⁰ *Singer v. Sheriff*, 28 Pa. Super. Ct. 305. The reason given is that "it would have been an idle performance for them to sit in their own office and demand the payment of the rent from themselves."

In *Union Scale Co. v. Iowa Machinery & Supply Co.*, 136 Iowa, 171, 113 N. W. 762, 125 Am. St. Rep. 250, it was decided that no demand was necessary, "as the rent was in a fixed amount, was payable in advance and at a given place, to wit, at the (lessors') place of business;" distinguishing *Cole v. Johnson*, 120 Iowa, 667, 94 N. W. 1113, where "no place of payment was designated, and the amount of rent reserved was uncertain." The opinion refers to the statute authorizing a summary proceeding for nonpayment of rent, but it does not appear that such was the form of the proceeding

strument will, it has been said, be construed, if possible, in favor of the tenant in this regard.¹⁶¹

The tenant cannot, it has been in one case decided, after a default in the payment of rent, waive the necessity of demand, since this would involve in effect a forfeiture by consent.¹⁶² In this case, however, the rights of third persons were involved. If third persons are not concerned, there is no reason why the requirement of a demand should not be waived, the tenant having a right to do what he likes with his leasehold, even to surrendering it to the landlord.

(2) **Statutory modification of requirement.** The necessity of a formal demand was in some cases obviated by St. 4 Geo. 2, c. 28, § 2, which declared that "in all cases between landlord and tenant * * * as often as it shall happen that one-half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for nonpayment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises." This statute, furthermore, after authorizing service by posting of the declaration in case there was no person on the premises on whom it could be served, provided in effect that, in case of judgment against the defendant for nonpayment, if it were made to appear to the court that half a year's rent was due before service of the declaration, and that no sufficient distress was to be found on the premises countervailing the arrears of rent, and that the lessor had power to re-enter, then the landlord could recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made. This statute has been recognized as in force in at least one state,¹⁶³ and there are in several states enactments of a somewhat similar character, the requirement of insufficiency of distress being, however, ordinarily omitted.¹⁶⁴ Occasionally the

to recover possession, and the re-rent or more is in arrear, and recovery of possession was based on landlord has subsisting right by law to the express language of the lease. re-enter for nonpayment of said

¹⁶¹ Camp v. Scott, 47 Conn. 375.

¹⁶² Gaskill v. Trainer, 3 Cal. 334.

¹⁶³ See Campbell v. Shipley, 41 Md.

81.

¹⁶⁴ Arkansas, Kirby's Dig. St. 1904,

§§ 4701, 4703 (Whenever a half year's

rent, he may bring an action for possession, and service of the summons in the action shall stand in the place of a demand and re-entry);

Illinois, Hurd's Rev. St. 1905, c. 80, § 4 (Whenever, etc., he may com-

statute in terms dispenses with the necessity of a formal demand without making any reference to the action by which the forfeiture is to be enforced.¹⁶⁵ And this presumably is the purpose and effect of a statute providing for a re-entry, on nonpayment of rent, after notice of a prescribed number of days.¹⁶⁶

It has been decided that the operation of a statute, thus dispensing with the necessity of a demand, is not affected by the fact that the lease expressly provides for a demand.¹⁶⁷

There must, under the English statute, be a lack of sufficient dis-

mence action of ejectment without any formal demand or re-entry); *Minnesota* Rev. Laws 1905, § 3328 (Substantially same as Arkansas); *Missouri* Rev. St. 1899, §§ 4116, 4118 (Substantially same as Arkansas); *New Jersey*, 2 Gen. St. p. 1916, § 7 (Substantially similar to English statute); *New York* Code Civ. Proc. § 1504 (Substantially same as Arkansas. May maintain action without any demand of rent or re-entry. See *City of New York v. Campbell*, 18 Barb. (N. Y.) 156; *Church v. Hempsted*, 27 App. Div. 412, 50 N. Y. Supp. 325; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Hosford v. Ballard*, 39 N. Y. 147; *Martin v. Rector*, 118 N. Y. 476, 23 N. E. 893, 16 Am. St. Rep. 771); *North Carolina* Revisal 1905, § 1983 (Same as Arkansas); *Oregon*, Bell & C. Codes, § 338 (Substantially same as Illinois); *Virginia* Code 1904, § 2796 (If right of re-entry by reason of "any rent being in arrear," landlord may serve declaration in ejectment, "which service shall be in lieu of a demand and re-entry." See *Johnstone v. Hargrove*, 81 Va. 118); *West Virginia* Code 1906, c. 93, § 16 (Same as Virginia. See *Bowyer v. Seymour*, 13 W. Va. 12).

¹⁶⁵ *Nevada* Laws 1900, § 3826 (Unnecessary to demand rent on day on which due or at any particular time

of day, but it may be made at any time within one year); *Colorado* Mills' Ann. St. 1891, § 1973 (No demand necessary to work a forfeiture for nonpayment of rent).

¹⁶⁶ See *California* Civ. Code, §§ 790, 791, 793 (If right of re-entry given by lease, landlord may re-enter after three days' notice, or may bring action without notice); *Idaho* Civ. Code 1901, § 2375 (Wherever right of re-entry given by lease, entry may be made at any time after right of re-entry upon three days' notice); *Montana* Rev. Civ. Codes 1907, § 4504 (Same as Idaho).

The Illinois statute providing for notice of a certain number of days in order to terminate the tenancy for nonpayment of rent is construed as dispensing with a formal demand. (See *Chadwick v. Parker*, 44 Ill. 326; *Dodge v. Wright*, 48 Ill. 382; *Cone v. Woodward*, 65 Ill. 477; *Leary v. Pattison*, 66 Ill. 203; *Woods v. Soucy*, 166 Ill. 407, 47 N. E. 67), as is that of Indiana giving the landlord the right of possession in case rent payable in advance is not paid (*Ingalls v. Bissot*, 25 Ind. App. 130, 57 N. E. 723).

¹⁶⁷ *Doe d. Scholefield v. Alexander*, 2 Maule & S. 525; *Doe d. Shrewsbury v. Wilson*, 5 Barn. & Ald. 363; *Campbell v. Shipley*, 41 Md. 81.

gress on the premises to countervail all the arrears due, and not merely insufficient to satisfy half a year's rent, if more than that is due.¹⁶⁸ But if the outer doors of the premises are kept locked, so that the goods therein cannot be distrained on, or if they are concealed, they are not "to be found" on the premises, so as to preclude the operation of the statute.¹⁶⁹ If a distress is levied and thereby the amount due is reduced to less than the six months' rent required by the statute, the statute no longer applies.¹⁷⁰

g. **By whom forfeiture may be asserted.** It is a well settled rule of the common law that a right of re-entry cannot be reserved in favor of a stranger to the legal interest in the premises.¹⁷¹ It is not necessary, however, it has been decided, that the person to whom the right of re-entry is reserved have a reversion, it being valid though reserved on a transfer of one's entire interest in the land.¹⁷²

At common law a grantee of the reversion could not enforce a condition reserved upon the lease, this being in accord with the general rule that a right of entry could not be assigned.¹⁷³ But by St. 32 Hen. 8, c. 34, it was enacted that grantees and assignees and their heirs, executors, and successors should have such like advantages against the lessees, their executors, administrators and assigns, by entry for nonpayment of rent, or for doing of waste, or other forfeiture, as the lessors or grantors themselves, or their

¹⁶⁸ *Cross v. Jordan*, 8 Exch. 149. Formerly the New York statute followed the language of the English statute and required that there be an inability to collect the rent by distress. See *Jackson v. Collins*, 11 Johns. (N. Y.) 1; *Jackson v. Hogeboom*, 11 Johns. (N. Y.) 163; *Presbyterian Congregation v. Williams*, 9 Wend. (N. Y.) 147; *Jackson v. Kipp*, 3 Wend. (N. Y.) 230; *Van Rensselaer v. Hayes*, 5 Denio (N. Y.) 477. That there was such inability could be proven by affidavit, without actually making a distress. *Rogers v. Lynds*, 14 Wend. (N. Y.) 172.

¹⁶⁹ *Doe d. Chippendale v. Dyson*, *Moody & M.* 77; *Doe d. Cox v. Roe*, 5 Dowl. & L. 272; *Hammond v. Math-*
er, 3 Fost. & F. 151; *Doe d. Haverson v. Franks*, 2 Car. & K. 678.
¹⁷⁰ See *Shepherd v. Berger* [1891] 1 Q. B. 597.
¹⁷¹ Litt. § 347; *Doe d. Barber v. Lawrence*, 4 Taunt. 23; *Doe d. Barker v. Goldsmith*, 2 Crompt. & J. 674; *Doe d. Barney v. Adams*, 2 Crompt. & J. 232. But see *McKissick v. Pickle*, 16 Pa. 140, to the effect that a condition may be reserved to one other than the grantor in the case of a conveyance in fee.
¹⁷² *Doe d. Freeman v. Bateman*, 2 Barn. & Ald. 168; *Van Rensselaer v. Ball*, 19 N. Y. 100. Contra, *Ohio Iron Co. v. Auburn Iron Co.*, 64 Minn. 404, 67 N. W. 221.
¹⁷³ Litt. § 347; *Co. Litt.* 214 a, 215 a.

heirs, should have had or enjoyed. Under this statute a transferee of the reversion has a right to enforce a right of re-entry reserved in the lease,¹⁷⁴ provided the condition is one of a character affecting the land,¹⁷⁵ the same distinction being thus adopted in regard to the enforcement of a condition by a transferee of the reversion as in regard to the enforcement of a covenant.¹⁷⁶ A transferee of the rent alone has obviously no right to enforce a forfeiture for any purpose, even for nonpayment of rent, the transfer of the rent passing neither the reversion nor the right of entry.¹⁷⁷

In this country the English statute, above referred to, is recognized as in force in some jurisdictions; and in others there are local statutes which are no doubt sufficient to give the transferee of the reversion the right to enforce the condition.^{178, 179} The question whether a particular condition is such as to affect the land, and so to entitle the transferee of the reversion to enforce it, under the statute of 32 Henry 8, c. 34, above referred to, is to be determined, no doubt, by the same considerations as apply in the case of a covenant of the same character. That is, if a covenant by the lessee to do or not to do a particular thing affects the land, so that the benefit thereof would pass to a transferee of the reversion, the benefit of a condition, giving a right to terminate the tenancy upon the doing or not doing of such a thing, would also pass to a transferee of the reversion.¹⁸⁰

The English statute, above referred to, has been decided not to have changed the common-law rule that a condition is not apportionable by the act of the parties, and consequently not to authorize an enforcement of the condition of the lease by one to whom the reversion in part only of the premises has been transferred.¹⁸¹

¹⁷⁴ See *City of Baltimore v. White*, 2 Gill (Md.) 444; *Page v. Esty*, 54 Me. 319; *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248, 71 S. W. 696.

¹⁷⁵ *Co. Litt.* 215 a; *Stevens v. Copp*, L. R. 4 Exch. 20; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80.

¹⁷⁶ See ante, § 149 b (2).

¹⁷⁷ See *Huerstel v. Lorillard*, 29 N. Y. Super. Ct. (6 Rob.) 260.

^{178, 179} See ante, § 149 b (1).

¹⁸⁰ See *Verplanck v. Wright*, 23 Wend. (N. Y.) 506, where it was held that a condition not to cut wood ran with the land, and *Stevens v. Copp*, L. R. 4 Exch. 20, where a condition not to violate the game laws was held not to run.

¹⁸¹ *Co. Litt.* 215 a, and note; *Dumpor's Case*, 4 Coke, 119 b; *Wright v. Burroughes*, 3 C. B. 685; *Twynam v. Pickard*, 2 Barn. & Ald. 105; *Van*

But one to whom a partial interest in the reversion in the whole premises is transferred, as by a concurrent lease, may enforce the condition.¹⁸² And the rule forbidding the apportionment of conditions has never been applied to an apportionment by act of the law, as when the reversion in different parts of the premises passes to different persons by descent.¹⁸³

A lessor, cannot, it has been decided, after having transferred the reversion in the land, enforce a forfeiture for breach of a condition.¹⁸⁴ On the other hand, his transferee cannot do so unless the breach occurred in his own time, that is, after the transfer to him.¹⁸⁵ There can be no forfeiture, it has been decided, as for nonpayment of rent, at the instance of a transferee of the reversion, if the tenant refused to pay rent because ignorant of the transfer, and he was not informed thereof.¹⁸⁶

h. Against whom forfeiture may be asserted. A condition can be enforced against an assignee of the leasehold interest,¹⁸⁷ or against a subtenant,¹⁸⁸ to the same extent as against the orig-

Rensselaer v. Jewett, 5 Denio (N. Y.) 121; *Cruger v. McLaury*, 41 N. Y. 219.

¹⁸² *Wright v. Burroughes*, 3 C. B. 685.

¹⁸³ *Co. Litt.* 215 a; *Dumpor's Case*, 4 Coke, 119 b; *Lee v. Arnold*, 4 Leon. 27; *Winter's Case*, 3 Dyer, 308 b; *Cruger v. McLaury*, 41 N. Y. 219.

¹⁸⁴ *Doe d. Marriott v. Edwards*, 5 Barn. & Adol. 1065, 3 Nev. & M. 193; *City of Baltimore v. White*, 2 Gill (Md.) 444.

¹⁸⁵ *Fenn v. Smart*, 12 East, 444; *Hunt v. Bishop*, 8 Exch. 675; *Crane v. Batten*, 23 Law T. 220; *Godwin v. Harris*, 71 Neb. 59, 98 N. W. 439; *Moulton v. Lawson*, 79 Neb. 720, 113 N. W. 244. See *Small v. Clark*, 97 Me. 304, 54 Atl. 758. This seems to be ignored in two Illinois cases holding that the lessor's waiver of a forfeiture on account of matters prior to the transfer precludes his transferee from asserting a forfeiture on those grounds, they thus assuming that, apart from the waiv-

er, the transferee might have enforced a forfeiture on these grounds. See *Watson v. Fletcher*, 49 Ill. 498; *McConnell v. Pierce*, 210 Ill. 627, 71 N. E. 622.

¹⁸⁶ *O'Connor v. Kelly*, 41 Cal. 432.

¹⁸⁷ *Main v. Green*, 32 Barb. (N. Y.) 448; *Reynolds v. Fuller*, 64 Ill. App. 134; *Abrahams v. Tappe*, 60 Md. 317; *Carnegie Natural Gas Co. v. Philadelphia Co.*, 158 Pa. 317, 27 Atl. 951. But persons taking the leasehold interest by purchase from the lessee for a valuable consideration are not affected by a verbal agreement for forfeiture of which they have no notice. *Thompson v. Christie*, 138 Pa. 230, 20 Atl. 934, 11 L. R. A. 236.

¹⁸⁸ *Arnsby v. Woodward*, 6 Barn. & C. 519; *Hand v. Blow* [1901] 2 Ch. 721; *Baldwin v. Wanzer*, 22 Ont. 612; *Brock v. Desmond & Co.* (Ala.) 45 So. 665; *Frazier v. Caruthers*, 44 Ill. App. 61; *Wheeler v. Earle*, 59 Mass. (5 Cush.) 31, 51 Am. Dec. 41; *Miller v. Prescott*, 163 Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434; *Stees*

inal lessee. The lessee cannot affect the landlord's right of re-entry by making an assignment or a sublease. The condition is also effective as against one having a lien subsequent to the lease.¹⁸⁹

In the case of a sublease, the act of the subtenant, if in violation of a condition of the head lease, has the same effect as the act of the original tenant, in enabling the head landlord to enforce a forfeiture, not only against such subtenant, but also against his sublessor, the tenant,¹⁹⁰ or against a subtenant of another part of the premises.¹⁹¹ For this reason it is a proper precaution, for one holding under a lease which contains a clause of re-entry for the doing of, or for the failure to do, certain classes of acts on the premises, to insert, in a sublease made by him, a covenant by the sublessee to perform the covenants and conditions of the original lease, the effect of which will be to make the sublessee liable to indemnify him for a loss of the term in case of a failure in this respect.¹⁹²

A clause providing that the lessor may assert a forfeiture in case the lessee, "his successors or assigns," should fail to perform the covenants, has been held to include, under the expression "successors," the executors of the lessee.¹⁹³

i. **Waiver of right to assert forfeiture—(1) Recognition of tenancy as still existent—(a) General considerations.** As before stated, the question whether the breach of a condition subsequent shall have the effect of terminating the tenant's estate is ordinarily a matter wholly in the option of the landlord, that is, the landlord may or may not enforce a forfeiture for such a breach. Sometimes, however, by his language or conduct after

v. Kranz, 32 Minn. 313, 20 N. W. 241; Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123; Cuschner v. Westlake, 43 Wash. 690, 86 Pac. 948; Eten v. Luyster, 60 N. Y. 252. See Peck v. Ingersoll, 7 N. Y. (3 Seld.) 528. In Sutton's Case, 12 Mod. 557, there is a dictum by Holt, C. J., that a forfeiture of the estate of a life tenant does not affect his lessee.

¹⁸⁹ See post, at notes 319-321.

¹⁹⁰ Wheeler v. Earle, 59 Mass. (5 Cush.) 31, 51 Am. Dec. 41; Logan v. Hall, 4 C. B. 598.

¹⁹¹ Clarke v. Cummings, 5 Barb. (N. Y.) 339; Geer v. Boston Little Circle Zinc Co., 126 Mo. App. 173, 103 S. W. 151; Darlington v. Hamilton, Kay, 550; Creswell v. Davidson, 56 Law T. (N. S.) 811.

¹⁹² Hornby v. Cardwell, 8 Q. B. Div. 329; Wheeler v. Earle, 59 Mass. (5 Cush.) 31, 51 Am. Dec. 41. See ante, § 162, at note 529 a.

¹⁹³ West Shore R. Co. v. Wenner, 71 N. J. Law, 682, 60 Atl. 1134.

a breach of condition, he elects that the tenancy shall go on as before, and thereby precludes himself from thereafter enforcing a forfeiture, that is, as it is usually expressed, he thereby "waives" the forfeiture. Ordinarily, if the landlord, after knowledge on his part of a breach of condition by the tenant, does any act which recognizes the tenancy as still existent in spite of such breach, he thereby precludes himself from enforcing a forfeiture for such breach,¹⁹⁴ and the fact that he did not intend, by such conduct, to waive his right of forfeiture, is immaterial in this regard.¹⁹⁵ A case might perhaps occur in which actual knowledge by the landlord of the breach of condition would not be necessary in order that his conduct might take effect as a waiver, the breach being such that he is chargeable with knowledge thereof,¹⁹⁶ but ordinarily actual knowledge is necessary.¹⁹⁷

(b) **Acceptance of rent.** The most usual case of a waiver of a right of forfeiture occurs as a result of the acceptance by the landlord, with knowledge of an act of forfeiture, of rent which has accrued since that act, that is, since the breach of condition, such acceptance of rent being necessarily an unequivocal recognition of the continued existence of the tenancy.¹⁹⁸ The landlord

¹⁹⁴ *Green's Case*, Cro. Eliz. 3; *Harvey v. Oswald*, Cro. Eliz. 553, *Ward v. Day*, 4 Best & S. 337, 5 Best 572.

¹⁹⁷ *Pennant's Case*, 3 Coke, 64 a; *Roe d. Gregson v. Harrison*, 2 Term R. 425; *McKildoe's Ex'r v. Darracott*, 13 Grat. (Va.) 278. And see authorities cited post, note 207.

¹⁹⁸ *Marsh v. Curteys*, Cro. Eliz. 528; *Goodright v. Davids*, Cowp. 803; *Arnsby v. Woodward*, 6 Barn. & C. 519; *Attalla Min. & Mfg. Co. v. Winchester*, 102 Ala. 184, 14 So. 565; *Mageon v. Alkire*, 41 Colo. 338, 92 Pac. 720; *Hartford Wheel Club v. Travelers' Ins. Co.*, 78 Conn. 355, 62 Atl. 207; *Watson v. Fletcher*, 49 Ill. 498; *Stover v. Hazelbaker*, 42 Neb. 393, 60 N. W. 597; *Levy v. Blackmore* (N. J. Eq.) 67 Atl. 1022; *Ireland v. Nichols*, 46 N. Y. 413; *Conger v. Duryee*, 90 N. Y. 594, 43 Am. Rep. 185; *Granite Bldg. Ass'n v. Greene*,

¹⁹⁵ Per Cockburn, C. J., in *Tolerman v. Portbury*, L. R. 6 Q. B. 245. And see post, at note 199.

¹⁹⁶ See language of Popham, J., in

cannot prevent this result by asserting, at the time of the acceptance of rent, that this is not to operate as a waiver.¹⁹⁹ It may, however, be so agreed by the parties,²⁰⁰ and such agreement may, it seems, be inferred from circumstances.²⁰¹

It is immaterial, it seems, by whom the rent is paid,²⁰² and so it has been held that its acceptance from an assignee of the lease is a waiver of the breach of a condition of the lease.²⁰³ The acceptance of rent must necessarily, in order thus to affect the landlord, be by him,²⁰⁴ or by some person authorized to act for

25 R. I. 48, 54 Atl. 792; *Id.*, 25 R. I. 115; *Croft v. Lumley*, 5 El. & Bl. 648, 586, 57 Atl. 649; *Smith v. Edgewood Casino Club*, 19 R. I. 628, 35 Atl. 884, 36 Atl. 128, 35 L. R. A. 790; *Maidstone v. Stevens*, 7 Vt. 487; *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. 948; *Pettygrove v. Rothschild*, 2 Wash. St. 6, 25 Pac. 907; *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151; *Gomber v. Hackett*, 6 Wis. 323, 70 Am. Dec. 467. *Meath v. Watson*, 76 Ill. App. 516, seems contra.

In *Michel v. O'Brien*, 6 Misc. 408, 27 N. Y. Supp. 173, it was held, on a construction of the particular language used, that where the lease provided that the landlord should have the right, upon the use of the premises in a prohibited manner, to terminate the lease, and "in addition" to recover stipulated damages equal to six months' rent, acceptance of rent involved a waiver of the right of forfeiture and also of the right to recover the stipulated damages.

A waiver in the instrument of lease of all demand for rent, re-entry, notice to quit and every other formality, does not preclude the tenant from asserting a waiver of a right to forfeiture by the acceptance of rent. *Hartford Wheel Club v. Travelers Ins. Co.*, 78 Conn. 355, 62 Atl. 207.

¹⁹⁹ *Davenport v. Reg.*, 3 App. Cas.

6 H. L. Cas. 672; *Gulf, C. & S. F. R. Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228. But see *Granite Bldg. Ass'n v. Greene*, 25 R. I. 48, 54 Atl. 792.

²⁰⁰ *Miller v. Prescott*, 163 Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434.

²⁰¹ This seems to be the effect of *Medinah Temple Co. v. Currey*, 162 Ill. 441, 44 N. E. 839, 53 Am. St. Rep. 320; *Manice v. Millen*, 26 Barb. (N. Y.) 41. The case of *Doe d. Cheny v. Batten, Cowp.* 243, from which, in the former case, the court quotes in support of the statement that the question whether the acceptance of rent constitutes a waiver is a question of intention, is of doubtful authority. See post, § 205, note 239.

²⁰² *Pellatt v. Boosey*, 31 Law J. C. P. 281 (provided the tenant assent thereto).

²⁰³ *Doe d. Griffith v. Pritchard*, 5 Barn. & Adol. 765; *Whitchot v. Fox*, Cro. Jac. 398; *Gulf, C. & S. F. R. Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228; *O'Keefe v. Kennedy*, 57 Mass. (3 Cush.) 325. As to waiver of breach of condition against assignment, see ante, § 152 j (3).

²⁰⁴ *Crouch v. Wabash, St. L. & P. R. Co.*, 22 Mo. App. 315; *Koehler v. Brady*, 78 Hun. 443, 29 N. Y. Supp. 388; *Gulf, C. & S. F. R. Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228.

him,²⁰⁵ but payment into the landlord's bank account has been regarded as sufficient for this purpose, when this was the usual mode of paying the rent, though the landlord had instructed the bank not to receive it, no steps being taken to inform the tenant that he would not receive the rent, nor to return it.²⁰⁶ It is necessary, as in other cases of waiver, that notice of the act of forfeiture be brought home to the landlord,²⁰⁷ or, at least, in the case of an asserted waiver by an agent having authority for that purpose, to such agent.²⁰⁸

The payment need not be in cash, but the allowance by the landlord of a credit on the rent is sufficient.²⁰⁹ And an indication of a readiness to accept the rent, accompanied by a failure so to do, occasioned merely by inability to make change, has been regarded as constituting a waiver.²¹⁰

Though ordinarily the acceptance of rent accruing after the act of forfeiture thus constitutes a waiver, this has been held not to be the case if, before the acceptance of rent, the landlord had

²⁰⁵ *Doe d. Nash v. Birch*, 1 Mees. & W. 402, where it was decided that one having authority to receive the rent has no authority to waive the forfeiture.

²⁰⁶ *Pierson v. Harvey*, 1 Times Law R. 430.

²⁰⁷ *Silva v. Campbell*, 84 Cal. 420, 24 Pac. 316; *Walker v. Wadley*, 124 Ga. 275, 52 S. E. 904; *Kew v. Trainor*, 50 Ill. App. 629; *Jackson v. Allen*, 3 Cow. (N. Y.) 220; *Walker v. Engler*, 30 Mo. 130; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *Keeler v. Davis*, 12 N. Y. Super. Ct. (5 Duer) 507; *Maidstone v. Stevens*, 7 Vt. 487.

In a jurisdiction where a mortgage does not involve a transfer of the legal title, acceptance of rent with knowledge of the making of a mortgage by the lessee does not constitute acceptance with knowledge of a breach of a condition against transfer, so as to preclude the assertion of a forfeiture on account of a subsequent sale under the mortgage.

West Shore R. Co. v. Wenner, 70 N. J. Law, 233, 57 Atl. 408, 103 Am. St. Rep. 801; *Id.*, 71 N. J. Law, 682, 60 Atl. 1134. See ante, § 152 f, note 119.

In *Walker v. Wadley*, 124 Ga. 275, 52 S. E. 904, it is said that "where the lessor is ignorant of an assignment of the lease for the full term of the tenancy, acceptance of the rent with knowledge limited to inferences drawn from facts which give no information as to the existence of a written assignment of the lease for the full term will not extend the waiver to the full period of the term covered by the lease assigned." The present writer confesses his inability to comprehend this statement.

²⁰⁸ See *Mulligan v. Hollingsworth*, 99 Fed. 216; *Doe d. Nash v. Birch*, 1 Mees. & W. 402.

²⁰⁹ *Brooks v. Rogers*, 99 Ala. 433, 12 So. 61.

²¹⁰ *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118, 33 Am. St. Rep. 290.

instituted an action of ejectment for the purpose of enforcing the forfeiture, this being regarded as an irrevocable assertion of a purpose to terminate the tenancy.²¹¹ And the acceptance of rent, paid by the lessee in accordance with the terms on which his appeal is allowed, in proceedings by the landlord to recover possession, is not regarded as constituting a waiver.²¹²

The acceptance of rent which accrued before the act of forfeiture does not effect a waiver, since this does not involve any recognition of the continuance of the tenancy.²¹³

²¹¹ *Doe d. Morecraft v. Meux*, 1 Mass. 12, 39 N. E. 409, 47 Am. St. Car. & P. 346; *Jones v. Carter*, 15 Mees. & W. 718; *Big Six Development Co. v. Mitchell* (C. C. A.) 138 Fed. 279, 1 L. R. A. (N. S.) 332; *Cleve v. Mazzoni*, 19 Ky. Law Rep. 2001, 45 S. W. 88. But see *Marshall v. Davis*, 28 Ky. Law Rep. 1327, 91 S. W. 714.

In *Evans v. Wyatt*, 43 Law T. (N. S.) 176, it was held (per Lindley, J.) that the payment and receipt of rent accruing after the commencement of an action to recover possession for breach of a condition, while it did not cause a waiver of the forfeiture and so restore the old tenancy, was evidence of a new tenancy of a periodic character on the terms of the old lease. And see *Cochran v. Philadelphia Mortg. & Trust Co.*, 70 Neb. 100, 96 N. W. 1051, where the possibility of the creation of a new tenancy by the payment of rent by one already in default appears to be suggested in the opinion.

²¹² *Chiera v. McDonald*, 14 Mich. 54, 79 N. W. 908; *Palmer v. City Liv- erty Co.*, 98 Wis. 33, 73 N. W. 559. And see *Granite Bldg. Ass'n v. Greene*, 25 R. I. 586, 57 Atl. 649.

²¹³ *Green's Case*, Cro. Eliz. 3; *Price v. Worwood*, 4 Hurl. & N. 512; *Silva v. Campbell*, 84 Cal. 420, 24 Pac. 316; *Robbins v. Conway*, 92 Ill. App. 173; *Miller v. Prescott*, 163

Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434; *Pendill v. Union Min. Co.*, 64 Mich. 172, 31 N. W. 100; *Jackson v. Allen*, 3 Cow. (N. Y.) 220; *Stuyvesant v. Davis*, 9 Paige (N. Y.) 427; *Campbell v. McElevey*, 2 Disn. (Ohio) 574; *Carraher v. Bell*, 7 Wash. 81, 34 Pac. 469.

In *Lindeke v. Associates' Realty Co.*, 77 C. C. A. 56, 146 Fed. 630, there was held to be no waiver of the forfeiture by reason of the payment and receipt of rent, for the reason that the rent so paid and received was for a period prior to the time at which the right of re-entry had attached, though subsequent to the date of the breach of condition and of notice of an intention to assert a forfeiture, the lease providing for a notice of four months before re-entry. The opinion says that a waiver arises only where the rent has accrued and been accepted after the right of re-entry has attached. The language of the cases generally, however, is that a waiver arises upon the payment and acceptance of rent which became due before the breach of condition or before the act of forfeiture. The point involved in the case referred to seems to have been discussed in no other case. In *Kenny v. Sen Si Lun*, 101 Minn. 253, 112 N. W. 220, 11 L. R. A. (N. S.) 831, there was held to be a

At common law, the acceptance by the landlord of an installment of rent, paid on a day after it became due, is not a waiver of the act of forfeiture consisting of its nonpayment on the day on which it became due, that is, he may accept the rent and yet enforce a forfeiture because it was not paid promptly.²¹⁴ There are several cases in this country to the contrary,²¹⁵ but these must be regarded, it would seem, as involving the introduction of an equitable defense in a common-law action, which is in many states now permitted by statute.²¹⁶ Even in the jurisdictions, however, in which this latter view prevails, the landlord's acceptance of part of an installment will, it seems, not prevent his enforcement of the forfeiture for nonpayment of the balance.²¹⁷

waiver by reason of the acceptance of rent accruing during the period between the giving of a notice of an intention to assert a forfeiture and the time at which the notice was limited to expire. But in this case the lease did not require any time to elapse between the breach and the assertion of the forfeiture.

In *Cochran v. Philadelphia Mortg. & Trust Co.*, 70 Neb. 100, 96 N. W. 1051, there is a decision as to the effect of a notation, upon a check given to the landlord by the tenant, indicating the period for which it is to be applied, with reference, it may perhaps be presumed, to whether it was to be regarded as a payment of rent accrued since the forfeiture, so as to constitute a waiver.

²¹⁴ Co. Litt. 211 b; *Green's Case*, Cro. Eliz. 3; *Pennant's Case*, 3 Coke, 64 a; *Ward v. Day*, 4 Best & S. 337; *Denison v. Maitland*, 22 Ont. 166; *Morrison v. Smith*, 90 Md. 76, 44 Atl. 1031.

²¹⁵ *Bacon v. Western Furniture Co.*, 53 Ind. 229; *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303; *Cuschnier v. Westlake*, 43 Wash. 690, 86 Pac. 948; *Coon v. Brickett*, 2 N. H. 163. In the case first cited it is

said that "to insist upon a forfeiture of the lease for the nonpayment of the rent, which he has received, seems to us a legal solecism." But it is to be noted that the forfeiture is for the nonpayment of the rent when it becomes due rather than for the absolute nonpayment thereof.

In *Bowling v. Crook*, 104 Ala. 130, 16 So. 131, it is decided that the landlord cannot, after accepting corn for rent with knowledge of its condition, assert a forfeiture on account of the inferior character of the corn.

²¹⁶ See the admirable opinion of Hoadly, J., in *Campbell v. McElevey*, 2 Disn. (Ohio) 574. And also *Johnson v. Lehigh Valley Traction Co.*, 130 Fed. 932.

²¹⁷ *Pendill v. Union Min. Co.*, 64 Mich. 172, 31 N. W. 100. But in *Barber v. Stone*, 104 Mich. 90, 62 N. W. 139, it was decided that, when rent was payable in advance, by the acceptance of part of the monthly rent in advance the landlord waived his right to insist on a forfeiture during the period covered by the payment. This seems to involve an apportionment of rent as to time such as is not ordinarily permitted. Compare *Tipton v. Roberts*,

Nor will his recovery of a personal judgment for the rent have such an effect.²¹⁸

Even though the common-law view be adopted that payment and acceptance of rent, after it becomes due, does not preclude a forfeiture at law for its nonpayment, equity would no doubt intervene to prevent a forfeiture if the rent has been paid.²¹⁹

(c) **Assertion of claim for rent.** The commencement of an action for rent, accruing after the act of forfeiture, with knowledge of such act, is regarded as a waiver of the right to enforce the forfeiture.²²⁰ The fact that, in a jurisdiction where such a joinder of causes of action is permitted, the landlord, in a proceeding in which he claims possession of the land for breach of a condition requiring the tenant to repair, also claims arrears of rent which have accrued since the commencement of the failure to repair, has been held not to affect the right to enforce the forfeiture,²²¹ the breach being of a continuing character.²²² And it has been held that when the landlord, suing in ejectment, based his right to recovery on a breach of the condition against a certain use of the premises, and also on a failure to pay rent accruing after such former breach, the latter claim did not involve a waiver of the former.²²³

An absolute and unqualified demand, on the part of the landlord, for rent accruing after the act of forfeiture, has been said to involve a waiver.²²⁴ A mere demand of rent in arrear is evidently not a waiver of the right to assert a forfeiture for nonpayment of such rent in accordance with the demand.²²⁵

48 Wash. 391, 93 Pac. 906, ante, note 97.

²¹⁸ *Campbell v. McElevey*, 2 Disn. (Ohio) 574.

²¹⁹ See post, § 194 1 (3).

²²⁰ *Dendy v. Nicholl*, 4 C. B. (N. S.) 376; *Alexander v. Touhy*, 13 Kan. 64. In *Ireland v. Nichols*, 37 How. Pr. (N. Y.) 222, it was decided that the fact that the lessor, in an action to enforce a forfeiture, asked for the appointment of a receiver to take charge of the rents and profits, did not involve a waiver.

²²¹ *Penton v. Barnett* [1898] 1 Q. B. 276.

²²² See post, § 194 1 (4).

²²³ *Toleman v. Portbury*, L. R. 6 Q. B. 245, L. R. 7 Q. B. 344.

²²⁴ Per Parke, J., in *Doe d. Nash v. Birch*, 1 Mees. & W. 408; per Bramwell, J., in *Croft v. Lumly*, 6 H. L. Cas. 705. And see the remarks in favor of this view per Loomis, J., in *Camp v. Scott*, 47 Conn. 366. *McCroskey v. Hamilton*, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79, is rather adverse thereto.

²²⁵ *McCroskey v. Hamilton*, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79. It is intimated that such de-

(d) **Action against tenant.** Not only does the bringing by the landlord of an action for rent, accruing after the act of forfeiture, operate as a waiver of the right to assert a forfeiture,²²⁶ but the bringing of any other action, which involves a recognition of the tenancy as still existing, involves a waiver. So the institution of a statutory proceeding to obtain possession for nonpayment of rent has been regarded as involving a recognition of the tenancy as still subsisting, and as therefore operating as a waiver of a right to assert a forfeiture for a previous act on the part of the tenant.²²⁷ And it has been held that, by asking for an injunction against the continuance of certain acts in breach of a covenant, the landlord waives a right to re-enter on account of such breach.²²⁸

The mere fact that an ejectment suit is based on a breach of two conditions in the lease does not involve a waiver of either.²²⁹ But if the landlord, in making an entry, expressly states that it is on account of the breach of a particular condition, he cannot thereafter, it has been decided, claim a forfeiture on account of the breach, prior thereto, of a different condition.²³⁰

(e) **Notice to tenant.** The action of the landlord in giving a regular notice to quit, in order to terminate the tenancy, is such a recognition of the continued existence of the tenancy as amounts to a waiver of the right to enforce a forfeiture,²³¹ and the giving of the notice necessary in order to sustain the statutory action to recover possession for nonpayment of rent has been also so regarded.²³² It has been decided also that where the tenant

mand, if complied with, would preclude the assertion of a forfeiture. assert a forfeiture, cannot thereafter obtain an injunction.

²²⁶ See ante, § 194 i (1) (c).

²²⁷ Dockrill v. Schenk, 37 Ill. App. 44; Frazier v. Caruthers, 44 Ill. App. 61; Nagel v. League, 70 Mo. App. 487.

²²⁸ Evans v. Davis, 10 Ch. Div. 747; Chautauqua Assembly v. Al-ling, 46 Hun (N. Y.) 582. Compare Linden v. Hepburn, 5 N. Y. Super. Ct. (3 Sandf.) 668, 5 How. Pr. 188, and Kramer v. Amberg, 53 Hun, 427, 6 N. Y. Supp. 303, where it is decided that the landlord, if he as-

²²⁹ Toleman v. Portbury, L. R. 6 Q. B. 245, L. R. 7 Q. B. 344, ante, note 223.

²³⁰ Atkins v. Chilson, 50 Mass. (9 Metc.) 52. And see cases cited post, note 233.

²³¹ Doe d. Scott v. Miller, 2 Car. & P. 348; Godwin v. Harris, 71 Neb. 59, 98 N. W. 439.

²³² Dockrill v. Schenk, 37 Ill. App. 44; Frazier v. Caruthers, 44 Ill. App. 61. But see Shermer v. Paciello, 161 Pa. 69, 28 Atl. 995.

has violated two conditions, the landlord cannot enforce a forfeiture for one of such violations, if he gives notice of an intention to enforce a forfeiture for the other violation.²³³

(f) **Language recognizing tenancy.** It has been held that a recital to the effect that the tenancy is still existent, in an instrument executed subsequently to the act of forfeiture, shows a waiver,²³⁴ as likewise does an agreement by the landlord to grant a new term to the tenant after the expiration, by effluxion of time, of the term, a forfeiture of which is sought.²³⁵ A consent by the landlord to an assignment by the lessee has also been held to involve a waiver of the right to assert a forfeiture for a previous act.²³⁶

A notice by the landlord to the tenant to make repairs has been regarded as showing an election not to declare a forfeiture for the previous failure to make the repairs, provided they are made on receipt of the notice.²³⁷

g. **Distress.** Since, ordinarily, a distress can be levied only during the continuance of the tenancy,²³⁸ the levy of a distress by the landlord, whether for rent accruing before or after the act of forfeiture, has been regarded as involving a recognition of the tenancy as still existing and as so operating as a waiver.²³⁹

²³³ *Brooks v. Rogers*, 99 Ala. 433, 12 So. 61; *Atkins v. Chilson*, 50 Mass. (9 Metc.) 52. See ante, at note 229.

²³⁴ *Green's Case*, Cro. Eliz. 3, where the use of the word "fermor" to describe the person to whom rent was paid was regarded as involving a recognition that he was still the landlord.

²³⁵ *Ward v. Day*, 5 Best & S. 359.

²³⁶ *Deaton v. Taylor*, 90 Va. 219, 17 S. E. 944. Here, however, the landlord not only assented to the assignment but also assured the assignee that the forfeiture would not be asserted.

²³⁷ *Hasterlik v. Olson*, 218 Ill. 411, 75 N. E. 1002. Here emphasis is also placed upon the fact that the lessor had written a letter asserting a forfeiture but failed to send

this letter. The letter, not being sent, would seem to be out of the case so far as the tenant was concerned, and that it had been written would seem to be immaterial.

²³⁸ See post, chapter XXXII. The statute 8 Anne, c. 14, §§ 6, 7, which allows distress within six months after the termination of the tenancy, has been decided not to apply when the tenancy is terminated by forfeiture. *Grimwood v. Moss*, L. R. 7 C. P. 365; *Kirkland v. Briancourt*, 6 Times Law R. 441.

²³⁹ *Pennant's Case*, 3 Coke, 64 b; *Doe d. Flower v. Peck*, 1 Barn. & Adol. 428; *Ward v. Day*, 4 Best & S. 337; *Doe d. David v. Williams*, 7 Car. & P. 322; *Cotesworth v. Spokes*, 10 C. B. (N. S.) 103; *Dermott v. Wallach*, 68 U. S. (1 Wall.) 61; *Camp v. Scott*, 47 Conn. 371; *Chase*

But, as in the case of the acceptance of rent,²⁴⁰ the levy of a distress does not have this effect when the landlord has already instituted proceedings to recover possession of the premises on account of the act of forfeiture,²⁴¹ nor when it is necessary to levy a distress before the landlord can enforce a remedy given by statute for nonperformance of a condition or covenant, as when the statute authorizes an action by him for possession on nonpayment of rent, if no sufficient distress is to be found on the premises.²⁴²

(2) **Delay in assertion of forfeiture.** The mere fact that the landlord fails to assert the right of forfeiture immediately upon the tenant's breach of condition should not, it seems, affect his right subsequently to assert it, that is, it should not be regarded as a waiver.²⁴³ There are, however, occasional statements apparently to the effect that the right must be asserted with the greatest promptitude.²⁴⁴

If the landlord, after knowledge of the tenant's act of forfeiture, delays to enforce the forfeiture, and also permits the latter to make improvements upon the premises, he cannot thereafter assert the right, with the result of depriving the tenant of the benefit of the improvements.²⁴⁵

v. Knickerbocker Phosphate Co., 32 App. Div. 400, 53 N. Y. Supp. 220; Jackson v. Sheldon, 5 Cow. (N. Y.) 448; McKildoe's Ex'r v. Darracott, 13 Grat. (Va.) 278.

²⁴⁰ See ante, note 211.

²⁴¹ Grimwood v. Moss, L. R. 7 C. P. 360.

²⁴² Brewer v. Eaton, 3 Doug. 230; Thomas v. Lulham [1895] 2 Q. B. 400.

²⁴³ See Doe d. Sheppard v. Allen, 3 Taunt. 78; Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. 476, 21 L. R. A. 489, 36 Am. St. Rep. 486; McKildoe's Ex'r v. Darracott, 13 Grat. (Va.) 278.

²⁴⁴ See Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118; Allen v. Dent, 72 Tenn. (4 Lea) 676.

In Soper v. Littlejohn, 31 Can. Sup. Ct. 572, the fact that one to whom the lessee had assigned for the benefit of creditors had by stat-

ute the right to retain possession for three months was held, in connection with other circumstances, to explain the delay on the part of the lessor in re-entering for a breach of condition involved in such assignment.

In Catlin v. Wright, 13 Neb. 558, 14 N. W. 530, a lease of a farm provided that the lessor might terminate the lease on the lessee's failure to furnish the lessor's stock on the farm with sufficient food and water during the winter or feeding season, and it was held that the lessor waived the right to enforce a forfeiture for the lessee's failure in this respect if he delayed to do so until the expiration of the winter or feeding season, thus throwing on the lessee the burden of caring for the stock during the winter months.

²⁴⁵ Doe d. Sheppard v. Allen, 3

After the lease has come to an end by effluxion of time,²⁴⁶ or, it seems, by force of a special limitation,²⁴⁷ the landlord cannot assert the right of forfeiture for the purpose of precluding the tenant from exercising his common-law right to take the emblements,²⁴⁸ or of preventing the latter from exercising a right, expressly reserved to him, of removing the improvements made by him.²⁴⁹ And no doubt the same principle would be applied as regards the exercise of any other right which the tenant may have on expiration of the lease.

(3) **Acts inducing breach of condition.** It may happen that the landlord, by his language or course of conduct, before any breach of condition by the tenant, in effect waives the condition, or, in other words, licenses its breach. Such a case is clearly distinguishable on principle from the case in which, after a breach of condition, the landlord waives the right to assert a forfeiture on account thereof. It involves ordinarily an application of the principle of estoppel. For instance, if the landlord in effect tells the tenant that he may do a certain act, which act violates the terms of the condition, he cannot thereafter assert a right of forfeiture because the tenant does such act.²⁵⁰ On this principle it has been held that, though the lease provides for a forfeiture if the tenant assigns without the written assent of the landlord, the latter cannot assert a forfeiture if he orally assents to an assignment.²⁵¹ And even though the landlord does not by express language assent to such act, if he so conducts himself as to lead the tenant to believe that he will not regard it as a cause of forfeiture, and thus induces such act by the tenant, it cannot be asserted by him as such.²⁵²

Taunt. 78 (dictum); North Staffordshire Steel & Iron Co. v. Camoys, 11 Jur. (N. S.; pt. 1) 555 (dictum); Hume v. Kent, 1 Ball & B. 554; Morrison v. Smith, 90 Md. 76, 41 Atl. 1021; Garnhart v. Finney, 40 Mo. 449, 93 Am. Dec. 303; Benavides v. Hunt, 79 Tex. 383, 15 S. W. 396. And see People v. Freeman, 110 App. Div. 605, 97 N. Y. Supp. 343.

²⁴⁶ Johns v. Whitley, 3 Wils. 127; Cheatham v. Plinke, 1 Tenn. Ch. 576.

²⁴⁷ Campbell v. Baxter, 15 U. C. C. P. 42.

²⁴⁸ Johns v. Whitley, 3 Wils. 127; Campbell v. Baxter, 15 U. C. C. P. 42.

²⁴⁹ Cheatham v. Plinke, 1 Tenn. Ch. 576.

²⁵⁰ Doe d. Henniker v. Watt, 8 Barn. & C. 308.

²⁵¹ See ante, § 152 h.

²⁵² Doe d. Knight v. Rowe, 2 Car. & P. 246; Randol v. Scott, 110 Cal. 590, 42 Pac. 976 (semble); Moses v. Loomis, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194; Johnson v. Douglass, 73 Mo. 168; Duffield v. Hue, 129

The mere fact that the landlord has failed to enforce a forfeiture on a previous breach of a condition, without more, should not be regarded as a license to commit subsequent breaches thereof, and it has accordingly been decided that his failure to enforce a forfeiture for failure to pay an installment of rent on the day on which it was due does not affect his right to enforce a forfeiture for delay in paying an installment subsequently falling due.²⁵³ And the fact that, though the rent was payable in specific articles, the landlord accepted, for a number of years, the money value of such articles in payment of the installments of rent, was held not to preclude him from asserting a forfeiture for failure to pay a subsequent installment in such articles rather than in money.²⁵⁴ But there are occasional decisions to the effect that the landlord's failure, at different periods, to enforce a forfeiture for one breach of a condition, precludes him from doing so upon a subsequent breach, unless at least he gives notice that such will be the effect of a breach.²⁵⁵ Why an exercise of the landlord's option not to enforce a forfeiture for breach of condition should have the effect of a license to commit another breach is by no means clear.

Pa. 94, 18 Atl. 566; *Steiner v. Marks*, 172 Pa. 400, 33 Atl. 695; *Hukill v. Myers*, 36 W. Va. 639.

In *Johnson v. Douglass*, 73 Mo. 168, it was held that if, on demand of rent, the tenant told the landlord that he would credit the rent on a note of the landlord, and the landlord made no reply, the latter could not thereafter assert a forfeiture for nonpayment. It does not appear that the tenant, even if misled, was misled to his prejudice.

²⁵³ *Robbins v. Conway*, 92 Ill. App. 173; *Douglas v. Herms*, 53 Minn. 204, 54 N. W. 1112.

²⁵⁴ *Lilley v. Fifty Associates*, 101 Mass. 432, 3 Am. Rep. 387. See post, note 341.

²⁵⁵ *Little Rock Granite Co. v. Shall*, 59 Ark. 405, 27 S. W. 562, 27 L. R. A. 190, 43 Am. St. Rep. 38; *Westmoreland & Cambria Natural*

Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. (N. S.) 731; *Carpenter v. Wilson*, 100 Md. 13, 59 Atl. 186; *Cogley v. Browne*, 15 Phila. (Pa.) 162.

In *Smith v. St. Philip's Church*, 107 N. Y. 616, 14 N. E. 825, it was held that where one took a lease for building purposes which contained a condition against subletting, and built an apartment house on the ground leased, and for several years the landlord accepted the rent without objecting that the lessee had no right to make leases of apartments in the building, he thereby granted a license to use and occupy the building as an apartment house. The court also said that "it is consistent with the circumstances and with fair dealing to construe the acts and silence of the defendant as an assent that the somewhat

Analogous to the case of a waiver of the condition, or a license for its breach, is that of the extension by the landlord of the time for its performance. If, for instance, the landlord concedes to the tenant that he need not pay the rent,²⁵⁶ or pay taxes,²⁵⁷ or make repairs,²⁵⁸ until after the stipulated time, he cannot claim a forfeiture because the rent or taxes are not paid, or the repairs not made, until such time. This is what is technically known as a "suspension" of the condition.

(4) **Continuing and recurring breaches.** Reference is sometimes made to a "continuing breach" of a condition, or to a condition which is susceptible of a "continuing breach," it being said that in such case a waiver applies only to past breaches, and does not affect the landlord's right to enforce a forfeiture for a subsequent breach.²⁵⁹ The expression "continuing breach" does not, however, seem particularly appropriate to all classes of cases which arise in this connection. Frequently the expression "recurring breaches" would seem to be more appropriate, as when the condition calls for the performance not of one single act, but of a series of acts, as occasions arise therefore.²⁶⁰ In the case of a condition to make repairs, for instance, different repairs become necessary at different times, and it seems somewhat of a misnomer to speak of the successive failures to do these acts as constituting one single continuing breach. The question in all this class of cases is whether, not the breach, but the condition, is continuous, that is, whether the condition

peculiar interest created by the letting of the apartments from time to time for brief periods was not an underletting or parting with any interest in the demised premises within the meaning of the covenant."

In *Whitehead v. Bennett*, 9 Wkly. Rep. 626, Kindersley, V. C., regarded the acceptance of rent for several years without objection to a breach of condition to work the mining property in question as such an acquiescence on the part of the landlord that he could not assert a forfeiture without first giving notice and also time within which to prepare to resume operations.

²⁵⁶ *Sauer v. Meyer*, 87 Cal. 34, 25 Pac. 153.

²⁵⁷ *Manice v. Millen*, 26 Barb. (N. Y.) 41.

²⁵⁸ *Doe d. Rankin v. Bindley*, 4 Barn. & Adol. 84.

²⁵⁹ See e. g., *Doe d. Ambler v. Woodbridge*, 9 Barn. & C. 376; *Doe d. Baker v. Jones*, 5 Exch. 498; *Penton v. Barnett* [1898] 1 Q. B. 277.

²⁶⁰ See the remarks of Tracy, J., in *Conger v. Duryee*, 90 N. Y. 594, 43 Am. Rep. 185, in regard to the expression "continuing cause of forfeiture."

is such that a single breach thereof exhausts the condition, or whether a continuance or recurrence of the same state of things as that which caused a breach in the first place will, after this first breach has been waived, cause another breach of the condition for which forfeiture may be enforced. The distinction between the two classes of conditions, the continuous and noncontinuous, may be illustrated as follows: In the case of a condition to make repairs or improvements within a certain time, or, as it would usually occur, a covenant to that effect, accompanied by a condition of re-entry in case of breach of the covenant, it is evident that, after the tenant has once broken the covenant or condition by failing to make repairs or improvements within the stipulated time, there can be no further breach.²⁶¹ On the other hand, if the tenant agrees generally to repair, there is a breach of the covenant or condition so long or so often as he fails to make any necessary repairs, and in such case there is a continuing, or recurring, breach.²⁶² So in the case of a covenant to keep the premises insured, there is a breach so long or so often as the premises are not insured.²⁶³ And in case the condition is to keep a way open,²⁶⁴ to keep trees planted on the premises,²⁶⁵ or to refrain from using the premises for certain specified purposes,²⁶⁶ there is a breach so long or so often as the tenant leaves the way unopened, leaves trees unplanted, or uses the premises for the purposes named,

²⁶¹ *McGlynn v. Moore*, 25 Cal. 384, 85 Am. Dec. 133. See *Jacob v. Down* [1900] 2 Ch. 156.

²⁶² *Doe d. Baker v. Jones*, 5 Exch. 498; *Coward v. Gregory*, L. R. 2 C. P. 153; *Jacob v. Down* [1900] 2 Ch. 156; *Penton v. Barnett* [1898] 1 Q. B. 276.

²⁶³ *Doe d. Muston v. Gladwin*, 6 Q. B. 953; *Doe d. Flower v. Peck*, 1 Barn. & Adol. 428; *Price v. Worwood*, 4 Hurl. & N. 512.

²⁶⁴ *Jackson v. Allen*, 3 Cow. (N. Y.) 220; *Gluck v. Elkan*, 36 Minn. 80, 30 N. W. 446 (Condition requiring lessee to keep stairway open and free from rubbish).

²⁶⁵ *Bleecker v. Smith*, 13 Wend. (N. Y.) 530. So in the case of a covenant to keep land in meadow.

Ainley v. Balsden, 14 U. C. Q. B. 535.

²⁶⁶ *Doe d. Ambler v. Woodbridge*, 9 Barn. & C. 376; *Farwell v. Easton*, 63 Mo. 446; *Mulligan v. Hollingsworth*, 99 Fed. 216; *Granite Bldg. Ass'n v. Greene*, 25 R. I. 48, 54 Atl. 792. For other instances of a continuing condition, see *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027 (Condition as to disposition of crops and other produce); *Alexander v. Hedges*, 41 Mich. 691, 3 N. W. 187 (Condition that lessee comply with all laws and ordinances).

respectively, and, in each of these cases, the fact that the landlord has done some act which involves a waiver of the right to enforce a forfeiture for the previous breach of condition by the tenant does not preclude him from enforcing a forfeiture if the tenant fails subsequently to perform the condition.

A condition of re-entry in case the lessee fails to perform his covenant to pay taxes is continuous, it has been considered, in the sense that a waiver of a breach by failure to pay certain taxes will not preclude a forfeiture for failure to pay taxes subsequently assessed, while the mere continuance, after the waiver, of the failure to pay the taxes assessed before the waiver, does not authorize a forfeiture.²⁶⁷

A condition against assigning or subletting is, in its nature, capable of repeated or recurring breaches, and it has been decided that the fact that one breach of such a condition is waived, by the acceptance of rent or otherwise, does not preclude the landlord from enforcing a forfeiture for a subsequent breach.²⁶⁸ There is, however, one decision to the contrary,²⁶⁹ in terms based upon the technical rule that a license to make an assignment destroys a condition against assignment,²⁷⁰ thus extending this rule to the case of the waiver of a breach caused by a previous assignment.²⁷¹

It has been held that when there is a condition against subletting, or permitting any person other than the lessee to occupy the premises, and the lessee sublets, there is not a continuing breach merely because the sublessee continues in occupation for the term of the sublease, and that consequently acts of waiver during that time preclude the lessor from thereafter asserting a right of forfeiture.²⁷² And the same principle, that there is no continuing or recurring breach if the lessee, having sublet, is not in a condition to control the occupation or use of the premises,

²⁶⁷ *Conger v. Duryee*, 90 N. Y. 594, *Ex'r v. Darracott*, 13 Grat. (Va.) 278. 43 Am. Rep. 185.

²⁶⁹ *Murray v. Harway*, 56 N. Y.

²⁶⁸ *Doe d. Boscowen v. Bliss*, 4 337.

Taunt. 735; *Doe d. Griffith v. Pritchard*, 5 Barn. & Adol. 765, per Pat-

²⁷⁰ See ante, § 152 l.

teson, J.; *Walker v. Wadley*, 124 Ga.

²⁷¹ See ante, § 152 l, note 201.

275, 52 S. E. 904; *Farr v. Walrond v. Hawkins*, L. R. 10 C. P. Kenyon, 20 R. I. 376, 39 Atl. 241, 39 342; *Ireland v. Nichols*, 46 N. Y. 413; L. R. A. 773. See *Bleecker v. Smith*, *McKildoe's Ex'r v. Darracott*, 13 13 Wend. (N. Y.) 530; *McKildoe's Grat. (Va.) 278.*

was applied when the lessee covenanted not to permit a particular use of the premises, and, his sublessee having begun such use, the original lessor accepted rent from the lessee, the lessor being regarded as precluded from enforcing a forfeiture on account of the continuance of the forbidden use by the sublessee for the balance of his term.²⁷³

In England there is not infrequently a general covenant by the tenant to repair, and also a covenant by him to repair on notice from the landlord, and it has been decided that, by a notice to repair within a certain period, the breach of the general covenant to repair is waived, so that, though the lease provides for a forfeiture on breach of any covenant, there is no ground for forfeiture till this period has elapsed.²⁷⁴ A notice to repair "forthwith,"^{275, 276} however, or "in accordance with the covenants of the lease,"²⁷⁷ has been held not to involve a waiver of the general covenant.

j. **Assertion and enforcement of forfeiture.** At common law, an actual re-entry was ordinarily necessary in order to terminate an estate of freehold for breach of a condition subsequent, it being considered that, since the estate commenced by a formal act, livery of seisin, it could terminate only by an act of equal formality.²⁷⁸ In the case of a term of years, however, since this did not commence by livery of seisin, a re-entry was not absolutely necessary, and the landlord's mere assertion of a forfeiture was sufficient to revest the property in him.²⁷⁹ But when the lease provided that, upon a certain default by the tenant, the landlord might "re-enter," a re-entry was, it seems, under the older English practice, regarded as necessary.²⁸⁰

The requirement of re-entry was, under the old practice in ejectment, satisfied by the tenant's entry into the consent rule

²⁷³ *Griffin v. Tomkins*, 42 Law T. 218a, and authorities cited 1 Tiff. (N. S.) 359. But see remarks of *fany*, Real Prop. p. 180.

Bramwell, J., in *Lawrie v. Lees*, 14 279 Co. Litt. 214 b; *Browning v. Beston*, 1 Plowd. 135, 136.

²⁷⁴ *Doe d. Morecraft v. Meux*, 4 280 Baylis v. Le Gros, 4 C. B. (N. Barn. & C. 606. S.) 537; *Jones v. Carter*, 15 Mees. &

^{275, 276} *Roe d. Goatly v. Paine*, 2 W. 718, per Parke, B.; *Arnsby v. Camp*. 520. Woodward, 6 Barn. & C. 519; *Liddy*

²⁷⁷ *Few v. Perkins*, L. R. 2 Exch. v. Kennedy, L. R. 5 H. L. 134, per Lord Westbury.

²⁷⁸ See Litt. § 351; Co. Litt. 214 b,

in such an action brought by the landlord, this involving a confession by him of the landlord's entry.²⁸¹ The fictions in ejectment have now been abolished in England, but an actual re-entry does not seem to be regarded as necessary, provided an action to recover possession is brought by the landlord, even though the lease expressly gives a right of "re-entry" for breach of condition.²⁸² When the lease provides that it is to be void or to come to an end upon a default by the tenant, a mere declaration by the landlord of his option to assert the forfeiture, if communicated to the tenant, would seem, under the common-law authorities, sufficient to terminate the tenancy.²⁸³

In this country the decisions but seldom suggest any distinction in this regard between a provision that, upon breach of condition, the landlord may re-enter, and one that, in such case, the lease shall become void.²⁸⁴ Occasionally the courts speak of a "re-entry" as being the proper mode of enforcing the forfeiture,²⁸⁵ but it is questionable whether by this is meant any more than that the tenancy continues till the forfeiture is in some way asserted.²⁸⁶ In other cases it is stated that an actual entry is

²⁸¹ *Little v. Heaton*, 2 Ld. Raym. 750, 1 Salk. 259; *Goodright v. Cator*, 2 Doug. 477; *Jones v. Carter*, 15 Mees. & W. 718; *Matthews v. Ward*, 10 Gill & J. (Md.) 443.

²⁸² *Ward v. Booth*, 10 Times Law R. 446; *Grimwood v. Moss*, L. R. 7 C. P. 360; *Kilkenny Gas Co. v. Somerville*, 2 L. R. Ir. 192; *Sergeant v. Nash* [1903] 2 K. B. 304. As before stated, in England and some of the states, an action of ejectment is, by express statutory provision, made the equivalent of a re-entry in some cases, when the forfeiture claimed is on account of the nonpayment of rent. See ante, at notes 163, 164.

²⁸³ See authorities cited ante, note 279. In *Jones v. Carter*, 15 Mees. & W. 718, this question is expressly left undetermined.

²⁸⁴ In *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901, it is said that a

re-entry is necessary if the lease provides for re-entry, and otherwise not. And in *Ocean Grove Camp Meeting Ass'n v. Sanders*, 68 N. J. Law, 631, 54 Atl. 448, the fact that the instrument of lease contained a provision that the lease shall be "at an end" on nonpayment of rent was held to justify judgment for the landlord in ejectment, though there was no proof that there was no sufficient distress on the premises so as to bring it within the local statute (ante, note 164), though such proof, it is said, is necessary when there is "a mere right of re-entry for nonpayment of rent."

²⁸⁵ See *Gage v. Smith*, 14 Me. 466; *Shattuck v. Lovejoy*, 74 Mass. (8 Gray) 204; *Robey v. Prout*, 7 D. C. 81; *Holman v. DeLin*, 30 Or. 428, 47 Pac. 708.

²⁸⁶ See ante, at note 86.

not necessary, and that a clear assertion, by word or act, of the landlord's intention that the tenancy shall come to an end, is sufficient.²⁸⁷ A reletting by the landlord to another person has occasionally been regarded as a sufficient declaration of such an intention.²⁸⁸

Actual re-entry is not necessary in any case, even in that of a freehold lease, if the lessor is already in possession.²⁸⁹ And the action of the landlord in inducing the person in possession, whether a subtenant,²⁹⁰ or a stranger who has entered in the

²⁸⁷ *Bowman v. Foot*, 29 Conn. 331; *Read v. Tuttle*, 35 Conn. 26, 95 Am. Dec. 216; *Cheney v. Bonnell*, 58 Ill. 268 ("Forfeiture must be formally and clearly declared"); *Walker v. Engler*, 30 Mo. 130; *Alexander v. Hodges*, 41 Mich. 691, 3 N. W. 187 ("A demand at such a time and place that if complied with possession would be at once secured is all that can possibly be needed"); *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603; *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901. It is so assumed in *Updegraff v. Lesem*, 15 Colo. App. 297, 62 Pac. 342; *McCroskey v. Hamilton*, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79. *S. Liebmann's Sons Brew. Co. v. Lauter*, 73 App. Div. 183, 76 N. Y. Supp. 748; *Mayer v. Clarke*, 129 Ill. App. 424, appear to be *contra*. In *Cannon v. Wilbur*, 30 Neb. 777, 47 N. W. 85, it is said that a "reasonable notice" of an intention to declare a forfeiture is necessary. Here it was decided that if the landlord obtained possession from a subtenant after default without having first given such notice, and excluded the original tenant, he was liable in damages as for an eviction. It is not made plain whether the court means that both a "reasonable notice" and also a declaration of forfeiture are necessary.

In *Updegraff v. Lesem*, 15 Colo. App. 297, 62 Pac. 342, *supra*, it was decided that one joint lessor could not make a declaration of forfeiture on behalf of the others unless specially authorized. In *McCroskey v. Hamilton*, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79, *supra*, it was decided that an agent of the lessor, authorized to declare a forfeiture, could do it though a subagent, a servant.

²⁸⁸ *Allegany Oil Co. v. Bradford Oil Co.*, 21 Hun, 26; *Id.*, 86 N. Y. 638; *Rinfret v. Morrissey* (R. I.) 69 Atl. 763 (*semble*); *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901. But not if the second lease is expressly made subject to the first. *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. 501. And see *Kreutz v. McKnight*, 53 Pa. 319.

²⁸⁹ *Allegany Oil Co. v. Bradford Oil Co.*, 21 Hun, 26; *Id.*, 86 N. Y. 638; *Ray v. Western Pennsylvania Natural Gas Co.*, 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922; *Sheaffer v. Sheaffer*, 37 Pa. 525; *Maxwell v. Todd*, 112 N. C. 677, 16 S. E. 926; *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901.

²⁹⁰ *Baylis v. LeGros*, 4 C. B. (N. S.) 537.

tenant's absence,²⁹¹ to accept a lease from him, has been regarded as the equivalent of a re-entry.

A re-entry being, as above indicated, the recognized mode, by the common-law authorities, for the assertion of a right of forfeiture for breach of condition, it seems clear that, at the present time, the landlord may so re-enter without resorting to a judicial proceeding to recover possession.²⁹² The right of re-entry is, however, in some jurisdictions, subject to the limitation that it must be peaceable in character;²⁹³ this according with the rule there prevailing as to the right of the landlord to take possession by force upon the expiration of the term.^{294, 295} In others the re-entry would be effective even though forcible.

²⁹¹ *O'Hare v. McCormick*, 30 U. C. Q. B. 567.

²⁹² That he has the right to enter peaceably, see *Winn v. State*, 55 Ark. 360, 18 S. W. 375; *Wetzel v. Meranger*, 85 Ill. App. 457; *Wright v. Everett*, 87 Iowa, 697, 55 N. W. 4; *Abrahams v. Tappe*, 60 Md. 317; *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248, 71 S. W. 696; *Geer v. Boston Little Circle Zinc Co.*, 126 Mo. App. 173, 103 S. W. 151; *Losch v. Pickett*, 36 Kan. 216, 12 Pac. 822 (May remove lessee's chattels in his absence); *Peacock & Hunt Naval Stores Co. v. Brooks Lumber Co.*, 96 Ga. 542, 23 S. E. 835; *Smith v. Detroit Loan & Bldg. Ass'n*, 115 Mich. 340, 73 N. W. 395, 39 L. R. A. 410, 69 Am. St. Rep. 575; *Alexander v. Griswold*, 17 N. Y. Supp. 522; *Marsh v. Bristol*, 65 Mich. 378, 32 N. W. 645. In *Jackson v. Elsworth*, 20 Johns. (N. Y.) 180, it seems to be thought that an action of ejectment is necessary. The authorities there cited do not support such a view.

In *Cockerline v. Fisher*, 140 Mich. 95, 103 N. W. 522, the fact that the landlord by artifice induced the tenant to leave the premises, and so was enabled peaceably to re-enter in his absence, was held not to ren-

der his re-entry illegal. Compare *Lasserot v. Gamble* (Cal.) 46 Pac. 917, post, note 293.

²⁹³ *Winn v. State*, 55 Ark. 360, 18 S. W. 375; *Kerr v. O'Keefe*, 138 Cal. 415, 71 Pac. 447; *Goshen v. People*, 22 Colo. 270, 44 Pac. 503; *Peacock & Hunt Naval Stores Co. v. Brooks Lumber Co.*, 96 Ga. 542, 23 S. E. 835; *Thiel v. Bull's Ferry Land Co.*, 58 N. J. Law, 212, 33 Atl. 281; *Hubner v. Feige*, 90 Ill. 208; *Briggs v. Roth*, 28 Ill. App. 314; *Graham v. Womack*, 82 Mo. App. 618; *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53.

Lasserot v. Gamble (Cal.) 46 Pac. 917 is to the effect that obtaining possession by having the tenant arrested on some criminal charge and then taking advantage of his confinement and the momentary absence of his servant constituted a forcible detainer within the statute. Compare *Cockerline v. Fisher*, 140 Mich. 95, 103 N. W. 522, ante, note 292.

The lease may, it has been decided, stipulate against liability for the use of force in removing the tenant on default. *Howe v. Frith* (Cal.) 95 Pac. 603.

^{294, 295} See post, § 216.

No notice from the landlord to the tenant is, it seems, necessary to validate the former's re-entry for breach of condition,²⁹⁶ unless the right of re-entry is expressly conditioned on the giving of notice.²⁹⁷ In New York there is a specific provision for a notice of fifteen days prior to a re-entry or action to recover possession, when the right of re-entry is, by the lease, expressly conditioned upon a default in rent and a lack of sufficient distress on the premises, the intention being, in view of the abolition of distress, to substitute the requirement of notice for that of insufficiency of distress.²⁹⁸ This statutory requirement of notice has been held to apply only when the lease expressly requires an insufficiency of distress to authorize a re-entry for nonpayment of rent,²⁹⁹ and that such a requirement exists in one clause of the lease does not preclude a re-entry without notice under another clause.³⁰⁰

In New Hampshire it is provided that notice to quit at the end of seven days shall be equivalent to an entry for condition broken,³⁰¹ and such notice need not state that it is given on account of breach of condition.³⁰² If the tenant fails to leave at the time specified in the notice the landlord may enter, it is said, provided he commits no breach of the peace, and may remove the tenant's goods.³⁰³

In case the landlord, instead of making a re-entry, resorts to a judicial proceeding to recover possession on breach of con-

²⁹⁶ Apparently to the effect that no notice is necessary is *Den d. Little Circle Zinc Co.*, 126 Mo. App. 173, 103 S. W. 151.

Bray v. McShane, 13 N. J. Law (1 J. S. Green) 35; *Comegys v. Van Rensselaer v. Snyder*, 13 N. Y. Russell, 175 Pa. 166, 34 Atl. (3 Kern.) 299; *Main v. Green*, 32 657. And see *Whitney v. Swett*, 22 Barb. (N. Y.) 448.

N. H. 10, 53 Am. Dec. 228. In *Cannon v. Wilbur*, 20 Neb. 777, 47 N. W. 147; *Cruger v. McLaury*, 41 N. Y. 85, a notice is regarded as necessary. 219.

²⁹⁷ See *Muskett v. Hill*, 5 Bing. N. C. 694; *Smith v. Blaisdell*, 17 Vt. 199. ³⁰⁰ *Van Rensselaer v. Jewett*, 2 N. Y. (2 Comst.) 135; *Martin v. Rector*, 118 N. Y. 476, 23 N. E. 893, 16 Am. St. Rep. 771; *Garner v. Hannah*, 13 N. Y. Super. Ct. (6 Duer) 262.

³⁰¹ Pub. St. 1901, c. 246, § 4.

³⁰² *Russell v. Allard*, 18 N. H. 222.

³⁰³ *Whitney v. Swett*, 22 N. H. 10, 53 Am. Dec. 228.

dition, the action of ejectment, or its statutory equivalent, is ordinarily the proper form of proceeding. In some jurisdictions, however, a summary proceeding is available for this purpose.³⁰⁴

While a court of equity will not ordinarily declare or enforce a forfeiture,³⁰⁵ it has been decided that a landlord may there obtain such relief on account of the breach of a condition, when possession and control of the property has been taken by that court through its receiver.³⁰⁶

It has been held that the landlord cannot enforce a condition as to part of the premises, and waive it as to the balance,³⁰⁷ and this seems to accord with the common-law rule that a condition shall not be apportioned.³⁰⁸ It has, however, been decided, in another state, that one having the leasehold interest in part of the premises cannot, in ejectment against him to enforce the condition as to that part, assert in defense that the landlord did not seek to enforce it against another part, in the possession of another tenant.³⁰⁹

k. Effect of enforcement of forfeiture. The effect of the enforcement of a forfeiture is to terminate the tenancy, and, ordinarily, the rights and obligations connected therewith.³¹⁰ Thereafter, for instance, the tenant cannot usually assert a right to remove fixtures annexed by him to the premises,³¹¹ nor assert a right to emblements.³¹² And it has been decided that, when the

³⁰⁴ See post, § 274 b.

³⁰⁵ *Pomeroy, Equity Jurisprudence*, §§ 459, 460. That an injunction against the tenant's use of the premises after breach of a condition is not the landlord's proper remedy, see *Kramer v. Amberg*, 53 Hun, 427, 6 N. Y. Supp. 303.

³⁰⁶ *Gunning v. Sorg*, 214 Ill. 616, 73 N. E. 870.

³⁰⁷ *Ocean Grove Land Ass'n v. Berthall*, 62 N. J. Law, 88, 40 Atl. 779.

³⁰⁸ See ante, note 181.

³⁰⁹ *Main v. Green*, 32 Barb. (N. Y.) 448, 33 Barb. 136. See *Stuyvesant v. Grissler*, 12 Abb. Pr. (N. S.) 6.

³¹⁰ In *Marshall v. Davis*, 28 Ky.

Law Rep. 1327, 91 S. W. 714, a clause that in case the lessee continued in possession after the expiration of the term or after forfeiture he should hold in accord with the terms of the lease was given the effect, apparently, of making the lessee a tenant of the lessor for the original term, even after re-entry for condition broken. How the term could be forfeited and yet still exist in the lessee is not entirely clear.

³¹¹ See post, § 242 d. But one who has sold articles to the tenant, retaining title in himself, can remove them. *Webster v. Bates Mach. Co.*, 64 Neb. 306, 89 N. W. 789.

³¹² See post, § 251 d. It has been

statute makes the service of a declaration in ejectment equivalent to a re-entry, the tenant cannot claim the crops, even though they were severed by him before the judgment in such action in favor of the landlord, the possession obtained by the landlord under the judgment relating back to the date of the service of the declaration.³¹³ It has been decided in one state that one to whom the tenant has sold the crops before any default stands in a better position than the tenant in this regard, and may claim them, even though not actually severed, as against the landlord re-entering for a forfeiture,³¹⁴ while elsewhere it was held that a mortgagee of the crops has no greater rights than the tenant himself and cannot claim them as against the landlord in such case,³¹⁵ a view which seems more in accordance with the generally accepted rules as to the effect of a forfeiture.

A subtenant is, ordinarily at least, entitled to emblements upon the termination of his interest by reason of an act of forfeiture on the part of the principal tenant, although the latter is not so entitled.³¹⁶ But no such right exists in favor of the subtenant, it has been decided, if he took his sublease and sowed the crop after the service of a declaration in an action by the principal landlord to enforce the forfeiture, such service being, by statute, equivalent to a re-entry.³¹⁷

By the enforcement of the forfeiture, the same estate becomes revested in the lessor, or his transferee, as was vested in the lessor at the time of making the lease,³¹⁸ and his rights take precedence of all mesne charges and incumbrances.³¹⁹ So a mortgage,³²⁰ or other lien,³²¹ arising or created since the making of

held that the fact that the landlord denied the tenant's right to harvest a crop and that he repaired a fence does not show a re-entry, so as to preclude the tenant from thereafter taking the crop. See *Somers v. Loose*, 127 Mich. 77, 86 N. W. 386.

³¹³ *Samson v. Rose*, 65 N. Y. 411.

³¹⁴ *Nye v. Patterson*, 35 Mich. 413; *Carney v. Mosher*, 97 Mich. 554, 56 N. W. 935.

³¹⁵ *Gregg v. Boyd*, 69 Hun, 588, 23 N. Y. Supp. 918.

³¹⁶ *Bevans v. Briscoe*, 4 Har. & J.

(Md.) 139; *Samson v. Rose*, 65 N. Y. 411.

³¹⁷ *Samson v. Rose*, 65 N. Y. 411.

³¹⁸ Co. Litt. 202 a.

³¹⁹ Bac. Abr., Conditions (O. 4).

³²⁰ *Abrahams v. Tappe*, 60 Md. 317; *Crandall v. Sorg*, 99 Ill. App. 22.

³²¹ *Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. 476, 21 L. R. A. 489, 36 Am. St. Rep. 486; *Mills v. Matthews*, 7 Md. 315; *Gable v. Preachers' Fund Soc.*, 59 Md. 455; *Lenderking v. Rosenthal*, 63 Md. 28, 52 Am. Rep. 495.

the lease, is absolutely divested. The interest of one claiming as subtenant under the lessee or under an assignee of the lessee is also divested by the assertion of the forfeiture.³²²

It was decided in England, under the old practice in ejectment, that, after the rendition of a judgment for the landlord in such an action brought to enforce a forfeiture, the tenant was to be considered, in point of law, as a trespasser from the day of the demise laid in the declaration, and that therefore he had, at an intervening day, no interest in the crops on which an execution against the tenant could then be validly levied.³²³ On a like theory, since the abolition of the fictions in ejectment, an execution levied on the crops after the date of the landlord's re-entry, or of whatever act on his part might be regarded as equivalent thereto, would be nugatory as against the landlord. It would seem, indeed, that the crops being, until severed, a part of the land, a re-entry by the landlord would take precedence of an execution which may have been levied at any time previous to such re-entry, unless the levy is to be regarded as a constructive severance.³²⁴

After a re-entry under a provision that, on default, the lessor might re-enter and repossess and enjoy the premises as of his former estate, the tenant cannot, it has been decided, claim payment for improvements under a stipulation in the lease for such payment "at the expiration of the term."³²⁵

There are in New York somewhat early decisions to the effect that, if the landlord takes possession after the tenant has vacated, with rent in arrear, and the landlord, or one claiming under him, thereafter holds possession for a number of years, it will be presumed, in favor of the latter's title, that he re-entered under a clause of re-entry in the lease.³²⁶ At the present day, pre-

But a forfeiture, so called, by agreement, without any ground therefor, cannot divest the lien of an execution against the lessee (Farnum v. Hefner, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174), or, presumably any other lien.

³²² See ante, at notes, 187, 188.

³²³ Hodgson v. Gascoigne, 5 Barn. & Ald. 88.

³²⁴ See Russell v. Moore, 8 L. R.

Ir. 318, where such a view is intimated, but the decision was finally based on the fact that the proceeding was under the statute to recover possession for nonpayment of rent, and not at common law to enforce a forfeiture for breach of condition.

³²⁵ Bates v. Johnston, 58 Hun, 528, 12 N. Y. Supp. 403; Id., 126 N. Y. 681, 28 N. E. 249.

³²⁶ In Jackson v. Demarest, 2

sumably, in such a case, the title of the landlord to the premises, free from any rights in the tenant, would be supported upon the theory, not of a presumption of re-entry, but of a surrender by operation of law.³²⁷

A provision that on re-entry the subleases should "belong to" the head landlord has been held not to create the relation of landlord and tenant between him and the sublessees.³²⁸

The effect of the enforcement of a forfeiture of the tenant's interest, as terminating the liability for rent, and the operation of the occasional stipulations looking to the continuance of the tenant's liability in that respect in spite of the forfeiture, have been previously discussed.³²⁹

1. **Relief against forfeiture**—(1) **General rule.** As a general rule, courts of equity will not grant relief from forfeiture for a cause other than the non-payment of a sum of money,³³⁰ in the absence of fraud, accident, surprise or mistake. So relief has been refused when the asserted forfeiture was for breach of a covenant not to assign nor underlet without the landlord's consent,³³¹ not to permit the existence of a way over the land,³³² to repair the premises,³³³ to make improvements,³³⁴ to refrain from a

Caines (N. Y.) 382, which was not a case of a lease, properly speaking, but of a conveyance in fee with a clause of re-entry for nonpayment of rent, the grantee vacated, and the grantor then sold to one who occupied fourteen years, and a valid re-entry was presumed. In *Jackson v. Stewart*, 6 Johns. (N. Y.) 34, a case of a lease for 999 years, a re-entry was presumed after a lapse of twenty-two years from the landlord's re-sumption of possession. In *Jackson v. Walsh*, 3 Johns. (N. Y.) 226, possession for nine years, and in *Jackson v. Elsworth*, 20 Johns. (N. Y.) 180, for ten years, was held insufficient to raise a presumption of re-entry; and in *Garrett v. Scouten*, 3 Denio (N. Y.) 334, it was recognized that mere lapse of time, unaccompanied by a change of possession, raised no such presumption.

³²⁷ See ante, § 190 c.

³²⁸ *Williams v. Michigan Cent. R. Co.*, 133 Mich. 448, 95 N. W. 708, 103 Am. St. Rep. 458.

³²⁹ See ante, § 182 j.

³³⁰ See *Gregory v. Wilson*, 9 Hare, 683; *Hill v. Barclay*, 18 Ves. 56; *Nokes v. Gibbon*, 3 Drew. 681; *Barrow v. Isaacs* [1891] 1 Q. B. 417; *Sheets v. Selden*, 74 U. S. (7 Wall.) 416.

³³¹ *Wafer v. Mocato*, 9 Mod. 112; *Hill v. Barclay*, 18 Ves. Jr. 56; *Barrow v. Isaacs* [1891] 1 Q. B. 417; *Easton Tel. Co. v. Dent* [1899] 1 Q. B. 835; *Roberts v. Geis*, 2 Daly (N. Y.) 535; *Sheets v. Selden*, 74 U. S. (7 Wall.) 416.

³³² *Descarlett v. Dennett*, 9 Mod. 22.

³³³ *Hill v. Barclay*, 18 Ves. Jr. 56; *Gregory v. Wilson*, 9 Hare, 683; *Bracebridge v. Buckley*, 2 Price, 200; *Job v. Banister*, 2 Kay & J. 374.

³³⁴ *Nokes v. Gibbon*, 3 Drew. 681.

particular use of the premises,³³⁵ and to insure.³³⁶ There are, however, occasional decisions in which the courts have shown a disposition to relieve against a forfeiture for failure to repair or improve, in view of the particular circumstances of the case.³³⁷ So in one case it was held that relief would be given against a forfeiture for delay in making improvements, it appearing that the delay was not willful, that the lessee had made preparations to carry on the work, that no demand was made for greater haste, and that no injury resulted to the lessor from the delay, and it further appearing that the requirement that the work be done within a certain time was imposed in order to obtain satisfactory security for the payment of the rent, and that this was promptly paid.³³⁸ In another case, on the theory that equity will relieve in case of a forfeiture involving a hardship on the tenant, if compensation can be made, it was held that, though the landlord was given a right of re-entry in case the tenant failed to make certain improvements, and he actually re-entered for that cause, the tenant was entitled to a specific performance of the lessor's agreement, contained in the instrument of lease, to convey the premises to the lessee on payment of a sum named.³³⁹

(2) **Fraud, mistake, accident and surprise.** What circumstances will constitute such fraud, mistake, accident or surprise as will justify a court of equity in granting relief does not clearly appear from the decisions. Occasionally the courts have asserted the view that if the landlord has, by his conduct, induced the tenant to believe that a strict performance of the covenant or condition will not be insisted on, an attempt on his part to enforce the forfeiture involves a fraud, entitling the tenant to equitable relief.³⁴⁰ By other cases, as before stated, such action

³³⁵ *Macher v. Foundling Hospital*, 465, 45 N. E. 933, 57 Am. St. Rep. 1 Ves. & B. 188.

³³⁶ *Reynolds v. Pitt*, 19 Ves. Jr. 134; *Rolfe v. Harris*, 2 Price, 206, note; *White v. Warner*, 2 Mer. 459; *Thompson v. Guyon*, 5 Sim. 65.

³³⁷ *Hack v. Leonard*, 9 Mod. 91; *Sanders v. Pope*, 12 Ves. Jr. 282; *Bargent v. Thomson*, 4 Giff. 473; *Bamford v. Creasy*, 3 Giff. 675.

³³⁸ *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368.

³³⁹ *Lundin v. Schoeffel*, 167 Mass.

472. Relief against forfeiture for the purpose of obtaining specific performance of a covenant to convey was refused when the term had expired by lapse of time before trial of the proceeding for relief. *Coventry v. McLean*, 21 Ont. App. 176.

³⁴⁰ *Horton v. New York Cent. & H. R. R. Co.*, 12 Abb. N. C. (N. Y.) 30; *Thropp v. Field*, 26 N. J. Eq. (11 C. E. Green) 82.

on the part of the landlord is regarded rather as a waiver of the condition.³⁴¹ So far as such a state of facts may furnish grounds for equitable relief, it seems that it might be regarded as a case of surprise rather than of fraud.

The action of the landlord in eluding the tenant's efforts to pay rent when due, followed by an action to enforce a forfeiture for nonpayment, presents a case of fraud, and equity will relieve in such case.³⁴²

Relief has been accorded as for mistake induced by the landlord when, after notifying the tenant to repair within six months, in accordance with a covenant by the tenant to repair within that length of time after notice, the parties entered upon negotiations looking to a surrender of the lease, and it was decided that a forfeiture would not be allowed until six months had elapsed, exclusive of the time during which the negotiations were pending.³⁴³ And relief was given, on the ground of accident and mistake, against a forfeiture for failure to insure, when the tenant's agent sought to renew the insurance, but the insurer made the policy payable to a creditor of the lessee instead of to the landlord, as required by the lease, and neither the tenant nor the agent knew of this change, and both intended in good faith to comply with the provision of the lease in this respect.³⁴⁴ Upon the same ground, relief was given against a forfeiture for breach of a condition against making such a noise, while preparing the premises for occupation, as to disturb performances in the landlord's theatre on the adjoining premises, where the tenant's employee, while testing the wall, though told to be careful as to noise, drove a chisel through the wall for about a minute, it not having oc-

³⁴¹ See ante, § 194 i (3).

In *Lilley v. Fifty Associates*, 101 Mass. 432, it was decided that where the yearly rent reserved in a lease for a thousand years was "ten tons of Russia Old Sables iron," and the equivalent had been accepted in cash for forty years, and for six years such iron had not been imported for the market, a notice dated December 12th, that rent due March 1st must be paid in iron, was unreasonable, this not giving suffi-

cient time for its importation, and a threatened re-entry for nonpayment of rent would be relieved against on the ground, as stated, that the attempt to enforce the forfeiture was unjust and inequitable.

³⁴² *Young v. Ellis*, 91 Va. 297, 21 S. E. 480.

³⁴³ *Hughes v. Metropolitan R. Co.*, 2 App. Cas. 439.

³⁴⁴ *Mactier v. Osborn*, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323.

curred to him that a performance was going on at the time.³⁴⁵ But where a breach of a covenant against subletting without consent was due to forgetfulness on the part of the tenant's agent that the landlord's assent was required, the court refused to grant relief, for the reason either that this was not a "mistake" within the meaning of the rule, or that, if a mistake, it was due to negligence for which the tenant was responsible.³⁴⁶ Relief on the ground of accident and surprise was given in one case against a forfeiture for nonrepair within three months after notice, where it appeared that, out of twenty-two items of repair, twenty had been proceeded with and fourteen completed, that the tenant had honestly endeavored to make the repairs, and that they had, in part, been delayed by the weather.³⁴⁷

(3) **Nonpayment of money.** In a court of equity, a clause of re-entry for nonpayment of rent is regarded as intended only to secure the payment of the rent, and such a court will, ordinarily at least, upon the payment of rent and of costs and expenses, relieve against the forfeiture and continue the tenant in the possession.³⁴⁸ The right of the tenant to such relief in equity, apparently already well established,³⁴⁹ was recognized and confirmed by the statute of 4 Geo. 2, c. 28, §§ 3, 4, which imposed certain conditions as to the payment into court, by the tenant seeking relief, of the amount of the rent claimed and of the costs in the ejectment suit.³⁵⁰ This statute also required that a bill for equitable

³⁴⁵ *Lundin v. Schoeffel*, 167 Mass. 465, 45 N. E. 933, 57 Am. St. Rep. 472. *Co. v. Wakefield*, 72 Wis. 204, 39 N. W. 136, 1 L. R. A. 178; *Sheets v. Selden*, 74 U. S. (7 Wall.) 416.

³⁴⁶ *Barrow v. Isaacs* [1891] 1 Q. B. 417.

³⁴⁷ *Bargent v. Thomson*, 4 Giff. 473, per Stuart, V. C. And see *Bamford v. Creasy*, 3 Giff. 675.

³⁴⁸ *Wadman v. Calcraft*, 10 Ves. Jr. 67; *Howard v. Fanshawe* [1895] 2 Ch. 581; *Abrams v. Watson*, 59 Ala. 524; *Wilson v. Jones*, 64 Ky. (1 Bush) 173; *Mactier v. Osborn*, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323; *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368; *Horton v. New York Cent. R. Co.*, 12 Abb. N. C. 30, 102 N. Y. 697; *Sunday Lake Min.*

In *Fleming v. Fleming Hotel Co.*, 69 N. J. Eq. 509, 61 Atl. 157, it was held that, a receiver having been appointed for the lessee, the equity court would not grant a petition of the lessor seeking a forfeiture of the lease until it appeared that the receiver was unable or unwilling to pay the rent.

³⁴⁹ See *Taylor v. Knight*, 4 Vin. Abr., Chancery (Y) pl. 31; *Doe d. Jersey v. Smith*, 7 Price, 281, 326.

³⁵⁰ See *Bowser v. Colby*, 1 Hare, 109; *Howard v. Fanshawe* [1895] 2 Ch. 581.

relief be filed within six months after the execution on the judgment in ejectment, a failure to do this barring all relief, other than by writ of error. The above statute also provided that if the tenant at any time before trial in the ejectment should pay or tender the rent and costs, all further proceedings in the ejectment should cease. Even before this statute, it had been the practice of the court of law in which the ejectment was pending thus to relieve the tenant upon payment of the rent at any time before execution,³⁵¹ and the effect of the statute was to restrict such relief in the ejectment suit to the time before trial.³⁵²

The fact that the statute 4 Geo. 2, c. 28, above referred to, provides in terms for relief only when the landlord's right of re-entry is enforced by action of ejectment, has been regarded as not excluding relief when the landlord, instead of maintaining ejectment, makes an actual re-entry on the premises.^{352a}

In a number of states there are statutory provisions enabling the tenant to obtain relief from a forfeiture for nonpayment of rent by paying the rent and costs, either in the proceeding brought to enforce the forfeiture, or by a separate proceeding in equity.³⁵³ The right of the tenant to obtain a stay of the former pro-

³⁵¹ *Gregg's Case*, 2 Salk. 596; *Phillips v. Doelittle*, 8 Mod. 345; *Smith v. Parks*, 10 Mod. 383; *Goodtitle v. Holdfast*, 2 Strange, 900.

³⁵² See *Roe d. West v. Davis*, 7 East, 363; *Doe d. Harris v. Masters*, 2 Barn. & C. 490.

^{352a} *Howard v. Fanshawe* [1895] 2 Ch. 581.

³⁵³ *Illinois*, Hurd's Rev. St. 1905, c. 80, § 4 (May pay rent in arrear and costs before judgment or before execution of writ of possession, or may obtain relief within six months by bill in equity); *Minnesota* Rev. Laws 1905, § 3328 (At any time before possession delivered to plaintiff on recovery by him, tenant may be restored to possession on paying rent, interest and costs); *Missouri* Rev. St. 1899, §§ 4120, 4122 (Tenant may put an end to proceedings by tendering or paying into court the rent and costs, or mortgagee may protect his interest by paying rent, costs and charges within three months after judgment for possession); *New Jersey*, 2 Gen. St. p. 1916, §§ 7, 8 (Lessee or person claiming under him may file bill in equity for relief, but not more than six months after execution. Same as English statute); *New York* Code Civ. Proc. § 1508 (Substantially same as Minnesota); *North Carolina* Revisal 1905, § 2007 (Tenant may tender or pay into court, during the action, the rent and costs); *Oregon*, Bell. & C. Codes, § 338 (Substantially same as North Carolina); *Virginia* Code 1904, §§ 2796, 2800 (Tenant or his mortgagee may pay interest and costs, or file a bill in equity for relief within twelve months); *West Virginia* Code 1906, §§ 3410-3413 (Same).

ceeding by the making of such payment has been recognized even without reference to any statute, in this country as well as in England.³⁵⁴ A tender of the rent will be as effectual to entitle the tenant to relief as would payment, provided, it seems, the tender is kept good.³⁵⁵

The court may occasionally refuse to relieve against a forfeiture even for nonpayment of rent. For instance, relief will not be given in case of forfeiture for nonpayment of rent, if the tenant has been guilty of breach of other covenants for which a right of re-entry is given, and against which equity will not relieve,³⁵⁶ nor if the restoration of the tenant to the undisturbed possession of the premises will endanger the rights of the landlord,³⁵⁷ nor if the landlord or other parties interested cannot be put in the same position as before.³⁵⁸ And in one case, where relief was sought after the expiration of the term, in order that the tenant might avail himself of a covenant for renewal, it was decided that even if equity would ever relieve after the expiration of the term, it would not do so in that case, as there were circumstances of fraud which would preclude enforcement of such covenant.³⁵⁹

While it is ordinarily necessary that the tenant, in order to obtain relief from forfeiture for nonpayment of rent, should pay or tender to the landlord the rent due, or pay it into court,³⁶⁰

³⁵⁴ *Atkins v. Chilson*, 52 Mass. (11 Metc.) 112; *Planters' Ins. Co. v. Diggs*, 67 Tenn. (8 Baxt.) 563; *Abrams v. Watson*, 59 Ala. 524, and ante, note 351.

³⁵⁵ *Chapman v. Kirby*, 49 Ill. 211; *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435; *Burnes v. McCubbin*, 3 Kan. 222, 87 Am. Dec. 468; *Lewis v. City of St. Louis*, 69 Mo. 595; *City of Carondelet v. Wolfert*, 39 Mo. 305; *Wacholz v. Griesgraber*, 70 Minn. 220, 73 N. W. 7. In the last cited case it was held that the landlord was liable in damages if he forcibly dispossessed the tenant after tender of the rent, although he was, under the statute, entitled to be restored to possession.

³⁵⁶ *Nokes v. Gibbon*, 3 Drew. 693; *Bowser v. Colby*, 1 Hare, 109; *Wadman v. Calcroft*, 10 Ves. Jr. 67.

³⁵⁷ *Sunday Lake Min. Co. v. Wakefield*, 72 Wis. 204, 39 N. W. 136, 1 L. R. A. 178.

³⁵⁸ *Stanhope v. Haworth*, 3 Times Law R. 34.

³⁵⁹ *Coventry v. McLean*, 21 Ont. App. 176. Compare ante, at note 339. See, also, as to circumstances under which equity might not relieve, citations in note to *Maginnis v. Knickerbocker Ice Co.*, 69 L. R. A. at p. 833. This note contains a full collection of authorities upon the subject of equitable relief against forfeiture of an estate.

³⁶⁰ *O'Mahony v. Dickson*, 2 Schoales & L. 400.

this was in one case dispensed with where the landlord was indebted to the tenant in more than the amount of the arrears of rent,³⁶¹ and in another where the dealings between the parties were so complicated that an account could not be taken at law, and the tenant filed a bill in equity for an accounting and to have the balance applied on the rent.³⁶²

In several cases relief has been given against forfeiture for non-payment of taxes, on the theory that the clause of re-entry is, as in the case of the rent, intended merely to secure payment.³⁶³ Relief has, however, been refused when the tenant had allowed the taxes for several years to be in arrear, the property had been sold for taxes, and he had failed to redeem from the sale.³⁶⁴ And generally, it appears, he is not entitled to relief after the land has been sold for taxes, in the absence at least of a showing that he allowed the property to go to sale through accident or mistake.³⁶⁵ The fact that the tax sale might, upon investigation, prove to be invalid, does not give him a right to relief in such a case.³⁶⁶

A court having jurisdiction of the parties may give relief, even though the premises are situated in another state, and it can consequently not put the tenant in possession.³⁶⁷

(4) **Persons in favor of and against whom relief given.** Relief

- ³⁶¹ *Abrams v. Watson*, 59 Ala. 524. the landlord owed the tenant more than the amount of the rent.
- And see *Sheets v. Selden*, 74 U. S. (7 Wall.) 416, where it is said that the tenant should have tendered the difference between the rent due and what he claimed to be due from the landlord. But in *O'Mahony v. Dickson*, 2 Schoales & L. 400, it was decided that if the question of the accounts is not too complicated to be tried at law, and consequently could be brought forward in the action of ejectment to enforce the forfeiture, a bill did not lie by the tenant for an account and to be restored to possession on payment of what might appear due, but that he must bring the rent and costs into court. And in *Faylor v. Brice*, 7 Ind. App. 551, 34 N. E. 833, it was decided that a forfeiture for nonpayment of rent was not prevented by the fact that
- ³⁶² *O'Connor v. Spaight*, 1 Schoales & L. 305. And see *Beasley v. Darcy*, 2 Schoales & L. 403.
- ³⁶³ *Giles v. Austin*, 62 N. Y. 486; *Garner v. Hannah*, 13 N. Y. Super. Ct. (6 Duer) 262; *Planters Ins. Co. v. Diggs*, 67 Tenn. (8 Baxt.) 563; *Abrahams v. Tappe*, 60 Md. 317 (semble); *Buckley v. Beigle*, 8 Ont. 85.
- ³⁶⁴ *Bacon v. Park*, 19 Utah, 246, 57 Pac. 28.
- ³⁶⁵ *Gordon v. Richardson*, 185 Mass. 492, 70 N. E. 1027, 69 L. R. A. 867.
- ³⁶⁶ *Kann v. King*, 204 U. S. 43, 27 Sup. Ct. 213.
- ³⁶⁷ *Sunday Lake Min. Co. v. Wakefield*, 72 Wis. 204, 39 N. W. 136, 1 L. R. A. 178.

may be granted in favor of an assignee of the original lessee, whether the assignment is absolute or by way of mortgage,³⁶⁸ and also in favor of a subtenant,³⁶⁹ but a subtenant apart cannot obtain relief as to his part only, but he must pay all the arrears of rent due on the whole premises.³⁷⁰ A creditor of the tenant, having a judgment lien against the property, has also been granted relief against a forfeiture incurred by the tenant.³⁷¹

Relief may be granted against one to whom the lessor has transferred the reversion after the act of forfeiture, to the same extent as against the lessor himself, since the rights of the tenant in this regard cannot be affected by such a transfer.³⁷²

It has been held that under a statute giving a right of redemption to a mortgagee of the leasehold as well as to the tenant, and providing that he must exercise this right within six months after execution on the judgment in ejectment, the six months does not begin to run against a mortgagee upon a merely nominal execution of the writ by notification to the tenant, without any open and notorious change of possession.³⁷³

³⁶⁸ Doe d. Whitfield v. Roe, 3 Taunt. 402; Newbolt v. Bingham, 72 Law T. (N. S.) 852. under a statute, but the court expressed the opinion that the lessor had a common-law right thereto.

³⁶⁹ Berney v. Moore, 2 Ridg. App. 310. ³⁷² Abrams v. Watson, 59 Ala. 524; Hagar v. Buck, 44 Vt. 285, 8 Am.

³⁷⁰ Webber v. Smith, 2 Vern. 103. Rep. 368.

³⁷¹ Corning v. Beach, 26 How. Pr. (N. Y.) 289. The relief was granted ³⁷³ Newell v. Whigham, 102 N. Y. 20, 6 N. E. 673.

CHAPTER XX.

NOTICE TO QUIT.

- § 195. General considerations.
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§ 195. General considerations.

The expression "notice to quit" refers to the notice which is, by law, in certain cases, necessary to be given by one party to the relation of landlord and tenant, to the other party thereto, in order that the tenancy may be terminated.¹ Though the expression in form would properly apply only to a notice by the landlord to the tenant, since the tenant cannot well notify the landlord "to quit" premises which are in the former's possession, it is nevertheless applied to a notice by the tenant of his intention to quit the possession.

In a number of states there is a statutory provision authorizing the landlord to terminate the tenancy, upon the tenant's default in the payment of rent, by giving him a notice of a prescribed

¹ As to the nature of a notice to quit, see the opinions in *Bellman*, 4 Exch. Div. 201. *Ahearn v.*

number of days to that effect. The subject of such notice, in effect to enforce a forfeiture for the tenant's default, is considered elsewhere.²

A notice to quit is also to be distinguished from the demand for possession which, by the common law, the landlord must give, in the case of a tenancy at will, unless he has otherwise determined the will, before bringing an action of ejectment.³ Likewise, it is to be distinguished from the notice or demand for possession which is ordinarily, by statute, required as a condition precedent to the maintenance by the landlord of the statutory proceeding to recover possession at the end of the term,⁴ and which is frequently referred to as a "notice to quit."

The notice necessary to be given by the landlord or the tenant, in order to exercise an option, expressly given by the lease, to terminate the tenancy before the end of the term named, has been previously referred to.⁵ Occasionally the instrument of lease contains a provision for a renewal upon the giving of a certain notice by the tenant, or for an extension of the term in the absence of a notice to the contrary from one party or the other. Such a notice will be considered in connection with stipulations for renewal.⁶

There is no necessity of a notice to quit, ordinarily, unless the relation of landlord and tenant exists between the parties. A mere trespasser cannot claim such a notice,⁷ and so one who enters as tenant cannot assert a right to a notice from a person claiming by title paramount, he being a mere trespasser as to such person.^{7a}

² See post, § 274 d (4).

⁴ See post, § 274 a (3).

³ See ante, § 13 b, at notes 403-405. The courts do not always so distinguish however. See e. g., *Den d. Mackey v. Mackey*, 2 N. J. Law (1 Penning.) 400; *Chicago, B. & Q. R. Co. v. Knox College*, 34 Ill. 195; *Murray v. Armstrong*, 11 Mo. 209, 47 Am. Dec. 151; *Bedford v. McElherron*, 2 Serg. & R. (Pa.) 48, in which cases, by the statement that the tenant is entitled to notice to quit before the bringing of an action against him for possession is apparently meant that a demand for possession must be first made.

⁵ See ante, § 12 e (4), f.

⁶ See post, § 223.

⁷ *Kilburn v. Ritchie*, 2 Cal. 145, 56 Am. Dec. 326; *Petty v. Malier*, 54 Ky. (15 B. Mon.) 606; *Jackson v. Rogers*, 1 Johns. Cas. (N. Y.) 33; *Jackson v. Robinson*, 4 Wend. (N. Y.) 436; *Jackson v. Deyo*, 3 Johns. (N. Y.) 422, 3 Am. Dec. 509; *Doe d. Borden v. Bell*, 53 N. C. (8 Jones Law) 294; *Neppach v. Jordan*, 15 Or. 308, 14 Pac. 353; *Doe v. Johnston*, 2 McLean, 323, Fed. Cas. No. 3,958.

^{7a} *Keech v. Hall*, 1 Doug. 21; *Doe*

And a mere licensee or servant is, usually at least, not entitled to notice.⁸

§ 196. Particular classes of tenancies.

a. **Tenancy for years.** At common law a notice to quit is unnecessary in order to terminate a tenancy for years at the expiration of the term named in the lease, each party being charged with knowledge of the time of such expiration.⁹ In a number of states it is expressly provided by statute that no notice shall be necessary to terminate such a tenancy at the time named in the lease.¹⁰ In a few states, however, the statutes seem to require

d. *Pietland v. Hilder*, 2 Barn. & Dec. 266; *Preble v. Hay*, 32 Me. 456; *Adol.* 782; *Roosevelt v. Hungate*, 110 Ill. 595; *Locke v. Coleman*, 18 Ky. (2 T. B. Mon.) 12, 15 Am. Dec. 118; *Thackray v. Cheeseman*, 18 N. J. Law (3 Har.) 1; *Eberwine v. Cook*, 74 Ind. 377.

⁸ *Doe d. Hughes v. Derry*, 9 Car. & P. 494; *Mayhew v. Suttle*, 4 El. & Bl. 347; *Aldin v. Latimer Clark*, *Muirhead & Co.* [1894] 2 Ch. 437, 448; *Wilson v. Tavener* [1901] 1 Ch. 578; *Johns v. McDaniel*, 60 Miss. 486; *Messerly v. Mercer*, 45 Mo. App. 327; *Doyle v. Gibbs*, 6 Lans. (N. Y.) 180; *Jackson v. Sample*, 1 Johns. Cas. (N. Y.) 231. In *Lowe v. Adams* [1901] 2 Ch. 598, it was held that to terminate a right of shooting over land, an "incorporeal hereditament," held under a yearly rent, a six months' notice was not necessary, but merely a reasonable notice.

⁹ *Cobb v. Stokes*, 8 East, 358; *Messenger v. Armstrong*, 1 Term R. 53; *Canning v. Fibush*, 77 Cal. 196, 19 Pac. 376; *Hihn v. Mangenberg*, 89 Cal. 268, 26 Pac. 968; *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729; *Walker v. Ellis*, 12 Ill. 470; *Secor v. Pestana*, 37 Ill. 525; *Pierson v. Turner*, 2 Ind. 123; *Hamit v. Lawrence*, 9 Ky. (2 A. K. Marsh.) 366; *Stockwell v. Marks*, 17 Me. 455, 35 Am. Dec. 266; *Preble v. Hay*, 32 Me. 456; *Dorrell v. Johnson*, 34 Mass. (17 Pick.) 266; *Engels v. Mitchell*, 30 Minn. 122, 14 N. W. 510; *Waldo v. Jacobs*, 152 Mich. 425, 15 Det. Leg. N. 316, 116 N. W. 371; *Young v. Smith*, 28 Mo. 65, 75 Am. Dec. 109; *Mastin v. Metzinger*, 99 Mo. App. 613, 74 S. W. 431; *Williams v. Mershon*, 57 N. J. Law, 242, 30 Atl. 619; *Allen v. Jaquish*, 21 Wend. (N. Y.) 628; *Cox v. Sammis*, 57 App. Div. 173, 68 N. Y. Supp. 203; *Den d. Stedman v. McIntosh*, 26 N. C. (4 Ired. Law) 291, 42 Am. Dec. 122; *McGregor v. Rawle*, 57 Pa. 184; *Ashhurst v. Eastern Pennsylvania Phonograph Co.*, 166 Pa. 357, 31 Atl. 116; *Logan v. Herron*, 8 Serg. & R. (Pa.) 459.

In *Weller v. Carnew*, 29 Ont. 400, it is decided that an express stipulation for such a notice, in the case of a tenancy for years, is invalid. But see *Wilcox v. Montour Iron & Steel Co.*, 147 Pa. 540, 23 Atl. 840, where, on a construction of particular language looking to a possible renewal from year to year and providing for a notice to quit, the latter provision was held to apply to the original term as well as to the renewal tenancy.

¹⁰ *Arizona Rev. St.* 1901, § 2694; *Colorado, Mills' Ann. St.* § 1976; *Dis-*

a notice in order to terminate the tenancy at the end of the term, even though the duration thereof is clearly defined by the lease.¹¹

If a tenancy for years is to terminate upon some contingency, that is, if there is a "special" or "conditional" limitation to that effect, the tenancy terminates upon the happening of such contingency, without any notice by one party to the other.¹² Such,

tract of Columbia Code 1901, § 1218; *Illinois*, Hurd's Rev. St. 1905, c. 80, § 12 (see *Knecht v. Mitchell*, 67 Ill. 86); *Indiana*, Burns' Ann. St. 1901, § 7094; *Iowa* Code 1897, § 2991; *Kansas* Gen. St. 1905, § 4059; *Kentucky* St. 1903, § 2293; *Mississippi* Code 1906, § 2882; *Missouri* Rev. St. 1899, § 4111; *Oklahoma* Rev. St. 1903, § 3328; *South Carolina* Civ. Code 1902, § 2415; *Virginia* Code 1904, § 2785; *Washington* Ball. Ann. Codes & St. § 4570; *West Virginia* Code 1906, § 3398.

¹¹ *Delaware* Rev. Code 1893, p. 866, § 4 (If notice to quit not given by landlord or tenant, in case of a term of one or more years, three months before the end of the term, lease renewed for another year. At page 772, summary proceedings are authorized against the tenant provided the landlord gives three months' notice before end of term). See *Thomas v. Black*, 8 *Houst. (Del.)* 507, 18 *Atl.* 771; *Bonsall v. McKay*, 1 *Houst. (Del.)* 520; *Roberts v. Grubb*, 5 *Houst. (Del.)* 461. *Illinois*, Hurd's Rev. St. 1905, c. 80, § 6 (Tenancies less than one year). See *Dunne v. Trustees of Schools*, 39 *Ill.* 578. *Missouri* Rev. St. 1899, § 4110 (One month's notice in case of tenancy for less than one year); *Rhode Island* Gen. Laws 1896, c. 269, § 4 (Tenants by parol for any term less than a year shall quit at the end of the term upon notice in writing from the landlord given at least half the period of the term, not

exceeding in any case three months before the end of the term). See, also, *Wolfer v. Hurst*, 47 *Or.* 156, 80 *Pac.* 419, 82 *Pac.* 20, construing the Oregon statute in this respect. In *Reccius v. Columbia Finance & Trust Co.*, 27 *Ky. Law Rep.* 880, 86 *S. W.* 1113, a tenant from month to month is regarded as a tenant for a month for the purpose of the application of such a statute.

In Pennsylvania the courts sometimes speak as if a notice to quit were necessary to terminate a tenancy for years, the notice to be given three months before the expiration of the tenancy. But the notice thus referred to is that required by Act Dec. 14, 1863, as a condition precedent to a proceeding to recover possession, which the statute requires to be given three months before the end of the term. See *Rich v. Keyser*, 54 *Pa.* 86, 93 *Am. Dec.* 675; *Snyder v. Carfrey*, 54 *Pa.* 90.

¹² *Scott v. Willis*, 122 *Ind.* 1, 22 *N. E.* 786; *Clark v. Rhodes*, 79 *Ind.* 342; *People v. Schackno*, 48 *Barb. (N. Y.)* 551; *Den d. Stedman v. McIntosh*, 26 *N. C. (4 Ired. Law)* 291, 42 *Am. Dec.* 122; *Sprague v. Quinn*, 108 *Mass.* 553; *Doe d. Waithman v. Miles*, 1 *Starkie*, 181; *Doe d. Colnaghi v. Bluck*, 8 *Car. & P.* 464. See ante, § 12 d.

In *Babcock v. Albee*, 54 *Mass.* (13 *Metc.*) 273, it was decided that if a landlord, after terminating the tenancy by notice, told the tenant

for instance, is the case when the tenancy is to cease upon the cessation of the use of the premises for a certain purpose,¹³ or upon the termination of the relation of employer and employee between the parties.¹⁴ But occasionally, as before stated,¹⁵ there is an option in the landlord or tenant to terminate the tenancy, at any time, or at a time or on a contingency named, and any requirement of the lease as to a notice of the exercise of such an option must be strictly complied with.¹⁶ Even when there is no provision as to notice of the exercise of the option, the tenant has been held to be entitled to a reasonable notice thereof before being compelled to vacate.¹⁷

b. **Tenancy at will.** By the English cases it has always been assumed that a tenancy at will may be terminated immediately by notice, without allowing the tenant any period of time between the receipt of the notice and the time for him to quit thereunder,¹⁸ though his right to re-enter for the purpose of securing crops planted by him, and also his right to enter, within a reasonable time after the termination of the tenancy, in order to remove his goods, have always been recognized.¹⁹ In this country, likewise, it has not infrequently been decided that the landlord may demand immediate possession.²⁰ In some jurisdictions, however,

that he might remain "a while longer," till he could sell off his goods, this made the tenant one at sufferance, or it constituted a demise for a term, understood by the parties to be fixed by the purpose to be accomplished, in neither of which cases was the tenant entitled to a new notice. It may be remarked that he could not have been a tenant at sufferance, since his continued possession was by permission. As to regarding him as a tenant for a term, see ante, § 12 c (2) (b).

¹³ *Horner v. Leeds*, 25 N. J. Law (1 Dutch.) 106; *Creech v. Crockett*, 59 Mass. (5 Cush.) 133.

¹⁴ *Hackett v. Marmet Co.*, 3 C. C. A. 76, 52 Fed. 268, 17 L. R. A. 804; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299; *Grosvenor v. Henry*, 27 Iowa, 269.

¹⁵ See ante, § 12 e, f.

¹⁶ See ante, §§ 12 e (4), 12 f, at notes 265-270.

¹⁷ *Shaw v. Hoffman*, 25 Mich. 162. And see *Goodright v. Richardson*, 3 Term R. 462.

¹⁸ See *Doe d. Tomes v. Chamberlaine*, 5 Mees. & W. 14; *Doe d. Hull v. Wood*, 14 Mees. & W. 682; *Doe d. Price v. Price*, 9 Bing. 356.

¹⁹ See post, § 251 c (3), 255 a, note 21.

²⁰ *Blatchley v. Coles*, 6 Colo. 82; *Herrell v. Sizeland*, 81 Ill. 457; *Cross v. Campbell*, 89 Ill. App. 489; *Peters v. Balke*, 170 Ill. 304, 48 N. E. 1012; *Sullivan v. Enders*, 33 Ky. (3 Dana) 66; *Grant v. White*, 42 Mo. 285; *Moore v. Boyd*, 24 Me. 242; *Withers v. Larrabee*, 48 Me. 570; *Johnson v. Johnson*, 13 R. I. 467; *Den d. Humphries v. Humphries*, 25 N. C. (3

the courts have regarded this rule as bearing with undue harshness on the tenant, and have required some notice before the landlord can demand possession.²¹ Occasionally it has been said that six months' notice is necessary, on the theory, which is now generally repudiated,²² that all tenancies at will are to be regarded as tenancies from year to year.²³ In other cases the length of notice necessary is regarded as dependent on the particular circumstances of the case, rendering a greater or less time requisite for the proper removal of the tenant's crops and other property.²⁴

In a number of states there are statutory provisions expressly

Ired. Law) 362; *Den d. Howell v. Howell*, 29 N. C. (7 Ired. Law) 496.

²¹ *Cody v. Quarterman*, 12 Ga. 386; *Sloat v. Rountree*, 87 Ga. 470, 13 S. E. 637 (semble). In *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615, it is said (per Redfield, J.) that, though six months' notice is not necessary as in the case of tenancies from year to year, a reasonable notice is necessary, and, "where emblements are in question, such notice as shall protect the tenant in his rights."

In Massachusetts the decisions previous to the passage of the statute as to the necessity of notice were not in entire harmony. *Ellis v. Paige*, 18 Mass. (1 Pick.) 43; *Coffin v. Lunt*, 19 Mass. (2 Pick.) 71, and note; *Howard v. Merriam*, 59 Mass. (5 Cush.) 563. And see *Leavitt v. Leavitt*, 47 N. H. 329. And this was likewise the case in New York. See *Jackson v. Bryan*, 1 Johns. 322; *Phillips v. Covert*, 7 Johns. 1; *Jackson v. Laughhead*, 2 Johns. 75; *Jackson v. Green*, 4 Johns. 186; *Jackson v. Miller*, 7 Cow. 747; *Larned v. Hudson*, 60 N. Y. 102. In the latter state the courts seem, before the statute, to have tended to regard a tenancy at will as a tenancy from year to year, for the purpose of notice at least.

²² See ante, § 14 b (2) (c).

²³ *Clark v. Smith*, 25 Pa. 137; *Den d. McEowen v. Drake*, 14 N. J. Law (2 J. S. Green) 523; *Squires v. Huff*, 10 Ky. (3 A. K. Marsh.) 17. The opinion of Putnam, J., in *Ellis v. Paige*, 18 Mass. (2 Pick.) 71, note, 11 Am. Dec. 146, cites several authorities, from the Year Books down, to the effect that a six months' notice is necessary, but, as shown by Redfield, J., in *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615, these appear to have all been cases of a holding from year to year, or to have involved merely the question of emblements.

²⁴ In *Amsden v. Floyd*, 60 Vt. 386, 15 Atl. 332, it is said: "A tenant has the right to a reasonable time to vacate the premises, depending upon the circumstances of the case. Under a lease of agricultural lands, he may be entitled to emblements, and can remain long enough after the lease determines to gather the crops that he has sown, which may be for the greater part of the year. In a lease of buildings, the tenant, when the lease ends, may have nothing in them, and so would need no time to vacate them; in a case like the one at bar, where the premises are used for storing heavy machinery, the lessee should have reason-

requiring a notice of a certain length in order to terminate a tenancy at will, the period named being ordinarily either one or three months,²⁵ with a provision, occasionally, that if the rent is payable at intervals less than the period named for the notice, the notice shall be of the length of such intervals.²⁶ Some of the statutes are so phrased as to require a notice to be given only by the landlord, thus by implication authorizing the tenant to terminate the tenancy immediately, without formal notice, as at common law,²⁷ while others expressly provide for notice by either party desiring to terminate the tenancy.²⁸

In two states the statutes provides that the tenant shall quit

able time to procure other accommodations, and remove his property. A case might arise where it would be necessary to erect buildings; store-houses might be plenty in the vicinity, or, there might be none. No rule can be laid down to apply to all cases." See, to the same effect, *Wheeler v. Wheeler*, 77 Vt. 177, 59 Atl. 842.

²⁵ *California* Civ. Code, § 789 (One month); *Colorado*, Mills' Code, § 1976 (Three days); *Delaware* Rev. Code 1893, p. 773 (Three months); *District of Columbia* Code 1901, § 1220 (Thirty Days); *Georgia* Code 1895, § 3133 (Two months' notice by landlord; one month's notice by tenant); *Idaho* Civ. Code 1901, § 2373 (One month); *Indiana*, Burns' Ann. St. 1901, § 7088 (One month); *Iowa* Code 1897, § 2991 (Thirty days); *Kansas* Gen. St. 1905, § 4054 (Thirty days); *Maine* Rev. St. 1903, c. 96, § 2 (Thirty days); *Massachusetts* Rev. Laws 1902, c. 129, § 12 (Three months); *Michigan* Comp. Laws 1897, § 9257 (Three months); *Minnesota* Rev. Laws 1905, § 3332 (Three months); *Missouri* Rev. St. 1899, § 4110 (One month); *Montana* Rev. Codes 1907, § 4502 (One month); *New Jersey* Acts 1903, c.

13, § 3 (Three months); *New York* Real Prop. Law, § 198 (Thirty days); *North Dakota* Rev. Code 1905, § 4782 (One month); *Oklahoma* Rev. St. 1903, § 3323 (One month); *Oregon*, Bell. & C. Codes, § 5390 (Three months); *South Dakota* Rev. Civ. Code, § 262 (One month); *Wisconsin* Rev. St. 1898, § 2183 (One month).

²⁶ See statutes, above cited, of Iowa, Kansas, Massachusetts, Michigan, Minnesota, Oregon, Wisconsin.

²⁷ See statutes, above cited, of California, Indiana, Missouri, Montana, New York, North Dakota, Oklahoma, South Dakota.

²⁸ See statutes, above cited, of Delaware, District of Columbia, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Oregon, Wisconsin. Also *Whitney v. Gordon*, 55 Mass. (1 Cush.) 266; *Walker v. Furbush*, 65 Mass. (11 Cush.) 366, 59 Am. Dec. 148; *Batchelder v. Batchelder*, 84 Mass. (2 Allen) 105; *Thomas v. Sanford Steamship Co.*, 71 Me. 548; *Huntingdon v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 13 L. R. A. 83, 24 Am. St. Rep. 146; *Sanford v. Johnson*, 24 Minn. 172, applying such a provision.

on notice in writing from the landlord upon "the day named therein,"²⁹ and such a statute has been construed as requiring not a "reasonable" notice, but a notice of a day merely.³⁰ In these states it is also provided that the tenant may terminate the tenancy "by notice in writing in the same manner as the lessor,"³¹ in effect requiring such a notice from the tenant in case he desires to terminate.³²

In construing the statutes requiring a notice of a certain length to terminate a tenancy at will, the courts of two or three states have decided that they require a notice to terminate the tenancy in those cases only in which, at common law, the owner or the tenant, desiring to terminate the tenancy, could do so by merely indicating his will to that effect, either by an express notice or by doing acts upon the land of such a character as to show his will, and that a tenancy at will may, as before the statute, be terminated by acts which effect such termination, not because they indicate a wish to terminate the tenancy, but because they are regarded as inconsistent with the continued existence of such a tenancy.³³ In other words, the statute "is limited to the case of determining the will, and terminating the tenancy, by the act of the party desirous of doing so," while it "leaves all other cases of determining the estate by act of law, as they stood before."³⁴ Accordingly it has been decided that, in spite of such a statute, the tenancy is terminated, without previous notice, by the act of the landlord in conveying or leasing the land,³⁵ and this though the conveyance or lease is merely colorable, made for the purpose of avoiding the statute.³⁶ Likewise, it may be ter-

²⁹ *New Hampshire* Pub. St. 1901, c. 246, § 2; *Rhode Island* Gen. Laws 1896, c. 269, § 1.

³⁰ *Payton v. Sherburne*, 15 R. I. 213, 2 Atl. 300.

³¹ *New Hampshire* Pub. St. 1901, c. 246, § 6; *Rhode Island* Gen. Laws 1896, c. 269, § 5.

³² *Chapman v. Tiffany*, 70 N. H. 249, 47 Atl. 603.

³³ *Howard v. Merriam*, 59 Mass. (5 Cush.) 563; *Seavey v. Cloudman*, 90 Me. 536, 38 Atl. 540; *Leavitt v. Leavitt*, 47 N. H. 329. In *Maine* it seems that a different rule would

apply to a tenancy at will arising under the provisions of the statute of frauds of that state. See *Esty v. Baker*, 50 Me. 325, 79 Am. Dec. 616; *Seavey v. Cloudman*, 90 Me. 536, 38 Atl. 540, commenting on *Young v. Young*, 36 Me. 133.

³⁴ *Howard v. Merriam*, 59 Mass. (5 Cush.) 563.

³⁵ *Howard v. Merriam*, 59 Mass. (5 Cush.) 563; *Seavey v. Cloudman*, 90 Me. 536, 38 Atl. 540.

³⁶ *Curtis v. Galvin*, 83 Mass. (1 Allen) 215; *Dunshee v. Grundy*, 81 Mass. (15 Gray) 314.

minated, without notice, by the act of the tenant in transferring his interest,³⁷ or in asserting a title adverse to that of the landlord.³⁸ And the death of either party will, under this view, no doubt terminate the tenancy immediately, as at common law.³⁹ But the tenancy is not terminated by the act of the tenant in relinquishing possession without the statutory notice.⁴⁰ It has occasionally been stated, without reference being made to the statutory requirement of notice, that the burning of the building on the premises would effect a termination of the tenancy.⁴¹ The statutory requirement of notice does not apply, it has been held, if it is expressly stipulated that the tenancy shall terminate upon a certain contingency, subjecting it to a "special limitation."⁴²

³⁷ *Cooper v. Adams*, 60 Mass. (6 Cush.) 87; *King v. Lawson*, 98 Mass. 309.

³⁸ *Appleton v. Ames*, 150 Mass. 34, 22 N. E. 69, 5 L. R. A. 206. And see *Simpson v. Applegate*, 75 Cal. 342, 17 Pac. 237, 7 Am. St. Rep. 177; *Amick v. Brubaker*, 101 Mo. 473, 14 S. W. 627.

³⁹ See *Seavey v. Cloudman*, 90 Me. 536, 38 Atl. 540.

⁴⁰ *Taylor v. Tuson*, 172 Mass. 145, 51 N. E. 462; *Batchelder v. Batchelder*, 84 Mass. (2 Allen) 105.

⁴¹ In *O'Brien v. Cavanaugh*, 61 Mich. 368, 28 N. W. 127, 1 Am. St. Rep. 589, it is said, without discussion, that "the tenancy ceased when the property was destroyed and the tenant ousted." There, however, the contest was not between the owner and the tenant. In *Gould v. Thompson*, 45 Mass. (4 Metc.) 224, a purchaser took possession, and afterwards, the building having been burned, he vacated the premises, refused to accept a conveyance, and sued to recover payments made by him, and it was held that a tenancy at will was created by his per-

missive possession and that this was terminated, the facts constituting "decisive evidence of the determination of his will at the time of the fire, and notice thereof to the owner."

⁴² *Hollis v. Pool*, 44 Ky. (3 Metc.) 350; *Corby v. McSpadden*, 63 Mo. App. 648; *McGee v. Gibson*, 40 Ky. (1 B. Mon.) 105 (semble). As where the letting was to endure so long as the tenant kept a barber shop on the premises (*Creech v. Crockett*, 59 Mass. [5 Cush.] 133) or kept a good school (*Ashley v. Warner*, 77 Mass. [11 Gray] 43). In the latter case there was a letting by two tenants in common, and the restriction above recited was imposed by only one of them. See, also, ante, § 13 b (5).

A provision, in the case of a lease at will, that rent shall be payable monthly in advance, does not make the tenancy subject to a special limitation, terminating the tenancy on nonpayment of rent in advance. *Elliott v. Stone*, 66 Mass. (12 Cush.) 174; *Sprague v. Quinn*, 108 Mass. 555.

The requirement of notice may be waived,⁴³ as when the parties expressly agree that one or the other, or both, may terminate the tenancy without any notice,⁴⁴ or there may be an express stipulation for a notice of a length greater or less than that named in the statute.⁴⁵ And, in spite of the statute, the parties may terminate the tenancy by agreement between themselves at any time, accompanied by a relinquishment and acceptance of possession,⁴⁶ this being in technical effect a surrender.

In one state the courts have refused to construe a statute, requiring notice to terminate the tenancy, as applying only to a termination by direct act of the party and not to a termination "by act of the law," and have decided that a transfer by the owner will not terminate the tenancy without the statutory notice.⁴⁷ In favor of this view is the fact that the landlord is thereby prevented from terminating the tenancy without notice by a merely colorable transfer.

The fact that a tenant, in a suit against him by the landlord to recover possession, asserts that he had a term of years which has not yet expired, has been held not to preclude him from also

⁴³ See post, § 197. In *Betz v. Maxwell*, 48 Kan. 142, 29 Pac. 147, it was decided that the recovery by the landlord of a judgment for the rent accruing for one rent period (a month) after knowledge of the tenant's relinquishment of possession and after commencement of the action for rent, together with the collection of such judgment, involved a waiver of the statutory requirement of a thirty days' notice. In this case, however, the tenancy was apparently a tenancy from month to month, rather than a tenancy at will.

⁴⁴ *Lane v. Ruhl*, 94 Mich. 474, 54 N. W. 175 (semble); *Sullivan v. Enders*, 33 Ky. (3 Dana) 66. So where it was agreed that the tenant might leave "at pleasure and at a moment's notice." *Davis v. Murphy*, 126 Mass. 143. But it has been held that a provision that "the

tenant may terminate the lease at any time" does not dispense with notice. *Paget v. Electrical Engineering Co.*, 82 Minn. 244, 84 N. W. 800. And see *Batchelder v. Batchelder*, 84 Mass. (2 Allen) 105.

⁴⁵ *May v. Rice*, 108 Mass. 150, 11 Am. Rep. 328; *B. Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530, 67 S. W. 967; *Den d. Humphries v. Humphries*, 25 N. C. (3 Ired. Law) 362 (semble).

⁴⁶ *Forbes v. Smiley*, 56 Me. 174; *Cooper v. Adams*, 60 Mass. (6 Cush.) 87; *Farson v. Goodale*, 90 Mass. (8 Allen) 202.

⁴⁷ *German State Bank v. Herron*, 111 Iowa, 25, 82 N. W. 430. This case applies in terms to a termination by transfer by the landlord, but by implication it applies to prevent a termination of the tenancy in any way without notice.

asserting that, if he is merely a tenant at will as claimed by the landlord, he is entitled to a notice to quit.⁴⁸

c. **Periodic tenancies.** The English rule, that a notice of half a year is necessary in order to terminate a tenancy from year to year, has ordinarily been adopted in this country, in the absence of a statutory provision on the subject.⁴⁹ In a number of the states the length of the notice is fixed by statutory enactment, it varying from one to six months.⁵⁰ And in perhaps two states

⁴⁸ *Simons v. Detroit Twist Drill Co.*, 136 Mich. 592, 99 N. W. 862.

⁴⁹ *Doe d. Flower v. Darby*, 1 Term R. 159; *Wilkinson v. Calvert*, 3 C. P. Div. 360; *Hunt v. Morton*, 18 Ill. 75; *Morehead v. Watkyns*, 44 Ky. (5 B. Mon.) 229; *Den d. McEowen v. Drake*, 14 N. J. Law (2 J. S. Green) 523; *Hall v. Myers*, 43 Md. 446; *Pugsley v. Aiken*, 11 N. Y. (1 Kern.) 494; *Den d. Jones v. Willis*, 53 N. C. (8 Jones Law) 430; *Barlow v. Wainwright*, 22 Vt. 88, 52 Am. Dec. 79; *Critchfield v. Remaley*, 21 Neb. 178, 31 N. W. 687; *Brown v. Kayser*, 60 Wis. 1, 18 N. W. 523.

In England the rule is that if the tenancy is one that can be ended on one of the regular feast or quarter days (Christmas, Lady day, Midsummer day and Michaelmas), a notice is sufficient if given on the preceding feast day, though the interval be less than half a year, this being regarded as a "customary" half year. See *Roe d. Durant v. Doe*, 6 Bing. 574; *Doe d. Bedford v. Kightley*, 7 Term R. 63; *Howard v. Wemsley*, 6 Esp. 53; *Doe d. Mathewson v. Wrightman*, 4 Esp. 5; *Doe d. Harrop v. Green*, Esp. 198; *Morgan v. Davies*, 3 C. P. Div. 260.

In South Carolina, where a tenancy "looks to the end of the calendar year for its termination" (see post, note 154), a reasonable notice before the end of the year is re-

quired, and whether a notice is reasonable is for the jury. *Jones v. Spartanburg Herald Co.*, 44 S. C. 526, 22 S. E. 731.

⁵⁰ *Colorado*, Mills' Code, § 1976 (Three months); *Illinois*, Hurd's Rev. St. c. 80, § 5 (Sixty days. See *Streit v. Fay*, 230 Ill. 319, 82 N. E. 648, 120 Am. St. Rep. 304); *Indiana*, Burns' Ann. St. 1901, § 7090 (Three months); *Kansas* Gen. St. 1905, § 4055 (Thirty days); *Michigan* Comp. Laws 1897, § 9257 (One year, expiring at any time); *Mississippi* Code 1906, § 2882 (Two months); *Missouri* Rev. St. 1899, § 4109 (Sixty days); *New Jersey* Acts 1903, c. 13, § 3 (Three months); *North Carolina* Revisal 1905, § 1984 (One month); *Oklahoma* Rev. St. 1903, § 3324; *Rhode Island* Gen. Laws 1896, c. 269, § 3 (Three months); *West Virginia* Code 1906, § 3398 (Three months); *Virginia* Code 1904, § 2785 (Three months if premises within city or town, and six months if without. See *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771).

In Minnesota the statutory provision (Rev. Laws 1905, § 3332) that estates at will may be determined by either party by three months' notice in writing for that purpose, given to the other party, and that when the rent reserved is payable at periods of less than three months the time of such notice shall be

there are decisions to the effect that no notice to terminate the tenancy at the end of any year is necessary to enable the landlord to maintain summary proceedings against the tenant to recover possession.⁵¹

sufficient if it be equal to the interval between the times of payment, is regarded as applying to estates from year to year and other periodic tenancies. See *Hunter v. Frost*, 47 Minn. 1, 49 N. W. 327; *Grace v. Michaud*, 50 Minn. 139, 52 N. W. 390. So in Oregon a tenancy from year to year is apparently regarded as within the statutory requirement as to notice to terminate tenancies at will. *Roseblat v. Perkins*, 18 Or. 156, 22 Pac. 598, 6 L. R. A. 257. But a different construction was put on the Wisconsin statute. *Brown v. Kayser*, 60 Wis. 1, 18 N. W. 523.

In Washington the forcible detainer statute making guilty of unlawful detainer a tenant for an indefinite time, with monthly or other periodic rent reserved, who continues in possession after the end of such period, if the landlord served notice on him twenty days before the end of such period, would seem, according to the construction placed upon the statute in the case of a tenancy from month to month (see post, note 54), to require only twenty days' notice to terminate a tenancy from year to year.

In Pennsylvania the three months' notice previous to the end of the year, necessary to support a proceeding to recover possession (post, § 274 a [3]), appears to be regarded as also sufficient to terminate the tenancy. See *Dunn v. Rothermel*, 112 Pa. 272, 3 Atl. 800.

⁵¹ In Connecticut it was held that the English requirement of half a year's notice is superseded by the

local statute giving a landlord, "in every case of holding over a right, and the remedy, to regain possession in thirty days," the view being, apparently, that a tenant from year to year, remaining in possession after the end of one or more years, holds over within the statute. *Larkin v. Avery*, 23 Conn. 304. The present statute in that state as to summary proceedings provides for only ten days' notice, and, applying the principle of the above decision, no further notice is necessary, presumably, to terminate a tenancy from year to year. In other jurisdictions the courts have not thus regarded the summary proceeding statute as intended to change the length of notice necessary to terminate a periodic tenancy.

In New York there is no express statutory provision as to notice in the case of a tenancy from year to year and it has been decided that the landlord may remove the tenant by summary proceedings, without previous notice, at the end of any year. *Nichols v. Williams*, 8 Cow. (N. Y.) 13; *Park v. Castle*, 19 How. Pr. (N. Y.) 29. The latter case says that the rule may be different when such a tenancy is created by a written lease. In *Prouty v. Prouty*, 5 How. Pr. (N. Y.) 81, it is decided that such a tenancy is a tenancy at will within the statute requiring one month's notice. In *Pugsley v. Aikin*, 11 N. Y. (1 Kern.) 494, it is said, without any qualification, that six months' notice is necessary, and it is so stated in 1 *McAdam, Landl. &*

In the case of a tenancy from quarter to quarter, month to month, or week to week, a notice of a quarter, a month, or a week, respectively, is ordinarily regarded as necessary to terminate it.⁵² In a number of states the length of the notice necessary in such cases is prescribed by statute, the statute occasionally referring in terms to a tenancy from quarter to quarter,⁵³ month to month,⁵⁴ or week to week,⁵⁵ and sometimes being so

Ten. (3d Ed.) 605. In *Peer v. O'Leary*, 8 Misc. 350, 28 N. Y. Supp. 687, there is a dictum that one month's notice is necessary. In *Adams v. Cohoes*, 127 N. Y. 175, 28 N. E. 25, the court apparently regards the tenancy there in question as a tenancy "from year to year," and yet holds that the tenancy "terminates at a fixed period," and that therefore no notice is necessary.

In Arizona, by statute (Rev. St. 1901, § 2694), a tenancy from year to year terminates at the end of each year unless expressly extended.

⁵² *Steffens v. Earl*, 40 N. J. Law, 128, 29 Am. Rep. 214; *Baker v. Kenny*, 69 N. J. Law, 180, 54 Atl. 526; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616; *People v. Darling*, 47 N. Y. 666; *McDevitt v. Lambert*, 80 Ala. 536, 2 So. 438; *Stewart v. Murrell*, 65 Ark. 471, 47 S. W. 130, 67 Am. St. Rep. 942; *Gunn v. Sinclair*, 52 Mo. 327; *Prickett v. Ritter*, 16 Ill. 96; *Creighton v. Sanders*, 89 Ill. 543; *Hollis v. Burns*, 100 Pa. 206, 45 Am. Rep. 379; *Currier v. Perley*, 24 N. H. 219.

In England it has been decided that a month's notice is necessary in the case of a tenancy from month to month. *Doe d. Parry v. Hazell*, 1 Esp. 94; *Beamish v. Cox*, 16 L. R. Ir. 270, 458. In the case of a weekly tenancy, while there are dicta to the effect that a week's no-

tice is necessary, it seems doubtful whether a less notice, provided it be reasonable, may not be sufficient. See *Jones v. Mills*, 10 C. B. (N. S.) 788; *Harvey v. Copeland*, 30 L. R. Ir. 412; *Bowen v. Anderson* [1894] 1 Q. B. 164.

⁵³ *District of Columbia Code*, § 1219 (Thirty days); *Mississippi Code*, 1906, § 2882 (One month, in case of holding by half year or quarter year).

Mills' Code Colo. § 1976, providing that a six months' tenancy may be terminated by a notice of one month, presumably means a tenancy from six months to six months, since the same section expressly provides that no notice shall be required when the term "is by contract to end at a time certain."

⁵⁴ *Arizona Rev. St.* 1901, § 2694 (Ten days); *Colorado, Mills' Ann. St.* 1891, § 1976 (Ten days); *Delaware Rev. Code* 1893, p. 866 (One month); *District of Columbia Code* 1901, § 1219 (Thirty days); *Illinois, Hurd's Rev. St.* 1905, c. 80, § 6 (Thirty days, *semble*); *Mississippi Code* 1906, § 2882 (One week. See *Wilson v. Wood*, 84 Miss. 728, 36 So. 609); *Missouri Rev. St.* 1899, § 4110 (One month); *Nevada Comp. Laws* 1900, § 3327 (Ten days); *New Jersey Acts* 1903, c. 13, § 3 (One month); *North Carolina Revisal* 1905, § 1984 (Seven days); *Virginia Code* 1904, § 2785 (Thirty days).

framed as to apply to any periodic tenancy, or to any such ten-

See, as to the Kentucky statute, *Recius v. Columbia Finance & Trust Co.*, 27 Ky. Law Rep. 880, 86 S. W. 1113; *Pulliam v. Sells*, 30 Ky. Law Rep. 456, 99 S. W. 289.

There are occasional decisions and dicta in New York to the effect that no notice is necessary to terminate a tenancy from month to month. See opinion of McAdam, J., in *Gilfoyle v. Cahill*, 18 Misc. 68, 41 N. Y. Supp. 29; *Decker v. Sexton*, 19 Misc. 59, 43 N. Y. Supp. 167; *People v. Darling*, 47 N. Y. 666; *Geiger v. Braun*, 6 Daly (N. Y.) 506. And see cases cited ante, § 14 c (1), note 507. Compare the cases cited ante, § 14 c (1), note 506, to the effect that one month's notice is necessary. In *Hoffman v. Van Allen*, 3 Misc. 99, 22 N. Y. Supp. 369, it is said that "assuming that notice be not requisite in simple tenancies from month to month" it is necessary when it is a letting from month to month "so long as the rent is paid," since these words "make the term indefinite." No explanation is given of the distinction asserted.

In New York, by Laws 1882, c. 303, amended by Laws 1889, c. 357, it is provided that no "monthly tenant" shall be removed in New York or Brooklyn unless "within five days before the expiration of the term" the landlord serves notice on the tenant. The intention of the framer of this law, Judge McAdam, appears to have been to protect the tenant in case of a lease for one month (see 1 McAdam, *Landl. & Ten.* [3d Ed.] 108), and the use of the word "term" would tend to show such an intention, but the expression "monthly tenancy" has been con-

strued as applying to a tenancy from month to month (*Simpson v. Masson*, 11 Misc. 351, 32 N. Y. Supp. 136; *Miller v. Lowe*, 14 Ann. Cas. 343, 86 N. Y. Supp. 16). Judge McAdam appears to accept this construction. See 1 McAdam, *Landl. & Ten.* (3d Ed.) 105, 109. On the other hand, it has been held that the statute was passed for the benefit of tenants only, and did not dispense with the necessity of one month's notice from the landlord (*Hungerford v. Wagoner*, 5 App. Div. 590, 39 N. Y. Supp. 369), the effect of which view would appear to be to confine the application of the statute to tenancies for a term of one month. The statute, it has been held, does not require notice to be served on a subtenant as well as a tenant (*Decker v. Sexton*, 19 Misc. 59, 43 N. Y. Supp. 167), and does not apply when the tenant himself terminates the tenancy (*Hoske v. Gentzlinger*, 87 Hun, 3, 33 N. Y. Supp. 747). The notice must warn the tenant that if he fails to remove at the time named summary proceedings will be begun against him. *Folz v. Shalow*, 16 N. Y. Supp. 942.

In Washington the statute (2 Ball. Ann. Codes, § 5527, subd. 2) making guilty of unlawful detainer a tenant for an indefinite time with monthly or other periodic rent reserved, who continues in possession after the end of any such month or period, in cases where the landlord, more than twenty days prior to the end of such month or period, shall have served a notice requiring him to leave at the end of the month, is regarded as making a twenty days' notice sufficient in order to terminate

ancy measured by periods less than a year.⁵⁶

The obligation to give notice is, at common law, reciprocal, the tenant being bound to give it, as well as the landlord, if he de-

a tenancy from month to month. *Yesler Estate v. Orth*, 24 Wash. 483, 64 Pac. 723; *Teater v. King*, 35 Wash. 128, 76 Pac. 688. The word "more" as used in said statute does not add any additional time to the twenty days, but merely designates the complete expiration of that number of days. *McGinnis v. Geness*, 25 Wash. 490, 65 Pac. 755.

⁵⁵ *Delaware* Rev. Code 1893, p. 866 (One week); *Mississippi* Code 1906, §§ 2882, 2544 (One week); *North Carolina* Revisal 1905, § 1984 (Two days).

⁵⁶ *Indiana*, Burns' Ann. St. 1901, § 7090 (In all tenancies which, by agreement of the parties, express or implied, are, from one period to another, of less than three months' duration, a notice equal to the interval between such periods shall be sufficient); *Kansas* Gen. St. 1905, § 4054 (Thirty days' notice "before either party can terminate tenancy from one period to another of three months or less. But where rent is reserved payable at intervals of less than thirty days, the length of notice need not be greater than such interval"); *Oklahoma* Rev. St. 1903, § 3323 (Same as Kansas); *Michigan* Comp. Laws 1897, § 9257 (When rent is payable at periods of less than three months, the time of notice is sufficient if equal to the interval between times of payment, and it shall not be void because it mentions a day for the termination of the tenancy not corresponding to the conclusion or commencement of any such period; but in any such

case the notice shall be held to terminate the tenancy at the end of a period equal in time to that in which the rent is made payable. See *Huntington v. Parkhurst*, 87 Mich. 38, 49 N. W. 597, 13 L. R. A. 83, 24 Am. St. Rep. 146); *Minnesota* Rev. Laws 1905, § 3332 (When rent reserved at periods of less than three months, the time of notice shall be equal to the interval between the times of payment. See *Grace v. Michaud*, 50 Minn. 139, 52 N. W. 390); *Mississippi* Code 1906, § 2882 (One month's notice shall be given where the holding is by the half year or quarter year); *New Hampshire* Pub. St. 1901, c. 246, § 3 (If the rent is payable more frequently than once in three months, thirty days' notice shall be sufficient, and three months' notice shall be sufficient in all cases); *New Jersey*, 2 Gen. St. p. 1921, § 29 (In all cases where any tenant entitled to notice, three months shall be sufficient); 2 Gen. St. p. 1924, § 37 (Where no term is agreed upon, and the rent is payable monthly, so long as the tenant pays the rent agreed it shall be unlawful for the landlord to dispossess the tenant before the first day of April succeeding the commencement of such letting, without giving the tenant three months' notice to quit); *Washington*, Ball. Ann. Codes & St. § 4569 (When premises rented for an indefinite time with monthly or other periodic rent reserved, such tenancy shall be terminated by written notice of thirty days or more).

sires to terminate the tenancy.⁵⁷ The statutes above referred to likewise ordinarily require notice to be given by the tenant as well as the landlord. Where, however, a statute provided only for notice to the tenant from the landlord, it was held that the landlord had no right to a notice from the tenant, it being considered that the common-law requirement of notice to the landlord was entirely superseded by the statutory provision as to notice.⁵⁸ Likewise, in one state it has been decided, without any statutory enactment bearing on the subject, that no notice is necessary on the part of the tenant to terminate the tenancy.⁵⁹

The common-law rule, in regard to the length of notice necessary to terminate a periodic tenancy, may be superseded by an express agreement in this regard,⁶⁰ and a statutory provision on the subject would no doubt likewise yield to any contract between the parties.⁶¹

d. **Tenancy at sufferance.** A tenant at sufferance would seem, by the very nature of the case, not entitled to notice to quit, since otherwise the effect would be to enable a tenant for a fixed term, by wrongfully holding over, to acquire a right to a notice to which otherwise he is not entitled, and that such is the law has been frequently recognized.⁶² In some states, however, the legis-

⁵⁷ *A. G. Rhodes Furniture Co. v. Taunt.* 555; *Dixon v. Bradford & Weeden*, 108 Ala. 252, 9 So. 318; *Pugsley v. Aikin*, 11 N. Y. (1 Kern.) 494; *Tanton v. Van Alstine*, 24 Ill. App. 405; *Donahue v. Chicago Bank Note Co.*, 37 Ill. App. 552; *Roberson v. Simons*, 109 Ga. 360, 34 S. E. 694; *Hall v. Wadsworth*, 28 Vt. 410; *Hanks v. Werkmaster* (N. J. Law) 66 Atl. 1097; *Buck v. Lewis*, 46 Mo. App. 227; *Hall v. Myers*, 43 Md. 446; *Currier v. Perley*, 24 N. H. 219, 228; *Morehead v. Watkins*, 44 Ky. (5 B. Mon.) 229.

⁵⁸ *Nelson v. Ware*, 57 Kan. 670, 47 Pac. 540.

⁵⁹ *Brown v. Brightly*, 17 Phila. (Pa.) 252. See *Milling v. Becker*, 96 Pa. 182; *Hollis v. Burns*, 100 Pa. 206, 45 Am. Rep. 379.

⁶⁰ *King v. Eversfield* [1897] 2 Q. B. 475; *Doe d. Pitcher v. Donovan*, 1

⁶¹ See post, § 197.

⁶² *Dewson v. St. Clair*, 14 U. C. Q. B. 97; *Burns v. McAdam*, 24 U. C. Q. B. 449; *McLeren v. Benton*, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814; *Lee Chuck v. Quan Wo Chong*, 91 Cal. 196, 19 Pac. 376; *Jackson v. Parkhurst*, 5 Johns. (N. Y.) 128; *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794; *Reed v. Reed*, 48 Me. 388; *Evans v. Reed*, 71 Mass. (5 Gray) 308, 66 Am. Dec. 368; *Hildreth v. Conant*, 51 Mass. (10 Metc.) 298; *Peters v. Balke*, 170 Ill. 304, 48 N. E. 1012; *Wamsganz v. Wolff*, 86 Mo. App. 205; *Guthman v. Vallery*, 51 Neb. 824, 71 N. W. 734, 66 Am. St. Rep. 475; *Lithgow v. Moody*, 35 Me. 214 (semble); *Moore v. Moore*, 41

lature has undertaken to provide that a tenancy at sufferance can be terminated only after notice of a month or more, placing it, for this purpose, in the same category as a tenancy at will,⁶³

N. J. Law, 515; *Moore v. Smith*, 56 N. J. Law, 446, 29 Atl. 159; *Howard v. Carpenter*, 22 Md. 10; *Anderson v. Brewster*, 44 Ohio St. 576, 9 N. E. 683; *Rich v. Keyser*, 54 Pa. 86, 93 Am. Dec. 675; *Blocker v. McCleendon*, 6 Ind. T. 481, 98 S. W. 166. It is sometimes provided by statute that no notice shall be necessary to terminate a tenancy at sufferance. *Indiana*, Burns' Ann. St. 1901, § 7094; *Kansas* Gen. St. 1905, § 4059.

No demand for possession is necessary before suit, as in the case of a tenancy at will. *Doe d. Roby v. Maisey*, 8 Barn. & C. 767; *Howard v. Carpenter*, 22 Md. 10.

The occasional statements in the Massachusetts cases to the effect that a tenant at sufferance is entitled to a notice and sufficient time thereafter to remove before legal proceedings are begun against him to recover possession apparently all refer to cases in which a tenancy at will had been terminated by a conveyance by the landlord, and the notice referred to is merely of the making of this conveyance. See *Hooton v. Holt*, 139 Mass. 54, 29 N. E. 221; *Lash v. Ames*, 171 Mass. 487, 50 N. E. 996; *Pratt v. Farrar*, 92 Mass. (10 Allen) 519; *Clark v. Wheelock*, 99 Mass. 14; *Arnold v. Nash*, 126 Mass. 397; *Wardell v. Etter*, 143 Mass. 19, 8 N. E. 420. See ante, § 13 b (4) (a).

⁶³ *Kentucky* St. 1903, § 2326; *Michigan* Comp. Laws 1897, § 9257 (Three months); *Missouri* Rev. St. 1899, § 4110 (One month); *New York* Real Prop. Law, § 198 (Thirty days); *Oregon*, Bell. & C. Codes, §

5390 (Three months); *Wisconsin* Rev. St. 1898, § 2183 (One month).

District of Columbia Code 1901, § 1221, provides that a tenancy by sufferance may be terminated at any time by a notice in writing from the landlord to the tenant to quit, or by such notice from the tenant to the landlord of his intention to quit on the thirtieth day after the day of the service of notice. In Rhode Island, likewise, the statute (Gen. Laws 1896, c. 269, § 1) provides that a tenant at sufferance shall quit upon notice in writing from the lessor or owner at the day named therein, and the effect of this provision, in connection with one that "the time agreed on in a definite letting shall be the time of the termination thereof for all purposes" (section 6), has been stated to be "to secure to every person holding over after the expiration of an estate which he has rightfully come into possession of by act of party, unless he be a lessee for a definite term, a clear opportunity to leave it without suit for his ejectment by requiring the owner or lessor to give him notice to quit as prescribed before bringing any such suit against him." *Johnson v. Donaldson*, 17 R. I. 107, 20 Atl. 242. It was in this case decided that, after sale under a mortgage, the mortgagor's grantee was a tenant at sufferance entitled to notice to quit before suit to eject him.

In Massachusetts, at one time, a statute existed requiring a notice to terminate a tenancy at sufferance, but this was repealed. See Kinsley

and these enactments have given the courts considerable trouble. For the purpose of avoiding a construction of these statutes which would give a tenant wrongfully holding over the right to such a notice before he could be turned out, the courts have occasionally adopted the statement, made by Coke and Blackstone, that a tenancy at sufferance arises from the *laches* of the landlord, and have declared that, for the purpose of the statute at least, one holding over is not a tenant at sufferance unless and until the landlord has been guilty of *laches* in failing to take measures to oust him, and they go so far as to say that the circumstances must be such as to evince an assent by the owner to the tenant's continued occupancy.⁶⁴

However sound and necessary these decisions may have been as constructions of the particular statutes, they are, if considered as statements of the qualities of a common-law tenancy at sufferance, entirely unsupported by authority. The statement that the tenancy arises from the *laches* of the landlord originated in a

v. Ames, 43 Mass. (2 Metc.) 29. And the provision of the New Jersey statute (Acts 1898, c. 228, § 109) requiring a notice of three months to terminate a tenancy by sufferance before a judgment for dispossession shall be ordered (see *Guvénator v. Kenin*, 66 N. J. Law, 114, 48 Atl. 1023) was, it seems, repealed by Acts 1901, c. 39, and Acts 1903, c. 13, §§ 1, 2, providing that "any lessee or tenant at will or at sufferance" may be removed by the district court when any such person shall hold over and continue in possession "after the expiration of his or her term, and after demand made and notice in writing given for delivering the possession thereof."

⁶⁴ *Rowan v. Lytle*, 11 Wend. (N. Y.) 616; *Moore v. Morrow*, 28 Cal. 551; *Meno v. Hoeffel*, 46 Wis. 282, 1 N. W. 31. See *Eldred v. Sherman*, 81 Wis. 182, 51 N. W. 441.

There is a full discussion of the construction of such a statute in Al-

len v. Carpenter, 15 Mich. 25, in which the court was divided as to its meaning. In a later case (*Benfey v. Congdon*, 40 Mich. 283) the court says that it does not know what the statute means, but that it does not give a tenant holding over a right to notice to quit. And see *Kunzie v. Wixom*, 39 Mich. 384, 33 Am. Rep. 403. To the same effect, that such a statute does not require a notice in order to oust a tenant holding over his term, see *Irvine v. Scott*, 85 Ky. 260, 3 S. W. 163. In *Livingston v. Tanner*, 14 N. Y. (4 Kern.) 64, it was held that such a statute, requiring a month's notice to terminate a tenancy at sufferance, did not apply where a purchaser of a life estate remained in possession after the death of the *cestui que vie*, since another statute provided that any person having a life estate who held over without permission should be adjudged a trespasser.

dictum in a case of the time of Coke, where it was introduced for a particular purpose;⁶⁵ and the view that the tenancy exists only in case of an implied assent by the landlord to the holding ignores the primary and peculiar feature of such a tenancy, distinguishing it from every other tenancy, that it is *without* the landlord's assent.

§ 197. Waiver or modification of requirement.

The notice to quit which might otherwise be necessary may be dispensed with by express stipulation.⁶⁶ Likewise, the parties may provide for a notice of a length different from that which is ordinarily necessary, either greater or less.⁶⁷ But, it seems, such provision must not be repugnant to the nature of the tenancy, as, for instance, by requiring, in the case of a tenancy from year to year, a notice of over a year.⁶⁸ And a provision precluding the landlord, in the case of such a tenancy, from terminating it by notice, would, it seems, be void, or it would have the effect of making the tenancy one for life.⁶⁹

It has in England been decided that a notice, which is not of the length required by law or named in the lease, cannot be rendered effective to terminate the tenancy by the recipient's acquiescence therein, upon its receipt, or even by his express verbal assent thereto, since this would, in effect, involve a termination of the tenancy by an agreement constituting in law a surrender, and a surrender must be in writing, when not by operation of

⁶⁵ Sir Moil Finch's Case, 2 Leon. D. C. (2 Mackey) 450; May v. Rice, 134. See ante, § 15 a, note 550. 108 Mass. 150, 11 Am. Rep. 328; B.

⁶⁶ Bethell v. Blencowe, 3 Man. & Roth Tool Co. v. Champ Spring Co., G. 119; In re Threlfall, 16 Ch. Div. 93 Mo. App. 530, 67 S. W. 967.

274; King v. Eversfield [1897] 2 Q. ⁶⁸ See Tooker v. Smith, 1 Hurl. & B. 475; Sullivan v. Enders, 33 Ky. N. 732, and Weller v. Carnew, 29 (3 Dana) 66; Davis v. Murphy, 126 Ont. 400, ante, note 9. But the parties may agree that a periodic tenancy shall be terminated by a notice expiring at any particular time named. See post, note 166.

⁶⁹ Doe d. Warner v. Browne, 8

⁶⁷ Doe d. Pitcher v. Donovan, 1 East, 165; Cheshire Lines Committee v. Lewis & Co., 50 Law J. Q. Exch. 319; Doe d. Peacock v. Raffan, B. 121.

⁶ Esp. 4; Waggaman v. Bartlett, 13

law.⁷⁰ There is one case in this country which appears to support this view,⁷¹ but there are at least *dicta* to the effect that one party may waive the requirement of notice from the other party to terminate the tenancy.⁷² Occasionally the requirement of notice is said to be waived when the landlord accepts possession of the premises from the tenant,⁷³ but in such a case there is in reality a surrender by operation of law which terminates the tenancy.⁷⁴

The requirement of notice to the tenant is dispensed with in

⁷⁰ *Johnstone v. Hudlestone*, 4 Barn. & C. 922; *Bessell v. Landsberg*, 7 Q. B. 638; *Doe d. Huddleston v. Johnston*, McClel. & Y. 141. .

⁷¹ *Lewis v. Scanlan*, 3 Pen. (Del.) 238, 50 Atl. 58. In *Smith v. Smith*, 62 Mo. App. 596, it is decided that a verbal agreement dispensing with the written notice required by statute is nugatory.

⁷² *Davis v. Murphy*, 126 Mass. 143; *Whitney v. Gordon*, 55 Mass. (1 Cush.) 266; *Graham v. Anderson*, 3 Har. (Del.) 364; *Farson v. Goodale*, 90 Mass. (8 Allen) 202. Compare *Sander v. Holstein Commission Co.*, 118 Mo. App. 29, 121 Mo. App. 293, 99 S. W. 12, where it was held that the landlord's acts did not show a waiver of written notice from the tenant.

In *Eimermann v. Nathan*, 116 Wis. 124, 92 N. W. 550, upon the landlord's refusal to make repairs, the tenant said that he would notify the landlord if he decided to remain, and did not notify him, and the landlord advertised the premises as for rent one month before the end of the year and continued advertising till the end of the year, and refused in terms to allow the tenant to remain, and it was held that the requirement of thirty days' notice was waived by the landlord. In

Woodbury v. Butler, 67 N. H. 545, 38 Atl. 379, it was held that a tenant from year to year who, at the public sale of the premises, assented to the auctioneer's statement that he would give up possession within four weeks, was estopped, as against a purchaser at the sale, to claim a three months' notice.

The tenant may lose all right to the statutory notice to terminate the tenancy at the end of a period by his failure to pay rent, thus rendering his tenancy subject to a forfeiture on that account. See *Snyder v. Porter*, 69 Neb. 431, 95 N. W. 1009.

⁷³ *Williams v. Jones*, 64 Ky. (1 Bush) 621; *Whitney v. Gordon*, 55 Mass. (1 Cush.) 266; *Vegely v. Robinson*, 20 Mo. App. 199; *Elgutter v. Drishaus*, 44 Neb. 378, 63 N. W. 19; *Torrans v. Stricklin*, 52 N. C. (7 Jones Law) 50; *Merritt v. Merritt*, 3 N. Y. St. Rep. 484. See *Hetfield v. Lawton*, 108 App. Div. 113, 95 N. Y. Supp. 451. The act of the landlord in entering with a person sent by the tenant, who has abandoned possession, to remove articles left by the tenant, or in entering to turn off the water after such abandonment, is not a waiver of the requirement of notice. *Finch v. Moore*, 50 Minn. 116, 52 N. W. 384.

⁷⁴ See ante, § 190 c.

case he disclaims holding under the landlord,⁷⁵ since one who denies that he is tenant is not entitled to claim the privileges of a tenant.

In two or three states the courts have, in particular cases, regarded the action of the tenant in quitting the premises as sufficient notification of his desire to terminate the tenancy at the end of the current period, and as dispensing with the necessity of any formal notice.⁷⁶ In jurisdictions where the statute requires, expressly or by implication, that the notice be in writing,⁷⁷ it does not seem that such mere relinquishment of possession could properly be regarded as a sufficient compliance with the requirement, and even when there is no requirement that the notice be in writing, to regard a mere act, without any communication with the landlord, as satisfying the requirement of notice, seems decidedly open to question.⁷⁸

⁷⁵ See ante, § 192.

⁷⁶ In *Adams v. Cohoes*, 127 N. Y. 175, 28 N. E. 25, it was decided that, assuming that a notice to quit was necessary to terminate a tenancy, created by a tenant's holding over his term, at the end of a year of holding over, the act of the tenant in leaving the premises nine months before the expiration of the year, taking a lease of other premises, and refusing to pay rent subsequently accruing, was sufficient notice. In *Rorbach v. Crossett*, 46 N. Y. St. Rep. 426, 19 N. Y. Supp. 450, it was decided that there was sufficient notice in the case of a tenancy from month to month, created by holding over, if the tenant tendered the keys, which the landlord refused to accept and he then left them with the latter, this clearly showing an intention to terminate the tenancy. In *Betz v. Maxwell*, 48 Kan. 142, 29 Pac. 147, it was decided that where the tenant was about to leave without notice, and the landlord, knowing thereof, sued for and recovered one month's rent, the necessity of

a month's notice was dispensed with. In *Roberson v. Simons*, 109 Ga. 360, 34 S. E. 604, it was decided that when a tenant from year to year abandoned the premises, leaving in possession, however, a subtenant, who remained for a year and a fraction, the original tenant was liable for two years' rent, the abandonment not being equivalent to notice, but it was at the same time said that it might be different if the subtenant were not left in possession. In *Landsberg v. Tivoli Brew. Co.*, 132 Mich. 651, 94 N. W. 197, the action of the tenant in returning the keys and relinquishing possession was regarded as sufficient, the statute not requiring a written notice.

⁷⁷ See post, § 199, note 77.

⁷⁸ That abandonment does not relieve the tenant from liability for rent until he gives the prescribed notice, see *Eastman v. Vetter*, 57 Minn. 164, 58 N. W. 989; *Chapman v. Tiffany*, 70 N. H. 249, 47 Atl. 603; *Rollins v. Moody*, 72 Me. 135; *Hall v. Wadsworth*, 28 Vt. 410; *Arbenz v. Exley, Watkins & Co.*, 57 W. Va.

§ 198. By and to whom notice to be given.

Notice upon the part of the landlord may be given either by the original lessor or by the person or persons succeeding him in the ownership of the reversion.⁷⁹ One having merely an equitable title, based on a contract for the sale to him of the reversion, has no authority to give it.⁸⁰

When a lease is made by two or more joint tenants, notice by one, on behalf of all, is sufficient to terminate the tenancy as to his own share,⁸¹ and, likewise, according to the English decisions, as to that of the others,⁸² unless the lease expressly requires the notice to be given by all.⁸³ In the case of a lease by tenants in common, likewise, each may give a notice, good as to his undivided share,⁸⁴ and presumably in England the rule, applied in the case of a lease by joint tenants, that each may give a notice in behalf of the others, would be applied in the case of a lease by tenants in common. In one case in this country, however, it has been decided that one tenant in common cannot give a notice in behalf of the others,⁸⁵ and there is a *dictum* in that case to the effect that one joint tenant cannot do so. In case the lessor makes a concurrent lease, as distinguished from a lease in reversion, the lessee becomes the landlord for the time being,⁸⁶ and consequently he, and not the lessor, is the person to give the notice.⁸⁷

An authorized agent of the landlord may give the notice on behalf of his principal,⁸⁸ and he may, it has been decided, give it

580, 50 S. E. 813. See, also, cases cited ante, § 190 c (2), and post, § 200.

⁷⁹ Liddy v. Kennedy, L. R. 5 H. L. 134; Swope v. Hopkins, 119 Ind. 125, 21 N. E. 462.

⁸⁰ Reeder v. Sayre, 70 N. Y. 180, 26 Am. Rep. 567.

⁸¹ Doe d. Whayman v. Chaplin, 3 Taunt. 120.

⁸² Doe d. Aslin v. Summersett, 1 Barn. & Adol. 135; Doe d. Elliot v. Hulme, 2 Man. & R. 433; Doe d. Kindersley v. Hughes, 7 Mees. & W. 139; Alford v. Vickery, Car. & M. 280; Burrows v. Mickelson, 14 Man. Rep. 739.

⁸³ Right v. Cuthell, 5 East, 491.

⁸⁴ See Cutting v. Derby, 2 Wm. Bl. 1075.

⁸⁵ Pickard v. Perley, 45 N. H. 188, 86 Am. Dec. 153. In Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073, notice by one cotenant was regarded as sufficient, but there it appeared that the other had previously informed the tenant that the one who gave the notice had charge of the "renting of the place."

⁸⁶ See ante, § 146 d, at notes 24-27.

⁸⁷ Wordsley Brewery Co. v. Halford, 90 Law T. 89; Doe d. Jarvis v. McCarthy, 5 New Br. (3 Kerr) 63.

⁸⁸ Reeder v. Sayre, 70 N. Y. 180,

in his own name, if he has general control over the property,⁸⁹ as when he is an agent to let and also to receive rents,⁹⁰ or is the steward of the corporate owner,⁹¹ while if acting under a special authority for this particular purpose he must, it has been decided, give the notice in the name of his principal.⁹² In one case it was decided, without reference to the character of the agent's authority, that a notice, signed by H. "Agent for" the landlord, was as effectual as one signed in the landlord's name "by H. Agent."⁹³ A notice purporting to be signed by the owner, "by B. & K., her attorneys and agents," was held to be valid, though a clerk of the firm of B. & K., by direction of a member of the firm, did the actual writing of the signature.⁹⁴ In case a notice is given in behalf of the landlord by one who is not authorized to do so, the landlord cannot, it has been decided, ratify it, at least after the requisite interval of time has commenced to run.⁹⁵

The notice should be given to the immediate tenant⁹⁶ and not to a mere subtenant;⁹⁷ and a notice to the tenant is effective as

26 Am. Rep. 567; Doe d. Birmingham Canal Co. v. Bold, 11 Q. B. 127. No written authority is necessary. Felton v. Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750.

⁸⁹ Jones v. Phipps, L. R. 3 Q. B. 567.

⁹⁰ Doe d. Manvers v. Mizem, 2 Moody & R. 56.

A receiver authorized to let may give notice to quit in his own name. Wilkinson v. Colley, 5 Burrow, 2694; Doe d. Marsack v. Read, 12 East, 57.

⁹¹ Roe d. Dean & Chapter of Rochester v. Pierce, 2 Camp. 96.

⁹² Jones v. Phipps, L. R. 3 Q. B. 567.

⁹³ Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073. In Reed v. Hawley, 45 Ill. 40, it was held that a "notice to quit" signed "C. M. H. (the landlord) by W. C. R., an authorized agent," was sufficient, though it would have been better to have substituted "his" for "an." This was not properly a "notice to quit,"

but was a demand of possession as a preliminary to summary proceedings.

⁹⁴ Bond v. Chapman, 34 Wash. 606, 76 Pac. 97. In McClung v. McPherson, 47 Or. 73, 81 Pac. 567, 82 Pac. 13, it was decided that failure to object to the introduction in evidence of a notice signed by the landlord's attorneys admitted their authority to sign it.

⁹⁵ Pickard v. Perley, 45 N. H. 188, 86 Am. Dec. 153; McCroskey v. Hamilton, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79; Doe d. Mann v. Walters, 10 Barn. & C. 626; Doe d. Lyster v. Goldwin, 2 Q. B. 143; Brahn v. Jersey City Forge Co., 38 N. J. Law, 74. Goodtitle v. Woodward, 3 Barn. & Ald. 689, contra, is in effect overruled.

⁹⁶ Whether the original lessee or his assignee. Mount Palatine Academy v. Kleinschnitz, 28 Ill. 133.

⁹⁷ Pleasant v. Benson, 14 East,

against a subtenant, whether the sublease be made before⁹⁸ or after the notice.⁹⁹ A person in actual occupation is, however, presumed to be an assignee of the leasehold for this purpose rather than a subtenant, until the contrary is proven.¹⁰⁰ And it has been decided that, if the tenant's widow continues in possession after his death, notice to her to quit is effective to terminate the tenancy, in the absence of evidence of the appointment of an executor or administrator,¹⁰¹ and this principle has been applied, in one case, to the extent of holding a notice to the widow in possession sufficient to terminate the tenancy, even as against an administrator subsequently appointed.¹⁰² In this last case the view is asserted, by the majority of the court, that, whoever might be in possession after the tenant's death, the landlord should be entitled to terminate the tenancy by notice to such person, without being compelled to await the grant of letters of administration, or himself to have an administrator appointed.

A notice to a corporation should be addressed to the corporation and served on one of its officers.¹⁰³

Where one of several tenants holds over the term, he alone, it has been decided, is to be regarded as a tenant for the purpose of notice to quit at the end of a subsequent year.¹⁰⁴

If the lease specifies that the notice is to be given to certain persons, it cannot be given to others.¹⁰⁵

Notice on the part of the tenant should be given to his immediate landlord, and not to one under whom his landlord holds.¹⁰⁶ It may, however, be given to an agent who has the

234; *Roe v. Wiggs*, 2 Bos. & P. (N. R.) 330.

⁹⁸ *Jackson v. Baker*, 10 Johns. (N. Y.) 270; *Roe v. Wiggs*, 2 Bos. & P. (N. R.) 330. But in *Waters v. Roberts*, 89 N. C. 145, it is said that a notice to a sublessee need not be by the sublessor, but is sufficient if given by the lessor, implying that the sublessee is entitled to notice.

⁹⁹ *Schilling v. Holmes*, 23 Cal. 227, 83 Am. Dec. 111.

¹⁰⁰ *Doe d. Morris v. Williams*, 6 Barn. & C. 41. Compare *Roe d. Blair*

v. Street, 2 Adol. & E. 329. And see ante, § 153.

¹⁰¹ *Rees v. Perrot*, 4 Car. & P. 230.

¹⁰² *Sweeny v. Sweeny*, 10 Ir. R. C. L. 375.

¹⁰³ *Doe d. Carlisle v. Woodman*, 8 East, 228.

¹⁰⁴ *Tice v. Cowenhoven*, 63 N. J. Law, 24, 42 Atl. 1054.

¹⁰⁵ *Hogg v. Brooks*, 15 Q. B. Div. 256; *Easton v. Penny*, 67 Law T. (N. S.) 290; *Quartermaine v. Selby*, 5 Times Law R. 223.

¹⁰⁶ *Woods v. Hyde*, 31 Law J. Ch. 295.

management and control of the property for the landlord,¹⁰⁷ though not to a mere collector of rents.¹⁰⁸ In case there is more than one tenant, the notice must purport to be given in behalf of all.¹⁰⁹ And if there be two or more owners of the reversion, a notice must, it seems, be given to each.¹¹⁰

§ 199. Form and language of notice.

No particular form of notice is necessary, in the absence of any specific requirement in the lease in this regard, nor is it necessary that it be in writing,¹¹¹ when this is not required by statute or by the terms of the lease. The statutes, however, quite generally require the notice to be in writing, by special provision to that effect, and even when this is not the case, they quite frequently contain provisions in regard to "service" or "posting" of the notice, which plainly contemplate a written notice, and render a verbal notice of at least doubtful validity.¹¹² Furthermore, even though a verbal notice would be valid, it is desirable that the notice be in writing, as being thus more susceptible of proof.

When the statute requires a written notice, merely reading a written notice to the person to be served has been regarded as insufficient.¹¹³ And it has been held that the notice must be the original notice and not a copy thereof.¹¹⁴

¹⁰⁷ *Papillon v. Brunton*, 5 Hurl. & N. 518; *Quartermaine v. Selby*, 5 Times Law R. 223; *Bay State Bank v. Kiley*, 80 Mass. (14 Gray) 492 (If given to him and received by him as "agent").

¹⁰⁸ *Pearse v. Boulter*, 2 Fost. & F. 133.

¹⁰⁹ *Easton v. Penny*, 67 Law T. (N. S.) 290.

¹¹⁰ *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Long v. Bolen Coal Co.*, 56 Mo. App. 605. In these cases, however, it is said that notice must be served on both.

¹¹¹ *Reccius v. Columbia Finance & Trust Co.*, 27 Ky. Law Rep. 880, 86 S. W. 1113; *Kenin v. Guvernator* (N. J. Law) 48 Atl. 1023; *Eberlein v.*

Abel, 10 Ill. App. (10 Bradw.) 626; *Pratcher v. Smith*, 104 Mich. 537, 62 N. W. 882, 29 L. R. A. 92; *Bird v. Defonvielle*, 2 Car. & K. 415; *Doe d. Macartney v. Crick*, 5 Esp. 196; *Doe d. Lynde v. Merritt*, 2 U. C. Q. B. 410. And see cases, to the effect that a mere relinquishment of possession by the tenant is sufficient, ante, note 76.

¹¹² See e. g., *Graham v. Anderson*, 3 Har. (Del.) 364.

¹¹³ *Langan v. Schlieff*, 55 Mo. App. 213.

¹¹⁴ *Mathewson v. Thompson*, 12 R. I. 288. Here it was decided that leaving a "copy" of the notice with some person at the last and usual place of abode of the defendant was

The notice should be addressed to the person for whom it is intended, but a failure in this respect has been regarded as immaterial, when the notice was delivered to the proper person.¹¹⁵ And a mistake in the Christian name of the tenant to whom the notice was given was held to be cured when the tenant kept it, there being no other tenant of that name,¹¹⁶ or ground for doubt as to the person for whom it was intended.¹¹⁷ On the same principle it has been considered immaterial that a notice was addressed to the husband of the tenant instead of to the tenant herself, that is, to "Mr. C. R. C.," and not to "Mrs. C. R. C."¹¹⁸

A notice to the tenant need not state the person to whom he is to give possession,¹¹⁹ but there is a decision to the effect that if it undertakes to do so, and does it incorrectly, the notice is invalid.¹²⁰

The notice should describe the premises correctly, though a mistake in this respect will not affect its validity, if the recipient was not misled.¹²¹ A description in general terms is sufficient, as, for instance, "the premises which you now hold of me, situate at A,"¹²² or "the house and land you rent of me,"¹²³ or "the messuage or tenement we now hold of you."¹²⁴

A notice to quit only a part of the demised premises is invalid,¹²⁵ though in the case of adjoining premises, held under separate demises, it need apply only to so much as is included

insufficient. Presumably, by copy is here meant a notice which is not signed by the person giving the notice. A copy which is signed is in effect the same as an original notice. That is, if the landlord, after writing out a notice, makes, or has made, a copy thereof, which he signs, the service of such "copy" would undoubtedly be good. Compare the remarks in Wigmore, Evidence, § 1231.

¹¹⁵ Doe d. Matthewson v. Wrightman, 4 Esp. 5.

¹¹⁶ Doe v. Spiller, 6 Esp. 70.

¹¹⁷ Clark v. Keliher, 107 Mass. 406.

¹¹⁸ Cook v. Creswell, 44 Md. 581.

¹¹⁹ Doe d. Bailey v. Foster, 3 C. B. 215.

¹²⁰ Doe d. Brooks v. Fairclough, 6 Maule & S. 40.

¹²¹ Doe d. Armstrong v. Wilkinson, 12 Adol. & E. 743; Doe d. Cox v. Roe, 4 Esp. 185; King v. Connolly, 44 Cal. 236; Farnam v. Hohman, 90 Ill. 312; Congdon v. Brown, 7 R. I. 19; Whipple v. Shewalter, 91 Ind. 114.

¹²² Doe d. Egremont v. Forwood, 3 Q. B. 627; Cook v. Creswell, 44 Md. 581; Epstein v. Greer, 78 Ind. 348.

¹²³ Doe d. Huntingtower v. Culliford, 4 Dowl. & R. 248.

¹²⁴ Doe d. Murrell v. Milward, 3 Mees. & W. 328.

¹²⁵ Alworth v. Gordon, 81 Minn. 445, 84 N. W. 454; Doe d. Rodd v. Archer, 14 East, 245.

in one demise.¹²⁶ Even though the notice is given by one to whom the lessor has transferred the reversion in part, it has been decided to be invalid if it in terms applies only to such part.¹²⁷ The instrument of lease may, however, expressly provide for the termination of the tenancy as to part only of the premises leased, and in such case a notice as to part is obviously valid.¹²⁸ And though the notice in terms describes part only of the premises, the courts have shown a tendency to uphold it as applying to the whole, if the part described is the principal part.¹²⁹

A written notice has been regarded as valid, though not signed, if purporting to come from "the owner and lessor" of the premises described therein.¹³⁰

A notice to quit must be plain and unequivocal in its terms, leaving no doubt as to the intention of the party giving it, so that the other party may safely act thereon.¹³¹ But, as before suggested, it is sufficient if it be intelligible and not open to misunderstanding.¹³² A notice by a tenant that "he guessed he would have to give up the house" is insufficient,¹³³ and the same view has been taken of a notice by a tenant that "I intend to surrender to you the tenancy of this house on or before" a date named, on the theory that, since a surrender cannot be made without the landlord's consent, the notice was merely of an intention to enter into negotiations for a surrender.¹³⁴

¹²⁶ *Donohue v. Chicago Bank Note Co.*, 37 Ill. App. 552.

¹²⁷ *Prince v. Evans*, 29 Law T. (N. S.) 835.

¹²⁸ *Liddy v. Kennedy*, L. R. 5 H. L. 134.

¹²⁹ Thus a notice to quit "Town Barton" was held to include lands not strictly so called but commonly held therewith. *Doe d. Rodd v. Archer*, 14 East, 245. And where there was a lease of two rooms, a finding by the jury that a notice to quit, naming one room only, the principle one, applied to both, was upheld. *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. 454.

¹³⁰ *Lund v. Ozanne*, 13 N. M. 293, 84 Pac. 710.

¹³¹ *Gardner v. Ingram*, 61 Law T. (N. S.) 729; *Fotterall v. Armour*, 218 Pa. 73, 66 Atl. 1001.

¹³² *Ahearn v. Bellman*, 4 Exch. Div. 201; *Bury v. Thompson* [1895] 1 Q. B. 231, 696; *Doe d. Lynde v. Merritt*, 2 U. C. Q. B. 410; *Cook v. Creswell*, 44 Md. 581.

¹³³ *Hunter v. Karcher*, 8 S. D. 554, 67 N. W. 621.

¹³⁴ *Gardner v. Ingram*, 61 Law T. (N. S.) 729. It appears doubtful whether such a decision would be rendered in most states in this country, in view of the very general use of the term "surrender" in a sense other than its technical one. See ante, § 187.

A notice to quit is not valid if it is in terms optional or conditional, that is, if it is conditioned to take effect only in case the tenant fails to do some certain thing before the expiration of the notice, as, for instance, a notice to quit in case the tenant fails to make certain repairs,¹³⁵ or to perform certain stipulations of the lease,¹³⁶ and a notice merely stating the terms on which the tenant may remain is insufficient to operate as a notice to quit in case he does not accept such terms.¹³⁷ But there are occasional decisions that a notice by the landlord, otherwise valid, is not insufficient because it contains a statement as to the terms on which the tenant may remain, that is, an offer of a new tenancy,¹³⁸ and, on the same principle, that a notice by the tenant is valid though it contains a statement of the terms on which he will remain.¹³⁹ A notice has been held not to be invalid because it contains a warning as to what will be the effect of a failure to comply therewith, as when a notice by the landlord states that if the tenant fails to comply he will be liable to the statutory penalty for holding over.¹⁴⁰

While a notice to quit must be of the length required by the common law or by statute, that is, it must be given such period

¹³⁵ *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771.

¹³⁶ *Muskett v. Hill*, 5 Bing. N. C. 694.

¹³⁷ *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771; *Smucker v. Grinberg*, 27 Pa. Super. Ct. 531.

¹³⁸ *Ahearn v. Bellman*, 4 Exch. Div. 201; *Cleland v. Kelly*, 13 U. C. Q. B. 442; *Amsden v. Floyd*, 60 Vt. 386, 15 Atl. 332. To the contrary is *Ayres v. Draper*, 11 Mo. 548 (followed in *Columbia Brew. Co. v. Miller*, 124 Mo. App. 384, 101 S. W. 711), which is based on the dictum of Lord Mansfield in *Doe d. Matthews v. Jackson*, 1 Doug. 175, discussed in *Ahearn v. Bellman*, 4 Exch. Div. 201, *supra*. In *Byrne v. Funk*, 13 Wldy. Notes Cas. (Pa.) 503, it was decided that a notice to quit presenting a double alternative, that is,

to buy the property or pay a higher rent, was insufficient.

In *D'Arcy v. Martyn*, 63 Mich. 602, 30 N. W. 194, a notice requiring the tenant to quit or pay an increased rent was regarded as insufficient, while on the other hand, in *Candler v. Mitchell*, 119 Mich. 464, 78 N. W. 551, a notice to quit in a month, or to begin immediately to pay an increased rent in advance, was held good, the earlier case being distinguished on the ground that in it the option was not to be exercised immediately, but was to be exercised only after the lapse of the time fixed by the notice.

¹³⁹ *Bury v. Thompson* [1895] 1 Q. B. 231, 696.

¹⁴⁰ *Doe d. Matthews v. Jackson*, 1 Doug. 175; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143.

before the time named for quitting, it is not necessary that it appear on the face of the notice to have been so given,¹⁴¹ that is, that it appear to have been given six months or three months or one month, as the case may be, before the time named.

A notice to quit expressed to be "for nonpayment of rent" has been decided, in different jurisdictions, to be,¹⁴² and not to be,¹⁴³ sufficient as a notice to quit terminating the tenancy at the end of a rent period, without reference to any default in rent.

Subject to the requirement that the recipient of the notice be not misled, the courts have sometimes shown a disposition to support a notice in spite of inaccuracies therein, as, for example, in case of a mistake in the name of a party,^{143a} or the description of the premises.^{143b} So a notice, given in September, 1795, to quit on a certain date in March, 1795, was held to be good as a notice to quit in March, 1796,¹⁴⁴ and a notice to quit at such time as "your present year's holding shall expire after the expiration of half a year from the delivery of this notice" was held good as a notice to quit at such time in the next year, the "present" year of the holding expiring before the termination of the half year.¹⁴⁵ But when a notice for a certain day in October "now next ensuing, or such other day or time as your tenancy may expire," was given in June, and so not six months before the next October, the court refused to construe it as good for October in the following year,¹⁴⁶ and the same view was taken of a notice to quit "on such day as the current year for which you now hold will expire."¹⁴⁷

The contents of a notice to quit may be proven by oral testimony, or by the production of an examined copy, and for the purpose of proof it is desirable that a copy of the notice be made before it is served. The contents of the notice may, it has been

¹⁴¹ *Doe d. Gorst v. Timothy*, 2 Car. Cal. 236; *Farnam v. Hohman*, 90 Ill. & K. 351. ³¹²; *Congdon v. Brown*, 7 R. I. 19.

¹⁴² *Creighton v. Sanders*, 89 Ill. ⁵⁴³. ¹⁴⁴ *Doe d. Bedford v. Kightley*, 7 Term R. 63.

¹⁴³ *Tuttle v. Bean*, 54 Mass. (13 Metc.) 275. ¹⁴⁵ *Doe d. Williams v. Smith*, 5 Adol. & E. 350.

^{143a} *Doe v. Spiller*, 6 Esp. 70; ¹⁴⁶ *Mills v. Goff*, 14 Mees. & W. 72. *Clark v. Keliher*, 107 Mass. 406. ¹⁴⁷ *Doe d. Borough of Richmond v. Morphett*, 7 Q. B. 577, disapproving

^{143b} *Doe d. Cox v. Roe*, 4 Esp. 185; *Doe d. Huntingtower v. Culliford*, 4 Adol. & E. 743; *King v. Connolly*, 44 Dowl. & R. 248.

held, be proven without first giving notice to the opposite party to produce the original,^{148,149} in accordance with a general rule, frequently asserted, though of questionable soundness, that a notice to produce a notice is never necessary.¹⁵⁰ According to the doctrine of some cases, it seems, if the notice is made out in duplicate, the duplicate retained may be used as evidence of the contents without accounting for the one delivered.¹⁵¹

§ 200. Date of termination of notice.

In England and in most states, a notice to terminate a periodic tenancy must, in the absence of custom¹⁵² or agreement¹⁵³ to the contrary, be expressed to expire at the end of some period of the tenancy, and, if expressed to expire at another time, the notice is invalid.¹⁵⁴ In other words, the notice to quit, if given by the landlord, must require the tenant to quit at the end of the period, and if given by the tenant it must assert an intention to quit on that day. In applying this rule it is generally considered that the notice may be expressed to expire either on the last day of the period or on the day after the last day, which will ordinarily be the day corresponding to the first day of the tenancy, the theory appearing to be that, since the termination of the

^{148, 149} Doe d. Fleming v. Somerton, 7 Q. B. 58; Colling v. Treweek, 6 Barn. & C. 394; Falkner v. Beers, 2 Doug. (Mich.) 117; Eisenhart v. Slaymaker, 14 Serg. & R. (Pa.) 153.

¹⁵⁰ 2 Wigmore, Evidence, § 1206.

¹⁵¹ See Philipson v. Chase, 2 Camp. 111; Jory v. Orchard, 2 Bos. & P. 39; Eisenhart v. Slaymaker, 14 Serg. & R. (Pa.) 153; 2 Wigmore, Evidence, § 1234.

¹⁵² Brown v. Burtinshaw, 7 Dowl. & R. 603.

¹⁵³ See ante, at note 67.

¹⁵⁴ Doe d. Spicer v. Lea, 11 East, 312; Sidebotham v. Holland [1895] 1 Q. B. 378; Goode v. Howells, 4 Mees. & W. 198; Dixon v. Bradford & Dist. R. Servants' Coal Supply Soc. [1904] 1 K. B. 444; Hunter v. Frost, 47 Minn. 1, 49 N. W. 327; Waggoner v. Preston, 83 Minn. 336, 86 N. W. 335; Steffens v. Earl, 40

N. J. Law, 128, 29 Am. Rep. 214; Waters v. Williamson, 59 N. J. Law, 337, 36 Atl. 665; Finkelstein v. Herson, 55 N. J. Law, 217, 26 Atl. 688, 20 L. R. A. 61; Anderson v. Prindle, 23 Wend. (N. Y.) 616; People v. Darling, 47 N. Y. 666; Simmons v. Jarman, 122 N. C. 195, 29 S. E. 332; Silsby v. Allen, 43 Vt. 172, 5 Am. Rep. 267. In South Carolina, however, a tenancy from year to year can be terminated only at the end of the calendar year, in the absence of express agreement to the contrary. Floyd v. Floyd, 4 Rich. Law (S. C.) 23. But a notice by the tenant that he will vacate the premises "by January 1, 1888," was held to state with sufficient clearness that they would be vacated before that day. Wilson v. Rodeman, 30 S. C. 210, 8 S. E. 855.

period is at midnight between those days, the one day is as close thereto as the other. For instance, while a notice to terminate a tenancy from year to year would perhaps more properly be expressed to expire on the day before the anniversary of the commencement of the tenancy, that being the last day of the year,¹⁵⁵ it is valid if expressed to expire on the anniversary itself,¹⁵⁶ and a notice to terminate a tenancy from month to month may be expressed to expire either on the last day of any monthly period,¹⁵⁷ or on the day thereafter, that is, the day corresponding to that on which the tenancy began.¹⁵⁸ In one case, however, it was decided that the notice must be expressed to terminate on the day corresponding to the day of commencement, and that a notice expiring on the previous day, that is, on the last day of the period, would be insufficient,¹⁵⁹ and there are occasional *dicta* that it must expire on the day corresponding to the day of commencement, without any suggestion as to whether it could expire on the previous day.¹⁶⁰

Not only is a notice expressed to expire on a wrong day insufficient, but so is a notice not naming any day, and therefore constituting in effect a mere demand for immediate possession by the landlord, or, if given by the tenant, an offer of immediate possession.¹⁶¹ The notice is, however, valid, though given for

¹⁵⁵ Fox v. Nathans, 32 Conn. 348; Sidebotham v. Holland [1895] 1 Q. B. 378.

¹⁵⁶ Sidebotham v. Holland [1895] 1 Q. B. 378; Doe d. Cornwall v. Matthews, 11 C. B. 675; Burrows v. Mickelson, 14 Manitoba, 739; Thurber v. Dwyer, 10 R. I. 355.

¹⁵⁷ Leahy v. Lubman, 67 Mo. App. 191; Combs v. Midland Transfer Co., 58 Mo. App. 112; Petsch v. Biggs, 31 Minn. 392, 18 N. W. 101.

¹⁵⁸ Walker v. Sharpe, 96 Mass. (14 Allen) 43; Steffens v. Earl, 40 N. J. Law, 128, 29 Am. Rep. 214; Searle v. Powell, 89 Minn. 278, 94 N. W. 868; Detroit Sav. Bank v. Bellamy, 49 Mich. 317, 13 N. W. 606; Harris v. Halverson, 23 Wash. 779, 63 Pac. 549; Drey v. Doyle, 28 Mo. App. 249.

¹⁵⁹ Waters v. Young, 11 R. I. 1, 23

Am. Rep. 409. The decision is to some extent based on the local practice.

¹⁶⁰ Berner v. Gebhardt, 87 Mo. App. 409; Dixon v. Bradford & Dist. R. Servants' Coal Supply Soc. [1904] 1 K. B. 444. In England a notice to quit on the day before the customary quarter or feast day (see ante, note 49) is bad, but it must be to quit on that day if the tenancy is calculated with reference to such days. Page v. More, 15 Q. B. 684.

¹⁶¹ McLean v. Spratt, 19 Fla. 97; Grace v. Michaud, 50 Minn. 139, 52 N. W. 390; Eastman v. Vetter, 57 Minn. 164, 58 N. W. 989; Vincent v. Corbin, 85 N. C. 108; Currier v. Barker, 68 Mass. (2 Gray) 224; Haley v. Hickman's Heirs, 16 Ky. (Litt. Sel. Cas.) 266; People v.

two alternative dates, if one of them is right,¹⁶² and no particular date for quitting need be named, the notice being sufficient, at common law, in the case of a tenancy from year to year, if to quit "at the expiration of the present year's tenancy,"¹⁶³ or "at such time as your (or my) holding shall expire next after the expiration of half a year from the receipt of this notice."¹⁶⁴ And such a general expression may be used, in case of uncertainty as to the proper date, either alone, or in the alternative with the mention of some definite date.¹⁶⁵

The general rule that the notice must be expressed to terminate at the end of a period may, in the particular case, be excluded by a provision of the lease, as when it is stipulated that the tenancy may be terminated by notice of a specified length "at any time," it being unnecessary, in such case, if the notice is of the specified length, that it terminate at any particular time.¹⁶⁶

The rule requiring the notice, in the case of a periodic tenancy, to terminate at the end of a period, has been applied in Massachusetts, where a periodic tenancy is, as such, for the most part

Gedney, 15 Hun (N. Y.) 475; Berner v. Gebhardt, 87 Mo. App. 409; McClung v. McPherson, 47 Or. 73, 81 Pac. 567, 82 Pac. 13; Arbenz v. Exley, Watkins & Co., 57 W. Va. 580, 50 S. E. 813. But in the District of Columbia it was decided that the notice need not "specify the day of the termination of the lease," this being "a fact not required, and one presumably as well known to the defendant as to the complainant. It was dated October 23, 1903, and served the full thirty days before the end of the term." The court merely refers to Code, § 1219, which provides that the notice shall "expire" on the day of the month from which such tenancy began to run. Byrne v. Morrison, 25 App. D. C. 72. See, perhaps to the same effect, Doe d. Ross v. Garrison, 31 Ky. (1 Dana) 36.

¹⁶³ Doe d. Gorst v. Timothy, 2 Car. & K. 351; Arbenz v. Exley, Watkins & Co., 57 W. Va. 580, 50 S. E. 813.

¹⁶⁴ Hirst v. Horn, 6 Mees. & W. 393; Holme v. Brunskill, 3 Q. B. Div. 495; Doe d. Phillips v. Butler, 2 Esp. 589.

¹⁶⁵ Doe d. Campbell v. Scott, 6 Bing. 362.

¹⁶⁶ Bridges v. Potts, 17 C. B. (N. S.) 314; Soames v. Nicholson [1902] 1 K. B. 157; King v. Eversfield [1897] 2 Q. B. 475. In Doe d. King v. Grafton, 18 Q. B. 496, it was held that, there being a letting at a yearly rent, "until one of the said parties shall give to the other six calendar months' notice in writing to quit," the notice might be given to expire with any half year from the commencement of the tenancy. This case is distinguished, on the particular language used, in Lewis v. Baker [1906] 2 K. B. 599.

¹⁶² Doe d. Matthewson v. Wrightman, 4 Esp. 5.

unrecognized,¹⁶⁷ to the case of a tenancy at will, for which the statute prescribes a notice of three months, or, if the interval between the days of payment of rent is less than three months, a notice equal to such interval,¹⁶⁸ and the notice is required to terminate on a rent day.¹⁶⁹ And this rule applies, it has been decided, even though the rent is payable in advance, and the rent day might consequently be regarded as the beginning of a new period.¹⁷⁰ It may, however, be modified by special agreement,¹⁷¹ and, as in the case of a periodic tenancy, the notice need not specify the day of the month on which the rent will become due, but it is sufficient if to quit at the end of the month or quarter, as the case may be, which will expire next subsequent to the day when the rent shall again become due.¹⁷² In Maine, likewise, where periodic tenancies are not recognized, a notice to terminate a tenancy at will is required to terminate with a rent day.¹⁷³

The New York statute,¹⁷⁴ providing that a tenancy at will may be terminated by a written notice from the landlord of not less than thirty days, does not require the notice to terminate at any particular time, and it has been decided to be immaterial that the notice wrongly names a date within the thirty days' interval, it being still sufficient to terminate the tenancy at the end of thirty days.¹⁷⁵ There, however, if rent is payable at regular intervals,

¹⁶⁷ See ante, § 14 b (2) (a).

¹⁶⁸ Massachusetts Rev. Laws 1902, c. 129, § 12.

¹⁶⁹ Prescott v. Elm, 61 Mass. (7 Cush.) 346; Currier v. Barker, 68 Mass. (2 Gray) 224; Steward v. Harding, 68 Mass. (2 Gray) 235; Hultain v. Munigle, 88 Mass. (6 Allen) 220.

¹⁷⁰ Walker v. Sharpe, 96 Mass. (14 Allen) 43.

¹⁷¹ Farson v. Goodale, 90 Mass. (8 Allen) 202. In May v. Rice, 108 Mass. 150, 11 Am. Rep. 328, where, on the expiration of a lease for years, it was agreed that the tenants, who were looking for a new store, might remain at the same rent, either party to have the right to terminate the tenancy by one month's notice, it was

held that the new tenancy was one at will, terminable by one month's notice, expiring at any time.

¹⁷² Sanford v. Harvey, 65 Mass. (11 Cush.) 93.

¹⁷³ It was so decided in Wilson v. Prescott, 62 Me. 115, construing a statute providing for a "thirty days' notice, excepting cases where no rent is due at the time the notice expires." The present statute expressly so provides. See Rev. St. 1903, c. 96, § 2.

¹⁷⁴ Real Prop. Law, § 198.

¹⁷⁵ Burns v. Bryant, 31 N. Y. 453; People v. Ulrich, 2 Abb. Pr. (N. Y.) 28; Peer v. O'Leary, 8 Misc. 350, 28 N. Y. Supp. 687; Morgan v. Powers, 83 Hun, 298, 31 N. Y. Supp. 954.

the tenancy would ordinarily be a periodic tenancy, as to the termination of which by notice the law in that state seems to be somewhat indefinite.¹⁷⁶ In Minnesota, where a periodic tenancy is regarded as a species of tenancy at will for the purpose of the statutory requirement of notice, it is held that the notice must expire at the end of the period by which the tenancy is measured, that is, the ordinary rule is applied.¹⁷⁷ But in New Hampshire, a statutory provision that the lessor may terminate a tenancy by notice in writing to quit "at a day therein named,"¹⁷⁸ has been held to dispense with any necessity that it require a tenant at will from year to year, from month to month, or week to week, to quit on the last day of the year, month or week of the tenancy.¹⁷⁹

A tenant holding over his term is, as is elsewhere stated,¹⁸⁰ usually regarded as a periodic tenant if his holding is accompanied by the payment and acceptance of rent accruing after the term. In most states a notice to quit is necessary to terminate a periodic tenancy so arising to the same extent as any other peri-

¹⁷⁶ See ante, note 54.

¹⁷⁷ *Hunter v. Frost*, 47 Minn. 1, 49 N. W. 327; *Grace v. Michaud*, 50 Minn. 139, 52 N. W. 390.

¹⁷⁸ New Hampshire Pub. St. 1901, c. 246, § 2.

¹⁷⁹ *Stickney v. Burke*, 64 N. H. 377, 10 Atl. 852, where the question at issue, however, was merely whether a notice expressed to expire on the first day of the calendar month, the day on which the rent for the preceding month was payable, was sufficient. The case seems to overrule a dictum in *Leavitt v. Leavitt*, 47 N. H. 329. The tenant cannot, it has been decided in that state, if the legal notice to quit is given by the landlord, extend his holding beyond the time named by undertaking to apply a balance due him by the landlord to the payment of rent in advance for another period, or part of another period. *Blair v. Mason*, 64 N. H. 487, 13 Atl. 871.

In Michigan the statute (Comp. Laws 1897, § 9257) expressly provides that the notice shall not be held void by reason of it mentioning a day for the termination of the tenancy not corresponding to the conclusion or commencement of any rent period. Even apart from this statute, it seems never to have been regarded as necessary to name the day for quitting. *Hogsett v. Ellis*, 17 Mich. 351; *Hart v. Lindley*, 50 Mich. 20, 14 N. W. 682. In *Ganson v. Baldwin*, 93 Mich. 217, 53 N. W. 171, it was decided that though the notice was not given by the landlord the statutory time before beginning proceedings for possession, a judgment for possession would be sustained, no objection to the notice having been asserted in the lower court, and the statutory period having since elapsed.

¹⁸⁰ See post, § 210 b.

odic tenancy,¹⁸¹ and the same requirement applies as regards the date of the termination of the notice. It has in England been decided that, in the case of a periodic tenancy created by the payment of rent by the overholding tenant and its acceptance by the landlord, each period of the new tenancy is, for the purpose of the notice to quit, to be deemed to commence, in the absence of evidence to the contrary, not upon the expiration of the original term, but on the day corresponding to its commencement. For instance, where a lease was made for eighteen months at a yearly rent, and the tenant continued to occupy after the eighteen months, paying the same rent, the notice to quit, it was decided, must terminate on a day corresponding to the day of the beginning of the term and not to the day of its termination, the tenancy from year to year being considered to commence on the former date.¹⁸² This doctrine was, however, held not to apply when the tenant assigned during the term, and the assignee held over, the tenancy from year to year being considered to terminate, not at the time of the commencement of the original term, but at the time of its expiration,¹⁸³ unless the assignee expressly agreed to hold on the same terms as his assignor.¹⁸⁴ The doctrine referred to has been applied when a tenant held over, after the expiration of his lessor's interest, by consent of the lessor's successor in interest, as when the lease was by a tenant for life and the holding over was under and by consent of the remainderman,¹⁸⁵ and when the lease was by a tenant for years, and the holding over was under a subsequent tenant for years,¹⁸⁶ and in each of these cases it was considered that the tenancy from year to year, arising from the holding over, was to be computed from the commencement of the tenant's original holding, and not from the commencement of the holding over.

A question has occasionally arisen in England as to the time for the notice to terminate, when the lease provides that the tenancy

¹⁸¹ See post, § 210 b, at note 95.

¹⁸² *Doe d. Robinson v. Dobell*, 1 Q. B. 806; *Berrey v. Lindley*, 3 Man. & G. 498.

¹⁸³ *Doe d. Buddle v. Lines*, 11 Q. B. 402.

¹⁸⁴ *Humphreys v. Franks*, 18 C. B. 323, where the widow of the tenant

held over, and the question as to the character of the holding was left to the jury.

¹⁸⁵ *Roe d. Jordan v. Ward*, 1 H. Bl. 97; *Doe d. Collins v. Weller*, 7 Term R. 478.

¹⁸⁶ *Kelly v. Patterson*, L. R. 9 C. P. 681.

shall commence at different times as to different parts of the premises. It has been decided that the notice should be expressed to expire at the time of the termination of the tenant's interest in that portion which is the principal subject-matter of the lease,¹⁸⁷ which is such principal subject-matter being a question for the jury.¹⁸⁸

§ 201. Computation of period of notice.

There are but few decisions with reference to the mode of computing the period of time for which, by the common law or statute, the notice must run. The rule that, in computing a period of time, one day, either the first or the last, is to be included, and the other excluded,¹⁸⁹ has occasionally been applied in this connection, and accordingly a requirement of a month's notice has been regarded as satisfied when the time named for quitting was the day of the next month corresponding to the day on which the notice was given,¹⁹⁰ or when the proceedings to recover possession were begun on that day.¹⁹¹ By other cases it is regarded as necessary that the period named in the statute, or by the common-law requirement, be computed as exclusive of the day on which the notice is given, and also of the day on which the tenant is required to yield possession.¹⁹² There is one case to the

¹⁸⁷ Doe d. Daggett v. Snowden, 2 W. Bl. 1224; Doe d. Strickland v. Spence, 6 East, 120; Doe d. Bradford v. Watkins, 7 East, 551.

¹⁸⁸ Doe d. Heapy v. Howard, 11 East, 498; Doe d. Kindersley v. Hughes, 7 Mees. & W. 139.

¹⁸⁹ See 28 Am. & Eng. Enc. Law (2d Ed.) at p. 217; note to State v. Michel, 49 L. R. A. 193.

¹⁹⁰ Baker v. Kenny, 69 N. J. Law, 180, 54 Atl. 526; McGowen v. Sennett, 1 Brewst. (Pa.) 397; Corby v. Brill Book & Stationery Co., 76 Mo. App. 506. So in Murrell v. Lion, 30 La. Ann. 255, it was held that where the lease provided that if either party desired to terminate the tenancy, he must give notice one month before the first of October,

and the first of September happened to be a Sunday, a notice given on the second of September was regarded as sufficient. In Quartermaine v. Selby, 5 Times Law R. 223, Lord Esher, M. R., expresses approval of the statement in Leake on Contracts (3d Ed. at p. 729) that "where notice is required as a condition precedent to any right or claim, as a month's notice of action or a week's notice to quit, it is to be computed exclusive of the day of the notice."

¹⁹¹ Barlum v. Berger, 125 Mich. 504, 84 N. W. 1070.

¹⁹² See Bay State Bank v. Kiley, 80 Mass. (14 Gray) 492. In Aiken v. Appleby, Morris (Iowa) 8, it was held that where a tenant agreed to quit on ten days' notice, ten full

effect that, in view of the language of the particular statute, both of these days might be included in computing the statutory period.¹⁹³

A statutory requirement of one month's notice, expiring at any time, has been held to be satisfied by a thirty days' notice, if the notice is given in a calendar month having only thirty days.¹⁹⁴ A provision that if notice shall be given, "more" than twenty days prior to the end of the month, to leave at the end of the month, the tenant shall be bound to do so, has been regarded as not requiring a notice of more than twenty days, the word "more" merely designating the expiration of the number of days.¹⁹⁵

A requirement of a notice of a particular length is not satisfied by the mailing of the notice at the prescribed time before the day for quitting, but it must reach the person to whom it is sent at the prescribed time.¹⁹⁶ And so it has been held that a

days must elapse, exclusive of the day on which the notice was given, before an action could be brought for possession, and accordingly, if notice was served on the last day of April, the action could not be brought on the tenth of May. In *Hungerford v. Wagoner*, 5 App. Div. 590, 39 N. Y. Supp. 369, it was decided that, in view of the statute providing that "the day from which any specified number of days, weeks or months of time is reckoned shall be excluded in making the reckoning," a month's notice to quit, given on the second day of October, did not entitle the landlord to begin proceedings to dispossess the tenant on the second of November. In *Williams v. McAnany*, 1 Pa. Dist. R. 128, where there was a lease made on the 26th of a month to run from month to month, until either party should give one month's notice previous to the expiration of the current month, a notice served on the 26th of one month was held insufficient to terminate the tenancy on the 26th of the next month.

¹⁹³ *Duffy v. Ogden*, 64 Pa. 240,

where it was decided that the three months' notice which the statute requires to be given before the end of the term, in order to sustain summary proceedings (post, § 274 a [3]), was satisfied when the term ended March 24th and the notice was given December 25th.

¹⁹⁴ *People v. Ulrich*, 2 Abb. Pr. (N. Y.) 28; *Minard v. Burtis*, 83 Wis. 267, 53 N. W. 509.

¹⁹⁵ *McGinnis v. Genss*, 25 Wash. 490, 65 Pac. 755. It was consequently regarded as sufficient that a notice to terminate the tenancy on the 31st of January was served on the 11th of that month.

¹⁹⁶ *Roberts v. Grubb*, 5 Houst. (Del.) 461. And see cases cited post, note 220. In *Binswagner v. Deardon*, 9 Pa. Co. Ct. 653, it was held to be a question for the jury whether a notice was given in sufficient time when, on the last day allowed for notice, the tenant sent the notice twice to the landlord's office, in business hours, and, finding it closed, mailed it on that day, it being received the next day.

notice dropped in the letter box of the addressee took effect only from the time that it was actually received by him.¹⁹⁷

In view of the uncertainty as to the mode of computing time in this connection, it is advisable, in giving a notice to quit, to allow a margin of time, and, as a matter of fact, notices are ordinarily given more than the prescribed period before the time named for the expiration of the notice. It has never been suggested that a notice is invalid because thus given earlier than the common-law or statutory period before the time named for quitting.

§ 202. Waiver of defects.

There are a number of cases in this country to the effect that a defect in a notice to quit may be waived by the recipient of the notice, so as to render it effective as against him to terminate the tenancy. Exactly what is necessary to effect such a waiver does not clearly appear. There are, in one jurisdiction, cases to the effect that the mere failure of the recipient to object to the sufficiency of the notice is sufficient to justify a finding of a waiver,¹⁹⁸ though there is elsewhere a decision clearly repudiating such a view.¹⁹⁹ Ordinarily the inference of a waiver has been based on the absence of express objection to the notice, accompanied by other acts which might be regarded as calculated to induce the belief that the recipient would acquiesce in the termination of the tenancy at the time named in the notice.²⁰⁰ In one case it

¹⁹⁷ *May v. Rice*, 108 Mass. 150, 11 Am. Rep. 328.

In *Hultain v. Munigle*, 88 Mass. (6 Allen) 220, it was decided that a notice requiring the tenant to quit at the proper interval "from the service of this notice upon you," without naming any day, if left at the tenant's house in his absence, did not begin to run until his return. And to the same effect, see *Hodgkins v. Price*, 137 Mass. 13.

¹⁹⁸ In *Ludington v. Garlock*, 29 N. Y. St. Rep. 600, 9 N. Y. Supp. 24, there was held to be a waiver of defects in a notice given by the tenant if the landlord failed to object until after the tenant moved out and tend-

ered the key two weeks later. In *Thomson v. Chick*, 92 Hun, 150, 37 N. Y. Supp. 59, it was decided that if the tenant, while moving out, informed the landlord that he was doing so, a case was presented for the jury whether there was a waiver of the regular notice by failure to object to the notice as given. Compare cases cited ante, note 76.

¹⁹⁹ *Bay State Bank v. Kiley*, 80 Mass. (14 Gray) 492.

²⁰⁰ In *Boynton v. Bodwell*, 113 Mass. 531, evidence that, after service of notice on the landlord, the latter offered to lower the rent and make improvements, that he did not object to the notice, and that the

is said, without any specific reference to the doctrine of "waiver," that a tenant cannot be estopped to question the validity of a notice from the landlord by reason of acts done by him after the time at which the notice could be given,²⁰¹ and it seems that the same principle might well be applied to the theory of waiver of defects, inferred from the acts merely of the recipient of the notice, that is, that they must have been such as to mislead the giving of the notice to his detriment.²⁰² Such a view is not, however,

tenant, when he left, sent the keys to him, was held to warrant a finding that he waived a defect in the notice in failing to fix the time of quitting. In this same case it was decided that, it appearing that the tenant left because of the obstruction of light by the erection of a wall, evidence that at the time of making the lease the landlord had said that there was no danger of such an obstruction was held to be admissible to show such a waiver. No reason is stated for this latter holding.

The failure of a notice from the landlord to a tenant from month to month to name the proper time for quitting was held to be waived by the tenant's action in refusing to quit on the ground that he was a tenant from year to year (*Drey v. Doyle*, 99 Mo. 459), and also when neither the landlord nor his agent objected to the sufficiency of the notice until near the time for quitting, and the latter asked the tenant to withdraw it, and offered inducements to get him to remain. *Corby v. Brill Book & Stationery Co.*, 76 Mo. App. 506. The fact that the landlord continues to demand and accept payments of rent accruing before the expiration of the notice does not show a waiver of defects therein. *Whicher v. Cottrell*, 165 Mass. 351, 43 N. E. 114.

In *Smith v. Snyder*, 168 Pa. 541,

32 Atl. 64, a lessor from year to year made no objection to a verbal notice from his tenant, and subsequently, during the last month of the current year, the lessee having proposed to hold, after its expiration, from month to month, the lessor's agent promised to see whether the lessor would agree to this and to inform the lessee of the answer in time so that he should not be prejudiced by holding over, but the agent failed to communicate again with the lessee, and the latter, assuming that his proposition had been accepted, held over, and it was decided that the jury was justified in finding a waiver of a written notice, though not in finding an acceptance of the lessee's proposition, and consequently the lessee continued to hold from year to year.

In *Snyder v. Porter*, 69 Neb. 431, 95 N. W. 1009, it was decided that the tenant waives the objection that the notice was not of sufficient length by pleading, in defense to an action against him for possession, merely that a new lease had been made to him for a definite term.

²⁰¹ *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771.

²⁰² See 29 Am. & Eng. Enc. of Law (2d Ed.) title "Waiver"; article by Cohn P. Campbell, Esq., 3 Mich. Law Rev. 9.

suggested by the cases previously referred to, and they are perhaps directly opposed thereto.

There is in England a recent case which suggests the possibility that defects in a notice to quit may be cured by the action of the recipient in recognizing the notice as valid.²⁰³ On the other hand a notice expressed to expire at the wrong date, though accepted by the other party, has been there regarded as not binding on the giver of the notice.²⁰⁴ The failure of the addressee, when served personally with the notice, to object to the time named, has been regarded as raising a presumption that this was the proper time,²⁰⁵ a presumption capable of rebuttal if not in accord with the facts.²⁰⁶

§ 203. Service of notice.

Personal service of the notice upon the person for whom it is intended is not necessary, if it is served upon an agent having express or implied authority to receive such a notice.²⁰⁷ A notice to a corporation may be served on the treasurer, or, it seems, on any of its executive officers.²⁰⁸

Upon the question whether a notice may be served upon the wife or servant of the person for whom it is intended, the decisions are not entirely clear. There are cases apparently to the effect that a service upon the wife or servant of such person, at his

²⁰³ General Assur. Co. v. Worsley, 64 Law J. Q. B. 253. There the tenant wrote in January, 1892, to the landlord, "I hereby give you notice that I wish to terminate my tenancy * * *. Will you kindly let me know when my tenancy will expire?" And the reply said, "We find that six months' notice must be given to terminate on the first of July in any year; you, therefore, hold the rooms till July, 1893," and it was held in a brief opinion (Per Wills & Wright, J. J.) that "it is obvious the tenant meant to give notice to quit the offices on the 1st of July, 1893, and the landlord meant to accept it," and that there was sufficient notice to terminate the tenancy.

²⁰⁴ Doe d. Murrell v. Milward, 3 Mees. & W. 328.

²⁰⁵ Doe d. Charges v. Forster, 13 East, 405; Thomas v. Thomas, 2 Camp. 647; Doe d. Leicester v. Biggs, 2 Taunt. 190.

²⁰⁶ Walker v. Gode, 6 Hurl. & N. 594; Oakapple v. Copous, 4 Term R. 361.

²⁰⁷ Doe d. Prior v. Ongley, 10 C. B. 25; Prendergast v. Searle, 81 Minn. 291, 84 N. W. 107 (Notice directed to landlord may be served on one managing the property).

²⁰⁸ Doe d. Carlisle v. Woodman, 8 East, 228; Lindeke v. Associates Realty Co., 77 C. C. A. 56, 146 Fed. 630.

residence, is absolutely good, upon a conclusive implication that the wife or the servant is an agent for this purpose.²⁰⁹ There are to be found, however, expressions to the effect that there is no conclusive implication of agency in such a case, but that there is merely a rebuttable presumption to that effect,²¹⁰ and some cases suggest that there is no such conclusive implication of agency unless the master or husband is at the time absent from his residence.²¹¹ The question whether such service is effective seems to be entirely independent of whether the notice was eventually received by the person for whom it was designed,²¹² nor does it appear to be necessary that the person serving it explain its contents to the person on whom it is served.²¹³ Service upon the

²⁰⁹ *Jones v. Marsh*, 4 Term R. 464; *Doe d. Neville v. Dunbar*, Moody & M. 10; *Smith v. Clark*, 9 Dowl. 202; *Clark v. Keliher*, 107 Mass. 406; *Steese v. Johnson*, 168 Mass. 17, 46 N. E. 431, 36 L. R. A. 493, 60 Am. St. Rep. 364; *Hazeltine v. Colburn*, 31 N. H. 466; *De Giverville v. Stolle*, 9 Mo. App. 185. Service on the husband of the tenant was held good when he had acted as her agent in obtaining the lease. *Cook v. Creswell*, 44 Md. 581.

²¹⁰ *Tanham v. Nicholson*, L. R. 5 H. L. 561.

²¹¹ *Beiler v. Devoll*, 40 Mo. App. 251; *Doe d. Hearn v. Gray*, 2 Houst. (Del.) 135. See *Gerhart Realty Co. v. Weiter*, 108 Mo. App. 248, 83 S. W. 278.

²¹² *Tanham v. Nicholson*, L. R. 5 H. L. 561; *Doe d. Neville v. Dunbar*, 1 Moody & M. 10; *Smith v. Clark*, 9 Dowl. 202. But see *Ewing v. O'Malley*, 108 Mo. App. 117, 82 S. W. 1087. In *Steese v. Johnson*, 168 Mass. 17, 46 N. E. 431, 36 L. R. A. 493, 60 Am. St. Rep. 364, it was decided that service on the wife or servant of the defendant was sufficient, since this "would furnish presumptive evidence that the defendant received

the notice." It does not appear whether by this is meant that such a presumption may be rebutted. As shown by Lord Hatherley in the English case last cited, granting that there is an agency in the wife or servant for the purpose of receiving service, it must be regarded as entirely immaterial whether the notice actually reaches the husband or master. The remarks of Buller, J., in *Jones v. Marsh*, 4 Term R. 464, to the effect that it might be shown that the notice did not reach him, may, in view of the later English decisions, be disregarded.

²¹³ See *Tanham v. Nicholson*, L. R. 5 H. L. 561. In *Walker v. Sharpe*, 103 Mass. 154, Gray, J., seems to regard the English cases as being to the effect that such explanation is necessary if the service on the tenant's wife or servant is at his residence off the demised premises, while not necessary if on his wife or other agent on the premises. The cases cited by him do not, however, distinguish between the case of a service on and off the premises, except that in *Roe d. Blair v. Street*, 2 Adol. & E. 329, it is decided that a service on the wife on the premises

servant of a boarding house at which one lives has been regarded as not equivalent to service on his servant at his own residence within this rule, it being possible, with diligence, to find the tenant himself.²¹⁴

A notice to two joint owners of the reversion must, it has been decided in one jurisdiction, be served upon both,²¹⁵ but elsewhere it has been regarded as a question for the jury whether the notice did not reach the other, so as to affect him therewith.²¹⁶ Where a tenant occupied the premises for business purposes with his partner, service on the latter, in the absence from the state of the tenant and his family, was regarded as sufficient.²¹⁷ And a notice addressed to joint tenants under a lease was regarded as properly served, when actually served on one of them on the leased premises, on which both resided.²¹⁸

A notice has been held to be sufficiently served when put under the door of the house of the person for whom intended, it being shown that he actually received it.²¹⁹ And the service may

is sufficient, while if on the wife off the premises it may not be. In this case, however, the "notice to quit" was, as appears from the report in *Roe d. Blair v. Street*, 4 Nev. & M. 42, and from the facts of the case, a demand of possession as a pre-requisite to an action of ejectment against a tenant at will. In *Smith v. Clark*, 9 Dowl. 202, the service on the tenant's wife, apparently on the premises, was accompanied by a statement that the paper was "a notice of discharge," and the service was upheld.

²¹⁴ *De Giverville v. Stolle*, 9 Mo. App. 185.

²¹⁵ *Bless v. Jenkins*, 129 Mo. 647, 21 S. W. 938; *Long Bros. v. Bolen Coal Co.*, 56 Mo. App. 605.

²¹⁶ *Doe d. Bradford v. Watkins*, 7 East. 551. Compare *Doe d. Macartney v. Crick*, 5 Esp. 196.

²¹⁷ *Walker v. Sharpe*, 103 Mass. 154.

²¹⁸ *Grundy v. Martin*, 143 Mass.

279, 9 N. E. 647. This appears to have been the notice required in the case of summary proceedings (post, § 274 a [3]), but the court discusses it as a question of a notice to terminate a tenancy. In *Langan v. Schlieff*, 55 Mo. App. 213, it is decided that delivery of the notice to one cotenant on the premises for the other is good as against the other.

²¹⁹ *Alford v. Vickery*, Car. & M. 289. So in *Currier v. Grebe*, 142 Pa. 48, 21 Atl. 755, it was held that the jury were justified in finding that there was a sufficient service when the notice was pushed under the door of the tenant's house, when he was absent with intent to avoid service, and he entered the same door on his return, and the next day was told of the notice by the landlord. And see *May v. Rice*, 108 Mass. 150, 11 Am. Rep. 328, where service was made by dropping the notice in the letter box of the addressee.

be by mailing the notice, provided it is received in proper time,²²⁰ and there would, in this, as in other cases, be a presumption that the notice, if properly addressed, posted, and mailed, was duly received.²²¹ A notice was held to be effective when mailed in time to reach the office of the person to whom directed on the last day on which notice could be given, though there was no person there to receive it, so that it did not actually reach him till the next day.²²²

An express requirement of the lease, that notice be delivered to the tenant or his assigns, has been held not to be satisfied by the sending of notice to his last known address, nor by service upon a sublessee, although the tenant himself has disappeared.²²³

The service of the notice need not be made by an officer, but the landlord or any person designated by him may make it.²²⁴

In a number of states there are express statutory provisions as to the mode of service of a notice to the tenant to quit. These ordinarily provide for service upon some person other than the tenant, sometimes restricting such substituted service to cases in which the tenant cannot be found, and the person thus named for service in place of the tenant being usually a person in possession of the premises, or a person of suitable age and discretion residing thereon.²²⁵ They further ordinarily provide that, in case

²²⁰ *Candler v. Mitchell*, 119 Mich. 464, 78 N. W. 551; *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. 454. See ante, at note 196.

²²¹ *Gresham House Estate Co. v. Rossa Grande Cold Co.* [1870] Wkly. Notes 119, cited *Roscoe N. P.* (17th Ed.) 1006; *Papillon v. Brunton*, 5 Hurl. & N. 518. But it must be shown to have been stamped. *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938.

²²² *Papillon v. Brunton*, 5 Hurl. & N. 518.

²²³ *Hogg v. Brooks*, 15 Q. B. Div. 256.

²²⁴ *Farnam v. Hohman*, 90 Ill. 312; *Simpson v. Masson*, 11 Misc. 351, 32 N. Y. Supp. 136. This is assumed in practically all the cases, the notice being but rarely served by an officer.

²²⁵ *California Civ. Code*, § 789; *Code Civ. Proc.* § 1162 (If tenant absent from place of residence or usual place of business, by leaving copy with person of suitable age or discretion at either place, and mailing copy addressed to tenant at his residence); *Colorado*, *Mills' Ann. St.* 1891, § 1977 (By delivering copy to tenant or other occupant of premises, or leaving copy with member of tenant's family above fifteen years of age residing on or in charge of premises); *District of Columbia Code* 1901, § 1223 (If tenant cannot be found, by delivery to person of proper age on the premises); *Idaho Civ. Code* 1901, §§ 2373, 2374 (same as California); *Illinois*, *Hurd's Rev. St.* 1905, c. 80, § 10 (By delivering copy to tenant, or by leaving it with per-

a proper person cannot be found on whom to make service, the notice shall be posted in some conspicuous place on the premises.²²⁶ In only two states do there appear to be any provisions as to the mode of service on the landlord, it being in those states provided that it may be served upon any one who at the time owns the premises, in whole or in part, or the agent of such owner, or according to the common law.²²⁷

The service of the notice to quit may be proven, as any other

son above age of twelve residing on or in possession of the premises). The tenant's wife is such person. *Bell v. Bruhn*, 30 Ill. App. 300. And see *Farnam v. Hohman*, 90 Ill. 312; *Indiana*, Burns' Ann. St. 1901, § 7095 (Notice may be served on tenant, or if tenant cannot be found, by delivery to person of proper age and discretion residing on the premises, having first made known to such person the contents). The notice may be served on the tenant off the premises. *Epstein v. Greer*, 78 Ind. 348; *Iowa* Code 1897, § 2991 (If tenant cannot be found, notice may be given to any subtenant or other person in possession); *Kansas* Gen. St. 1905, § 4060 (If tenant cannot be found, by delivery to person over twelve years of age residing on premises, having first made known to such person the contents, or by leaving copy at tenant's residence, or by posting copy at tenant's residence, or by posting copy on premises); *Montana* Rev. Codes, §§ 4502, 7272 (same as California). *New York* Real Prop. Law, § 198 (By delivery to the tenant or a person of suitable age and discretion residing upon the premises); *North Dakota* Rev. Codes 1905, § 4783 (By delivery to the tenant or some person of discretion residing on the premises); *South Dakota* Rev. Civ. Code, § 262

(same as North Dakota); *Virginia* Code 1904, § 2785 (May be served upon the tenant, or upon any one holding under him the leased premises or any part thereof); *West Virginia* Code 1906, § 3398 (same as Virginia); *Wisconsin* Rev. St. 1898, § 2184 (By delivery to tenant or to some person of proper age residing on the premises).

²²⁶ It is so provided in effect in the statutes enumerated in the previous note, except in those of Virginia and West Virginia. In California, Idaho and Montana the statute provides for such posting, in case the tenant's place of residence and business cannot be found, or a person of suitable age or discretion cannot be found, and also delivering a copy to a person there residing, if such person can be found, and also sending a copy through the mail addressed to the tenant at the place where the property is situated.

In Illinois it was held that a notice by posting was not insufficient because it described the premises as those "now occupied by you," this not admitting that there was someone in possession, so as to preclude a notice by posting. *Consolidated Coal Co. v. Schaefer*, 135 Ill. 210, 25 N. E. 788.

²²⁷ *Virginia* Code 1904, § 2785; *West Virginia* Code 1906, § 3398.

fact, by oral evidence,²²⁸ and this indeed would seem ordinarily to be the only method of proving it, since the affidavit or return of the person serving it is not in reference to the performance of an official duty, even when the service is in the particular case made by an official, and consequently the rule against hearsay evidence applies.²²⁹ But an indorsement upon a duplicate, by the person serving the notice, of the fact and time of service, although not ordinarily admissible, may be so in case of his death, provided it was made by him in the ordinary course of business,^{229a} and consequently it is well for him to make such an indorsement.

§ 204. Effect of giving of notice.

A notice to quit, once given, is effectual in favor of and as against any successors in interest of either party,²³⁰ and, as before stated, a notice to a tenant is effectual as against a subtenant.²³¹

The fact that, in a case in which no notice to quit is necessary, as when the lease is for a certain term,²³² or when there is no valid lease,²³³ the landlord or owner gives a notice to quit, does not conclude him as to the character of the holding.

²²⁸ *Weeks v. Sly*, 61 N. H. 89; *Chung Yow v. Hop Chong*, 11 Or. 220. See ante, at notes 148-151.

²²⁹ *People v. Walsh*, 13 Wkly. Dig. (N. Y.) 440; *Possen v. Dean*, 8 N. Y. Civ. Proc. 177 (semble); *Simpson v. Masson*, 11 Misc. 351, 32 N. Y. Supp. 136; *Hollingsworth v. Snyder*, 2 Iowa, 435. But in Illinois the statute makes the return of an officer or the sworn return of a private individual as to service of the notice prima facie evidence of the facts therein stated (Rev. St. c. 80, § 11). See *Moller v. Barrett*, 49 Ill. App. 519. Whether the service could be proven by an ex parte affidavit was left undecided in *Weeks v. Sly*, 61 N. H. 89.

^{229a} *Doe d. Patteshall v. Turford*, 3 Barn. & Adol. 890. Compare *Stapyl-*

ton v. Clough, 2 El. & Bl. 933, where the facts did not bring the case within the principle.

²³⁰ *Doe d. Egremont v. Forwood*, 3 Q. B. 627; *Doe d. Higgs v. Terry*, 4 Adol. & E. 274. In *Bernstein v. Koch*, 52 Misc. 550, 102 N. Y. Supp. 524, the decision seems to be that the fact that the lessor has transferred the reversion during a rent period does not enable the lessee, as against the transferee, to relinquish possession at the end of such period without having given the statutory notice, implying that a notice to the lessor would be effective as against his transferee.

²³¹ See ante, at notes 98, 99.

²³² *Secor v. Pestana*, 37 Ill. 525.

²³³ *Melley v. Casey*, 99 Mass. 241.

§ 205. Withdrawal or waiver of notice.

It has in England been decided that a valid notice to quit, if once given, cannot be withdrawn or waived, but will necessarily cause the tenancy to cease upon the expiration of the notice; and that an attempted withdrawal or waiver, though assented to by both parties, can merely make the holding of the tenant, if continued beyond the current period, a new tenancy, and not a continuance of the old one.²³⁴ That such withdrawal or waiver, if after the expiration of the date of expiration of the notice, that is, the end of the current period, cannot restore the tenancy terminated by the notice, and can only create a new tenancy, is evident, but the view that the notice cannot be withdrawn while it is still running is open to considerable question. A different view has been strongly asserted in Ireland,²³⁵ and there are cases in this country clearly opposed to the English view.²³⁶ In both countries there are numerous cases in which the possibility of such waiver of the notice, with the effect of leaving the former tenancy unchanged, has been assumed.^{236a} For most purposes, the question whether the continued holding of the tenant is under the old or a new tenancy is immaterial.

It has been decided in England that a party who has given a notice to quit cannot afterwards withdraw or "waive" such notice without the assent of the other party to the tenancy, that is, that a notice once given operates to terminate the tenancy at the time therein specified unless both parties consent that it shall not so operate.²³⁷ Presumably the courts of this country would take a like view, but the question appears never to have been

²³⁴ *Tayleur v. Wildin*, L. R. 3 Exch. 303. In *Holme v. Brunskill*, 3 Q. B. Div. 495, the earlier case of *Tayleur v. Wilden*, L. R. 3 Exch. 303, *supra*, is distinguished on the ground that in the later case the tenant did not continue in possession after the date of the expiration of the notice, so that its withdrawal did not create a new tenancy.

²³⁵ *Inchiquin v. Lyons*, 20 L. R. Ir. 474.

²³⁶ *Whitney v. Swett*, 22 N. H. 10,

53 Am. Dec. 228; *Supplee v. Timothy*, 124 Pa. 375, 16 Atl. 864; *Brown v. Montgomery*, 21 Pa. Super. Ct. 262; *Arcade Inv. Co. v. Gieriet*, 99 Minn. 277, 109 N. W. 250.

^{236a} See cases cited in the notes next following.

²³⁷ *Jenner v. Clegg*, 1 Moody & R. 213; *Alford v. Vickery*, 1 Car. & M. 280; *Williams v. Stiven*, 9 Q. B. 14; *Doe d. Hertford v. Hunt*, 1 Mees. & W. 692.

presented.²³⁸ Such a requirement of the assent of the party to whom the notice was given does not, it seems clear, require that the assent be expressed by words rather than by conduct.

If the landlord receives money from the tenant as for rent accruing after the expiration of a notice to quit, given by the latter, there is a waiver of the notice.²³⁹ But the payment and acceptance of money, not as rent, but as compensation for the injury done by the tenant in continuing on the premises as a trespasser, would not involve a waiver,²⁴⁰ and it has been held that a recovery in use and occupation will not have that effect.²⁴¹

The question whether a mere demand for rent, accruing after the expiration of the notice, constitutes a waiver, has been regarded as one of intention, properly for the jury.²⁴² The demand for, or receipt of, rent, accruing before the expiration of the notice, cannot be regarded as a waiver.²⁴³

The levy of a distress for rent falling due after the date of expiration of the notice has been held to show conclusively, as against the landlord, an intention on his part to withdraw or

²³⁸ There is a dictum to that effect in *Western Union Tel. Co. v. Pennsylvania R.*, 120 Fed. 362.

²³⁹ *Goodright v. Cordwent*, 6 Term R. 219; *Blyth v. Dennett*, 13 C. B. 178; *Doe d. Ash v. Calvert*, 2 Camp. 387; *Keith, Prowse & Co. v. National Tel. Co.* [1894] 2 Ch. 147; *Den d. Stedman v. McIntosh*, 27 N. C. (5 Ired. Law) 571, 44 Am. Dec. 58; *Collins v. Canty*, 60 Mass. (6 Cush.) 415; *Prindle v. Anderson*, 19 Wend. (N. Y.) 391. The case of *Doe d. Cheny v. Batten*, 1 Cowp. 243, deciding that the payment and receipt of rent do not necessarily involve a waiver of the notice, but that it is a question of intention for the jury, is disapproved in *Goodright v. Cordwent*, 6 Term R. 219, and is not in accord with the cases above cited. It is followed, however, in *Fitzpatrick v. Childs*, 2 Brewst. (Pa.) 365.

Acceptance of rent by agent au-

thorized to receive rent does not involve a waiver of the notice if he does not know of the notice (*Doe d. Ash v. Calvert*, 2 Camp. 387), or unless he has authority to waive the notice. *Fitzpatrick v. Childs*, 2 Brewst. (Pa.) 365. That a waiver by an unauthorized agent is nugatory, see *Lucas v. Brooks*, 85 U. S. (18 Wall.) 436.

²⁴⁰ *Goodright v. Cordwent*, 6 Term R. 220; *Zouch v. Willingale*, 1 H. Bl. 311.

²⁴¹ *Den d. Stedman v. McIntosh*, 27 N. C. (5 Ired. Law) 571, 44 Am. Dec. 58.

²⁴² *Blyth v. Dennett*, 13 C. B. 178; *Bantjo v. Clark*, 88 N. Y. Supp. 135.

²⁴³ *Conner v. Jones*, 28 Cal. 59; *Norris v. Morrill*, 43 N. H. 213; *Byrne v. Morrison*, 25 App. D. C. 72; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 59 C. C. A. 113, 123 Fed. 33.

waive the notice,²⁴⁴ and the tenant's assent is shown by his submission to the distress,²⁴⁵ he having the right, if he so choose, to contest the distress proceeding on the ground that the tenancy was terminated before the rent could have accrued.²⁴⁶

The landlord may, without waiving the notice, agree with the tenant that he may remain on the premises after the termination of the notice,²⁴⁷ and a mere delay by the landlord, after giving a notice to quit, in bringing proceedings to recover possession, does not involve a waiver of the notice.²⁴⁸

The giving of a second notice is regarded as a waiver of a prior notice,²⁴⁹ but the mere making of a subsequent demand for the delivery of possession, in pursuance of a previous notice to quit, does not involve a waiver of such notice, it being rather a confirmation thereof,²⁵⁰ and the fact that the landlord had already brought ejectment has been regarded as sufficient to preclude the inference of a waiver by a second notice.²⁵¹

If the tenant, having given notice of an intention to quit, remains in possession after the time named in the notice, he is liable, by force of St. 11 Geo. 2, c. 19, § 18, adopted or re-enacted in a number of states, for double the rental value of the premises,²⁵² and, even apart from such statute, he would ordinarily, it seems, be liable in use and occupation as a tenant holding over.²⁵³ Such retention of possession does not necessarily operate as a waiver or withdrawal of the notice, so as to effect a continuance

²⁴⁴ *Zouch v. Willingale*, 1 H. Bl. 311. the holding after the expiration of the notice was by permission.

²⁴⁵ *Panton v. Jones*, 3 Camp. 372.

²⁴⁶ *Jenner v. Clegg*, 1 Moody & R. 213; *Blyth v. Dennett*, 13 C. B. 178.

²⁴⁷ *Babcock v. Albee*, 54 Mass. (13 Metc.) 273.

²⁴⁸ *Jackson v. Stafford*, 2 Cow. (N. Y.) 547; *Boggs v. Black*, 1 Bin. (Pa.) 333; *Whiteacre v. Symonds*, 10 East, 13. In *Vance v. Vance*, 5 Ir. R. C. L. 363, it was held to be a question for the jury whether there was a tenancy from year to year, the notice not having been acted on. Here, however, there was evidence that

²⁴⁹ *Doe d. Brierly v. Palmer*, 16 East, 53; *D'Arcy v. Martyn*, 63 Mich. 602, 30 N. W. 194; *Dockrill v. Schenk*, 37 Ill. App. 44; *Morgan v. Powers*, 83 Hun, 298, 31 N. Y. Supp. 954.

²⁵⁰ *Moody v. Seaman*, 46 Mich. 74, 8 N. W. 711; *Messenger v. Armstrong*, 1 Term R. 53; *Doe d. Digby v. Steel*, 3 Camp. 115.

²⁵¹ *Doe d. Williams v. Humphreys*, 2 East, 237; *Ewing v. O'Malley*, 108 Mo. App. 117, 82 S. W. 1087.

²⁵² See post, § 213 b.

²⁵³ See post, § 211. But merely

of the former tenancy, since it may be that he intends to hold over otherwise than as tenant of the same landlord,²⁵⁴ and *a fortiori* there is no waiver of the notice if such retention of possession is merely the result of inadvertance.²⁵⁵ Such retention of possession is, however, it seems, evidence to go to the jury upon the question whether there was a waiver of the notice.²⁵⁶

leaving ashes on the premises does not render him liable in use and occupation. *Wilson v. Prescott*, 62 Me. 115.

²⁵⁴ *Jenner v. Clegg*, 1 *Moody & R.* 213. In *Hunter v. Kircher*, 8 *S. D.* 554, 67 *N. W.* 621 the fact that the tenant remained in possession after

the time named seems to be regarded as having some effect, but what effect does not clearly appear.

²⁵⁵ *Gray v. Bompas*, 11 *C. B. (N. S.)* 520.

²⁵⁶ *Jones v. Shears*, 4 *Adol. & E.* 832.

CHAPTER XXI.

HOLDING OVER BY TENANT.

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 - a. General considerations.
 - b. Liability for entry on the land.
 - c. Liability for injury to the person.
 - d. Liability for removal of chattels.
- 217. Rights of landlord after resuming possession.

§ 206. Duty to relinquish possession.

It is the duty of a tenant for years, unless he obtains a renewal of the lease, to relinquish possession of the premises at the end of the term, and his failure so to do is not excused by the fact that the landlord has not demanded the possession or manifested

a readiness to receive it.¹ In one state only, it appears, has a different view been asserted, it being there said that the tenant is under an obligation not to leave unoccupied a dwelling leased to him.² The duty to relinquish possession applies to the whole premises, and if the tenant fails to relinquish any part he is regarded as "holding over" as to all.³

The tenant has no right to retain possession for the sake of cleaning the premises,⁴ nor, it seems, for the sake of removing improvements in accordance with a stipulation giving him such right of removal.⁵ But not infrequently he is allowed, by the express provisions of the lease, to retain possession until the landlord has paid him for improvements made by him.⁶ And occasionally a provision looking towards the possible purchase of the premises by the tenant may have the effect of enabling the latter to retain possession pending the settlement of the price to be paid.⁷

The fact that the instrument of lease provides that rent shall be paid by the lessee in case he holds over does not give him any right to hold over.⁸ Nor can the tenant justify his failure to re-

¹ Schilling v. Holmes, 23 Cal. 227, 83 Am. Dec. 111; Werner v. Footman, 54 Ga. 128; Poppers v. Meagher, 148 Ill. 192, 35 N. E. 805; Excelsior Steam Power Co. v. Halstead, 5 App. Div. 124, 39 N. Y. Supp. 43; Cairns v. Llewellyn, 2 Pa. Super. Ct. 599. Compare Mitchell v. Blossom, 24 Mo. App. 48.

² Kyle v. Proctor, 70 Ky. (7 Bush) 493; Bowling v. Ewing, 10 Ky. (3 A. K. Marsh.) 616. But compare Ky. St. 1903, §§ 2295, 2296, providing that if a tenancy is to expire on a certain day, the tenant shall "abandon" the premises on that day. The cases above cited involved covenants to return the premises at the end of the term.

³ Ballance v. City of Peoria, 180 Ill. 29, 54 N. E. 428; Bless v. Jenkins, 129 Mo. 647, 31 S. W. 938; Cavanaugh v. Clinch, 88 Ga. 610, 15 S. E. 673.

That the prosecution by the landlord of a suit to invalidate the lease, which suit did not prevent the lessee from exercising his rights, did not give any right to the latter to compensation by further extension of his holding, see Lanyon Zinc Co. v. Burtiss, 72 Kan. 441, 83 Pac. 989, 115 Am. St. Rep. 219.

⁴ Byxbee v. Blake, 74 Conn. 607, 51 Atl. 535, 57 L. R. A. 222.

⁵ See post, § 243 e.

A stipulation giving the lessee the right to remove improvements does not extend the right of possession beyond the term, but, at most, gives a right merely to enter within a reasonable time to remove the improvements. I. X. L. Furniture & Carpet Installment House v. Berets, 32 Utah, 454, 91 Pac. 279.

⁶ See post, § 271 k.

⁷ See post, § 265, at note 77.

⁸ Edwards v. Hale, 91 Mass. (9

linquish possession by showing that he had permission to remain from an intending lessee of the reversion, the negotiations between whom and the landlord, however, did not result in the making of a lease.⁹

It has been decided that, when the day of the termination of the tenancy falls on Sunday, the tenant need not relinquish possession till the next day,¹⁰ applying the rule which is ordinarily adopted that, if one has a certain period in which to do a thing, and the last day of the period is Sunday, he has until the next day for performance.¹¹

In three states the statute provides that if, in the case of agricultural land, the tenant holds over sixty days without any demand for possession being made upon him, he may hold for another year, as by permission of the landlord.¹² In another state there is a somewhat similar provision, that if proceedings to expel the tenant are not brought within a time named, he may hold over for another term of a period named in the statute.¹³

§ 207. What constitutes holding over.

A tenant cannot be regarded as holding over merely because he leaves a few abandoned articles on the premises,¹⁴ and in one

Allen) 462. Compare *Pickett v. Bartlett*, 107 N. Y. 277, 14 N. E. 301.

⁹ *Poppers v. Meagher*, 148 Ill. 192, 35 N. E. 805.

¹⁰ *Frost v. Akron Iron Co.*, 1 App. Div. 449, 37 N. Y. Supp. 374.

¹¹ See cases cited 28 Am. & Eng. Enc. Law (2d Ed.) 224.

¹² *California Code Civ. Proc.* § 1161 (2); *Utah Comp. Laws* 1907, § 3576; *Washington, Ball. Ann. Codes & St.* § 5528. See *Snyder v. Harding*, 38 Wash. 666, 80 Pac. 789; *Mounts v. Goranson*, 29 Wash. 261, 69 Pac. 740.

¹³ In Kentucky the statute (St. 1903, § 2295) provides that a tenant for a year or more, holding over without any contract, can hold for one year longer if no proceedings are brought to eject him within ninety days. The next section contains a provision, as to a tenant for less

than a year, that the tenant may hold sixty days longer if no proceeding is brought within thirty days. The payment of one month's rent is said to be "persuasive evidence" of the existence of a new contract. *Unger v. Bamberger*, 85 Ky. 11, 2 S. W. 498, 7 Am. St. Rep. 571. But in another case (*Irvine v. Scott*, 85 Ky. 260, 3 S. W. 163), it was said that the payment of two months' rent would not be sufficient to defeat the landlord's remedy for possession, though there it was held that the landlord was estopped to oust the tenant after he had stood by and permitted him to take in on the rented premises (a stable) sufficient provender to last for a year.

¹⁴ *Gibbons v. Darton*, 4 Hun (N. Y.) 451; *Excelsior Steam Power Co. v. Halstead*, 5 App. Div. 124, 39 N.

state it appears to have been decided that the leaving of articles not abandoned by him does not have that effect.¹⁵ The retention by the tenant of the keys of the building on the land leased has been regarded as involving a holding over by him,¹⁶ but a different view has been asserted when the failure to return the keys was accidental.¹⁷

For the purpose of imposing liability on a tenant, a retention of possession by his tenant, a subtenant, is ordinarily regarded as a holding over by the tenant himself, although without the latter's complicity or consent.¹⁸ This is not the case, however, if the retention of possession by the subtenant is by arrangement with the head landlord or a subsequent lessee of the latter, entitled to possession on the end of the original term.¹⁹

That one of two persons to whom the lease was made holds over with the assent of the other has been regarded as a holding over by both,²⁰ but this is not the case if the retention of possession by one is without the other's assent.²¹

Y. Supp. 43; *Beeston v. Yale*, 75 App. Div. 388, 78 N. Y. Supp. 158.

¹⁵ *Frost v. Akron Iron Co.*, 1 App. Div. 449, 37 N. Y. Supp. 374. See cases cited post, note 37. In *Nisbet v. Hall*, 28 Nova Scotia, 80, the fact that the moving was not completed on the last day of the term was not regarded as involving a holding over.

That one who leased land fronting on the water for the purpose of storing logs, having removed all his logs at the end of the term, retained his boom in front of the land, in order to prevent logs from coming upon the land, was held not to involve a retention of the possession of the land. *Thomas v. Frost*, 29 Mich. 336.

¹⁶ See *Byxbee v. Blake*, 74 Conn. 607, 51 Atl. 535, 57 L. R. A. 222; *Burnham v. Martin*, 90 Ill. 438. Contra. *Steen v. Scheel*, 46 Neb. 252, 64 N. W. 957.

¹⁷ *Gray v. Bompas*, 11 C. B. (N. S.)

520; *Brennan v. New York*, 80 App. Div. 251, 80 N. Y. Supp. 247.

¹⁸ *Harding v. Crethorn*, 1 Esp. 57; *Henderson v. Squire*, L. R. 4 Q. B. 170; *Schilling v. Holmes*, 23 Cal. 227, 83 Am. Dec. 111; *Bacon v. Brown*, 9 Conn. 334, 23 Am. Dec. 358; *Berkowsky v. Cahill*, 72 Ill. App. 101; *Ventura Hotel Co. v. Pabst Brew. Co.*, 33 Ky. Law Rep. 149, 109 S. W. 354; *Brewer v. Knapp*, 18 Mass. (1 Pick.) 334; *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Lubetkin v. Elias Brew. Co.*, 21 Abb. N. C. 304, 4 N. Y. Supp. 195; *Sullivan v. George Ringler & Co.*, 171 N. Y. 693, 64 N. E. 1126; *Morgenthau v. Beaton*, 88 N. Y. Supp. 359; *Wilson v. Cincinnati*, 10 Ohio Dec. 123; *Campau v. Mitchell*, 103 Mich. 617, 67 N. W. 890, 27 L. R. A. 211.

¹⁹ *Kennicott v. Sherwood*, 22 Ill. 190.

²⁰ *Christy v. Tancred*, 9 Mees. & W. 438.

²¹ *Draper v. Crofts*, 15 Mees. & W. 166.

There have been a considerable number of decisions upon the question of what constitutes a holding over for the purpose of enabling the landlord to hold the tenant liable as under a new tenancy, even though the tenant does not intend such a new tenancy. These decisions will be subsequently referred to.^{21a}

§ 208. Rights of tenant wrongfully holding over.

A tenant holding over the term of his lease without the consent, either express or implied, of his landlord, is, as we have before stated, a tenant at sufferance merely.²² Occasional statements that he is a tenant at will when thus holding over are incorrect.²³

The tenant thus holding over without the consent of the landlord has, as stated elsewhere, in some jurisdictions, a right to demand that force shall not be used to eject him,²⁴ and he cannot be made liable in trespass until the landlord has entered on the premises.²⁵ In other respects he has no greater rights than a trespasser,²⁶ and he cannot assert rights under the covenants of the expired lease.²⁷

§ 209. Landlord's option as to new tenancy.

a. **The rule usually adopted.** By the decided weight of authority in this country, one holding over may be held liable as a tenant for a further period, without reference to his actual wishes on the subject. As it is frequently expressed, the landlord has the option to treat him as a tenant for a further term or as a trespasser. It is said, in what may be regarded as the leading case supporting this view:^{28,29} "When a tenant under a demise for a year or more holds over after the end of his term, without any new agreement with the landlord, he may be treated as a tenant from year to year, and in all other respects as holding upon

^{21a} See post, § 209 c.

²² See ante, § 15.

²³ That he is not a tenant at will, see *Kuhn v. Smith*, 125 Cal. 615, 58 Pac. 204, 73 Am. St. Rep. 79; *Perine v. Teague*, 66 Cal. 446, 6 Pac. 84.

²⁴ See post, § 216.

²⁵ See ante, § 15 a, at notes 559-567.

²⁶ See ante, § 15 c.

²⁷ See *Ives v. Williams*, 50 Mich. 100, 15 N. W. 33.

^{28, 29} *Conway v. Starkweather*, 1 Denio (N. Y.) 113.

The landlord only, and not a lessee in reversion, has the right to assert this doctrine as against an overholding tenant. *United Merchants' Realty & Imp. Co. v. Roth*, 122 App. Div. 628, 107 N. Y. Supp. 511.

the terms of the original lease. The landlord has an election to treat him either as a trespasser, or as a tenant. He will be a trespasser if the landlord brings ejectment, or resorts to summary proceedings under the statute to recover the possession. He will be a tenant if the landlord either receives or distrains for rent accruing after the end of the original term. * * * The tenant has no such election as that which belongs to the landlord. If he holds over, though for a very short period, without any unequivocal act at the time to give his holding the character of a trespass, he is not afterwards at liberty to deny that he is in as a tenant, if the landlord chooses to hold him to that relation."

In England, and in one, if not more, of the states of this country, the courts have not recognized an option in the landlord thus to hold the tenant for another period merely because he wrongfully retains possession during a part of that period;³⁰ they applying, in this case as in others, the rule that a tenancy can be created only by the consent of the parties thereto. A modern English case, however, approximates somewhat in result, it would seem, to the ordinary American rule, it being held that, the landlord having demanded rent of the overholding tenant, the latter's failure to reply to such demand, combined with his continued retention of possession, showed a consent on his part to the renewal of the former tenancy.³¹

It is somewhat surprising that the courts of this country, which have ordinarily shown a desire to mould the law in favor of the tenant rather than the landlord, should have originated and generally adopted a rule, the tendency of which is, in many cases, to operate with considerable severity upon a tenant who is dis-

³⁰ See *Ibbs v. Richardson*, 9 Adol. & E. 849; *Jones v. Shears*, 4 Adol. & E. 832; *Waring v. King*, 8 Mees. & W. 571; *Nisbet v. Hall*, 28 Nova Scotia, 80; *Kendall v. Moore*, 30 Me. 327; *Edwards v. Hale*, 91 Mass. (9 Allen) 462; *Delano v. Montague*, 58 Mass. (4 Cush.) 42; *Emmons v. Scudder*, 115 Mass. 367. Compare *Dimock v. Van Bergen*, 94 Mass. (12 Allen) 551. *

holding over by any lessee shall be evidence of a new lease would seem to preclude the adoption of the ordinary American doctrine in that state. See *Miller v. Lampson*, 66 Conn. 432, 34 Atl. 79. But compare *Byxbee v. Blake*, 74 Conn. 607, 51 Atl. 535, 57 L. R. A. 222. And see the reference to the Wyoming statute, post, note 72.

³¹ *Dougal v. McCarthy* [1893] 1 Q. B. 736.

The provision of the Connecticut statute (Gen. St. § 4043) that no

posed promptly to relinquish possession but is accidentally prevented from so doing. The purpose and effect of the rule appear to be to impose a penalty upon the tenant wrongfully holding over, and this penalty it adjusts without reference to the actual wrong inflicted upon the landlord, as measured by the period of the holding over, or to the culpability of the tenant.

b. **The theory of the rule.** It has been suggested that this option in the landlord is to be regarded as based on the theory that the tenant holding over presumably intends to hold for another term or period, and that he cannot overthrow this presumption by asserting, to the disadvantage of the landlord, that he is holding as a wrongdoer.³² There seems, however, no advantage in introducing such a theory, and it is more satisfactory to regard this as "one among the cases where a person may be charged, as upon a contract, without his consent, and contrary to his intention."³³ In other words, the tenant is liable for further rent upon the principle, not of contract, but of *quasi* contract. That this is the character of the liability plainly appears from the fact that it exists in spite of any statements by the tenant evidencing a contrary intention.³⁴

³² Conway v. Starkweather, 1 Denio (N. Y.) 113.

³³ Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151. In Herter v. Mullen, 159 N. Y. 28, 53 N. E. 700, it is said, per Martin J., "The basis of this liability is often said to be an implied agreement upon the part of the tenant to hold for another year. While I doubt, as I always have, the propriety of calling this class of obligations implied contracts, but think they are to be regarded as the duties which the law imposes, yet, whether they be denominated implied contracts or duties created by law, in either case the right arises upon an implication of law, and in no sense upon an express or absolute contract."

³⁴ Schuyler v. Smith, 51 N. Y. 309, 10 Am. Rep. 609; Wolffe v. Wolff, 69 Ala. 549, 44 Am. Rep. 526; Mason v.

Wierengo's Estate, 113 Mich. 151, 71 N. W. 489, 67 Am. St. Rep. 461; Bradley v. Slater, 50 Neb. 682, 70 N. W. 258; Smith v. Bell, 44 Minn. 524, 47 N. W. 263; Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636; Graham v. Dempsey, 169 Pa. 460, 32 Atl. 408; Cavanaugh v. Clinch, 88 Ga. 610, 15 S. E. 673.

In one case it has been decided that this rule will not be applied against a municipal corporation for the reason that no contract will be implied against such a body. San Antonio v. French, 80 Tex. 575, 16 S. W. 440, 26 Am. St. Rep. 763. This view would seem to be based on the theory that the tenant's liability is a strictly contractual one. That a municipality may be made liable in quasi contract, see 1 Abbott, *Municipal Corporations*, p. 580.

c. **Facts justifying exercise of option.** A question has arisen in a number of cases as to what constitutes a "holding over" by the tenant, so as to bring him within this rule. The cases are generally to the effect that the mere fact that the holding over was of but short duration does not exclude the application of the rule,³⁵ nor does the fact that the tenant was engaged in moving at the expiration of the term and continued so doing without intermission, and completed his removal within a few days, have such an effect.³⁶ The action of the tenant in allowing all the personal property used on the premises during the term to remain there till after its expiration ordinarily involves a holding over,³⁷

³⁵ *Conway v. Starkweather*, 1 Denio (N. Y.) 113 (fourteen days); *Schuyler v. Smith*, 51 N. Y. 309, 19 Am. Rep. 609 (twenty-one days); *Wolfe v. Wolff*, 69 Ala. 549 (ten days); *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151 (eleven days); *Oussani v. Thompson*, 19 Misc. 524, 77 N. Y. St. Rep. 1061, 43 N. Y. Supp. 1061 (one day); *Shanahan v. Shanahan*, 55 N. Y. Super. Ct. (23 Jones & S.) 339, 14 N. Y. St. Rep. 732 (two days); *Sullivan v. George Ringler & Co.*, 171 N. Y. 693, 64 N. E. 1126 (five days). But in *Ketcham v. Ochs*, 34 Misc. 470, 70 N. Y. Supp. 268; *Id.*, 74 App. Div. 626, 77 N. Y. Supp. 1130, it was held that holding over till the afternoon of the day after that on which the term came to an end did not bring the case within the rule.

³⁶ *Shanahan v. Shanahan*, 55 N. Y. Super. Ct. (23 Jones & S.) 339, 14 N. Y. St. Rep. 732. So in *Oussani v. Thompson*, 19 Misc. 524, 77 N. Y. St. Rep. 1061, 43 N. Y. Supp. 1061, where the tenancy expired October 1, and the tenant commenced to move on that day but did not finish moving till 5 o'clock in the afternoon of the next day, the tenant was held liable for another term. But see to the

contrary, *Ketcham v. Ochs*, 34 Misc. 470, 70 N. Y. Supp. 268.

³⁷ *Vosburgh v. Corn*, 23 App. Div. 147, 48 N. Y. Supp. 598. In *McMann v. Bloomer*, 107 N. Y. Supp. 882, it was held that the action of the tenant in leaving some of his furniture on the premises for about a week, by the permission of the janitor, involved a holding over, the janitor having no authority to grant such permission. And in *Fitzgerald v. St. George*, 110 N. Y. Supp. 971, leaving, for fourteen days, bales of paper, empty cases and shelving, was regarded as constituting a holding over. But where the janitress of the apartment told the tenant that he might leave a piano and crib on the premises, and it was customary to leave articles until they could be conveniently removed, there was held to be no holding over within the rule (*Smith v. Maxfield*, 9 Misc. 42, 59 N. Y. St. Rep. 669, 29 N. Y. Supp. 63), and it was even held that there was no holding over where articles mortgaged were left, to be removed by the mortgagee, and he failed to remove them for fifteen days. *Ketcham v. Ochs*, 34 Misc. 470, 70 N. Y. Supp. 268; *Id.*, 74 App. Div. 626, 77 N. Y. Supp. 1130.

but the leaving of mere rubbish on the premises does not.³⁸ In one state the question whether there was a holding over has been quite frequently regarded as one for the jury, particularly in cases in which some of the tenant's chattels, though not all, remained on the premises after the end of the term.³⁹

There is a holding over by the tenant within the rule, though

In *Cavanaugh v. Clinch*, 88 Ga. 610, 15 S. E. 673, it was held that there was a holding over within the rule when the tenant retained possession of part of the premises for two weeks in order to store articles pending their distribution to his customers.

³⁸ *Gibbons v. Dayton*, 4 Hun (N. Y.) 451; *Rohrbach v. Crossett*, 46 N. Y. St. Rep. 426, 19 N. Y. Supp. 450. And see *Wilson v. Prescott*, 62 Me. 115, where this was held not a continued use and occupation waiving a notice by the tenant terminating a tenancy at will.

³⁹ In *Vosburgh v. Corn*, 23 App. Div. 147, 48 N. Y. Supp. 598, Hatch, J., says: "We do not question but that a case of holding over may be so doubtful that determination of it may not be made as matter of law, as where the tenant has left upon the premises fixtures and small articles of little value which he intends to abandon, or where the removal of the property has been practically accomplished. Such are the cases of *Rorbach v. Crossett*, 46 N. Y. St. Rep. 426, 19 N. Y. Supp. 450, where the property left was fixtures and worthless articles, and the keys were surrendered and accepted by the landlord; *McCabe v. Evers*, 30 N. Y. St. Rep. 833, 9 N. Y. Supp. 541, where a stove and some rubbish were left, and the keys were tendered the day following the expiration of the lease; *Manly v. Clemens*, 39 N. Y.

St. Rep. 199, 14 N. Y. Supp. 366, where the landlord refused to renew the lease, and the tenant began moving out and continued to midnight of that day, when he had removed every thing except a desk and safe, which he removed the next day." So it was held to be a question for the jury where the tenant did not remove all his machinery, which was very heavy, for over three weeks, owing to delays caused by a previous fire and negotiations for a new lease (*Smith v. Allt*, 4 Abb. N. C. [N. Y.] 205, 7 Daly, 492); and where the tenant, before the end of the term, removed everything except some broken boards and delayed doing this because the last day of the term was a holiday, and there was a procession the next day (*Hammond v. Eckhardt*, 16 Daly, 113, 30 N. Y. St. Rep. 856, 9 N. Y. Supp. 508); and where there was evidence that the tenant, in an interview with the landlord's agent, gave up the key, but in the same interview was given permission to re-enter in order to clean up and remove a few remaining articles (*Frost v. Akron Iron Co.*, 1 App. Div. 449, 72 N. Y. St. Rep. 478, 37 N. Y. Supp. 374); and where the tenant left a press on the premises and thereafter two of his employes entered and used it without his knowledge (*Excelsior Steam Power Co. v. Halstead*, 5 App. Div. 124, 39 N. Y. Supp. 43).

he himself is not in possession, if his subtenant has possession and fails to relinquish it before the end of the original term, this being in effect a holding over by the tenant, as being a result of his putting another in possession.⁴⁰ And it seems that, on the same theory, a holding over by one to whom the tenant has assigned his term might likewise be regarded as a holding over by the assignor,⁴¹ though the courts might hesitate to apply the rule in such a case, especially if the landlord had recognized the assignee as his tenant by accepting rent, or similar acts. And the view that a holding over by any person to whom the tenant thus transfers his right of possession, whether by sublease or otherwise, involves a holding over by the tenant within the rule, is not in harmony with occasional decisions that in the case of a lease to a firm, if all but one of the partners withdraw during the term, giving place to others, a holding over by the new partnership does not bind those who retired.⁴²

d. **Facts excluding exercise of option.** The option on the part

⁴⁰ *Bacon v. Brown*, 9 Conn. 334; See, also, *Landsberg v. Tivoli Brew. Co.*, 132 Mich. 651, 94 N. W. 197, for another case in which the rule was apparently regarded as inapplicable.
⁴¹ See *Lubetkin v. Henry Elias Brew. Co.*, 21 Abb. N. C. 304, 4 N. Y. Supp. 195; *Fulmer v. Crossman*, 8 Del. Co. Rep. (Pa.) 78, as in accord with this view.
⁴² *James v. Pope*, 19 N. Y. 324; *Mason v. Tretig*, 23 Misc. 443, 52 N. Y. Supp. 249. *Buchanan v. Whitman*, 151 N. Y. 253, 45 N. E. 556, involved the question whether, in the case of a lease to a firm, a partner alone holding over could assert a right of renewal given by the lease to the firm, and it was decided that he could not, the landlord not having recognized him as holding under the terms of the lease. The language of the court is rather adverse to the view that a holding over by one partner could bind the other partners, if otherwise than as their representative.

In *Swart v. Western Union Tel. Co.*, 132 Mich. 651, 94 N. W. 197, it was decided that, since a person occupying desk room merely was not a subtenant, if, upon the expiration of the tenancy, the landlord refrained from removing such person's chair and desk, there was in effect a consent by him to such person's continued occupancy, and that he could not regard this as constituting a holding over by the tenant.

of the landlord to regard the tenant as liable for another period can obviously not be exercised when the latter remains in possession under an agreement that he is to hold for a less period,⁴³ nor when the landlord or the landlord's agent induces him to remain temporarily.⁴⁴ And a provision of the lease that the tenant shall pay rent for the term, and also for such time as he may hold the premises, has been held to give the landlord a right to hold him merely for the period of actual occupancy.⁴⁵

It has been decided in one state that the rule would not be applied in favor of the landlord if the tenant was unable wholly to relinquish possession owing to the serious illness of a member of his family,⁴⁶ and likewise where the removal was forbidden

⁴³ *Wilcox v. Raddin*, 7 Ill. App. (7 Bradw.) 594; *Landsberg v. Tivoli Brew. Co.*, 132 Mich. 651, 94 N. W. 197; *Dobbin v. McDonald*, 60 Minn. 380, 62 N. W. 437; *Montgomery v. Willis*, 45 Neb. 434, 63 N. W. 794; *Luger v. Goerke*, 18 App. Div. 291, 79 N. Y. St. Rep. 839, 45 N. Y. Supp. 839. It was held that one of several landlords, tenants in common of the reversion, could so agree to a temporary holding over by the lessee firm, though he was a member of such firm. *Valentine v. Healey*, 158 N. Y. 369, 52 N. E. 1097, 43 L. R. A. 667. But a mere proposition by the tenant to hold for a less time, to which he receives no answer owing to the agent's failure to transmit the answer, a refusal, does not justify him in holding over. *Smith v. Snyder*, 168 Pa. 541, 32 Atl. 64.

⁴⁴ *Greaton v. Smith*, 1 Daly (N. Y.) 380; *Campau v. Mitchell*, 103 Mich. 617, 61 N. W. 890. So where the landlord's agent refused to accept the key and the rent which was due, and told the tenant to await the landlord's return to the city. *Adler v. Mendelson*, 74 Wis. 464, 43 N. W. 505.

⁴⁶ *Pickett v. Bartlett*, 107 N. Y.

277, 14 N. E. 301. A similar effect was given to a clause in the lease providing that the tenants should pay "double rent for all such time as they shall hold over after the expiration of the term." *Green v. Kroeger*, 67 Mo. App. 621. But see *Edwards v. Hale*, 91 Mass. (9 Allen) 462, where it is said that "covenants for the payment of rent, in case the lessees shall hold over, do not give them the right to hold over."

⁴⁶ *Herter v. Mullen*, 159 N. Y. 28, 53 N. E. 700, 44 L. R. A. 703, 50 Am. St. Rep. 517 (three out of the eight judges dissenting). On a subsequent hearing in the intermediate court, it was decided that the tenant thus retaining possession was liable for rent until his final removal and until he gave notice to the landlord of that fact. *Herter v. Mullen*, 65 N. Y. Supp. 279.

In *Preiser v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890, the decision first above referred to was regarded as establishing that a tenant so holding over in case of sickness was rightfully in possession, and that therefore the landlord, in case he undertook to tear down the building at the end of the term, and

by the board of health owing to an infectious disease contracted by the tenant's child.⁴⁷ In another state, however, it is held that the application of the rule would not be affected by the severe illness of the tenant.⁴⁸

As before stated, the rule which we are now discussing is frequently stated as giving to the landlord a right to treat the tenant as holding for another year, or "as a trespasser." This statement, that the tenant may be treated as a trespasser, means merely, it would seem, that the landlord may treat him as one wrongfully in possession. In other words, the overholding tenant, if not recognized by the landlord as rightfully in possession, is a "tenant at sufferance," giving this latter term its proper signification of a tenant holding over without permission.⁴⁹ In a few cases it has been decided that the landlord having, by his acts, made his election to treat the tenant holding over as a trespasser, could not thereafter assert a liability on his part as tenant for a further term.⁵⁰

so necessitated the removal of the sick person, was liable in tort for injuries to such person at the suit of such person's administrator.

⁴⁷ *Regan v. Fosdick*, 19 Misc. 489, 43 N. Y. Supp. 1102.

⁴⁸ *Mason v. Wierengo's Estate*, 113 Mich. 151, 71 N. W. 489, 67 Am. St. Rep. 461. Here, however, the tenant was not, apparently, sick on the premises, which consisted of a store, but the expressions of the court would seem to militate strongly against the view taken in *Herter v. Mullen*, 159 N. Y. 28, 53 N. E. 700, 44 L. R. A. 417, 70 Am. St. Rep. 517.

⁴⁹ See ante, § 15.

⁵⁰ It was held that there was such an election when the landlord put up a notice "to let" and accepted the keys and took possession (*Rosenburg v. Lustgarten*, 41 N. Y. St. Rep. 623, 16 N. Y. Supp. 523), and when the tenant made a new lease to another (*Goldberg v. Mittler*, 23 Misc. 116, 50 N. Y. Supp. 733; *Coleman v.*

Fitzgerald Bros'. Brew. Co., 29 Misc. 349, 60 N. Y. Supp. 460; *Smith v. Maxfield*, 9 Misc. 42, 29 N. Y. Supp. 63); but not merely because the landlord, before the end of the term, posted a "to let" sign, which he allowed to remain after the end of the term (*Shanahan v. Shanahan*, 55 N. Y. Super. Ct. [23 Jones & S.] 339, 14 N. Y. St. Rep. 738; *Manly v. Clemens*, 39 N. Y. St. Rep. 199, 14 N. Y. Supp. 366).

The commencement of summary proceedings against the tenant by the landlord has been regarded as showing an election to regard his possession as wrongful, precluding the landlord from thereafter asserting a new tenancy (*Johnson v. Johnson*, 62 Minn. 302, 64 N. W. 905; *Rosenberg v. Sprecher*, 74 Neb. 176, 103 N. W. 1045, 105 N. W. 293), as has a judgment in such proceedings in favor of the landlord (*Lambert v. Borden*, 16 Ill. App. [16 Bradw.] 431). Likewise, the commencement

e. **Character of new tenancy.** In the case above referred to as a leading case,⁵¹ it is said that the new tenancy created, at the landlord's option, by the holding over, is a tenancy from year to year, and there are other cases to the effect that, if the original tenancy was for a year or more, the new tenancy is from year to year.⁵² And on the same principle, in cases in which the original term was less than a year, as a month or a quarter, the new tenancy might presumably be regarded as a periodic tenancy measured by such a period.⁵³ In a majority, however, of the decisions asserting this option on the part of the landlord, it is stated, without any particular discussion, that the new tenancy is for another year.⁵⁴ Occasionally it is stated that the new tenancy

of an action for the penalty named in the instrument of lease in case the tenant held over was regarded as an election. *Peck v. Christman*, 94 Ill. App. 435.

In *Drake v. Wilhelm*, 109 N. C. 97, 13 S. E. 891, an offer by the landlord to allow the tenant to remain at the same rent, made after the end of the term, was regarded as a waiver of the former's right to treat the latter as already his tenant.

⁵¹ *Conway v. Starkweather*, 1 Denio (N. Y.) 113.

⁵² *Smith v. Bell*, 44 Minn. 524, 47 N. W. 263; *City of Chicago v. Peck*, 98 Ill. App. 434; *Goldsborough v. Gable*, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; *Williams v. Ladew*, 171 Pa. 369, 33 Atl. 329; *Providence County Sav. Bank v. Hall*, 16 R. I. 154, 13 Atl. 122; *Parker v. Page*, 41 Or. 579, 69 Pac. 822; *Shepherd v. Cummings*, 1 Cold. (Tenn.) 354; *Noel v. McCrory*, 47 Tenn. (7 Cold.) 623. In Wisconsin it is so provided by statute. See Rev. St. 1898, § 2187.

⁵³ Such seems to be the decision in *Hood v. Drysdale*, 27 Pa. Super. Ct. 540.

⁵⁴ *Wolffe v. Wolff*, 69 Ala. 549, 44

Am. Rep. 526; *Robinson v. Holt*, 90 Ala. 115, 7 So. 441; *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252, 19 So. 318; *Bacon v. Brown*, 9 Conn. 334; *Cavanaugh v. Clinch*, 88 Ga. 610, 15 S. E. 673; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Condon v. Brockway*, 157 Ill. 90, 41 N. E. 634; *New York, C. & St. L. R. Co. v. Randall*, 102 Ind. 453, 26 N. E. 122; *Alleman v. Vink*, 28 Ind App. 142, 62 N. E. 461; *Scott v. Beecher*, 91 Mich. 590, 5 N. W. 20; *Mason v. Wierengo's Estate*, 113 Mich. 151, 71 N. W. 489, 67 Am. St. Rep. 461; *Haynes v. Aldrich*, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636; *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609; *Merchants' State Bank v. Ruettel*, 12 N. D. 137, 97 N. W. 853, 65 L. R. A. 762; *Baltimore & O. R. Co. v. West*, 57 Ohio St. 161, 49 N. E. 344; *Harvey v. Gunzberg*, 148 Pa. 294, 23 Atl. 1005; *Hemphill v. Flynn*, 2 Pa. 144; *Smith v. Snyder*, 168 Pa. 541, 32 Atl. 64; *Brinkley v. Walcott*, 57 Tenn. (10 Heisk.) 22; *Gilman v. City of Milwaukee*, 31 Wis. 563; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762. That the tenant says that he will remain after the term only as tenant from month to month does

is for a term of the same length as the original tenancy.⁵⁵

The arbitrary character of the rule appears from the varying statements of different courts as to the character of the tenancy which is created, at the option of the landlord, by the holding over. While the majority of the cases state that a tenancy for another year is created, none of them give any reason why the tenancy should be for a year rather than for some other period. It is not probable that a tenant for a month would, by holding over, become subject, at the landlord's option, as a tenant for a year longer, though the rule as frequently stated would have such an effect. It would perhaps be more satisfactory if the courts should agree that the tenant shall be liable, at the option of the landlord, for another period equal to the period by which the rent was originally adjusted. That is, that a tenant under a lease at an annual rent should be liable as tenant for another year, while a tenant under a lease at a monthly rent should be liable as tenant for another month. The courts have, however, asserted no such rule, and it would have in its favor merely the consideration of convenience and exactitude.

When the tenant is thus regarded as liable for rent for another period or term at the landlord's option, his new holding is subject, as regards rent, and in other respects, to the provisions of the original lease,⁵⁶ in the same way as if the new tenancy

not prevent him from being held as tenant from year to year, if the landlord does not assent to his remaining as tenant from month to month. *Abeel v. McDonnell*, 39 Tex. Civ. App. 453, 87 S. W. 1066.

⁵⁵ *Ketcham v. Ochs*, 34 Misc. 470, 70 N. Y. Supp. 268; *Id.*, 74 App. Div. 626, 77 N. Y. Supp. 1130; *Wood v. Gordon*, 44 N. Y. St. Rep. 640, 18 N. Y. Supp. 109; *Schneider v. Curran*, 19 Ohio Cir. Ct. R. 224; *Bradley v. Slater*, 50 Neb. 682, 70 N. W. 258. Where a lease is within the statute providing that an agreement for the occupation of land in New York City, which does not specify the duration, shall be regarded as running till the first of May next after the com-

mencement of the occupation, the lease is regarded as for a full year, so that the tenant holding over may be treated as tenant for another year. *Douglass v. Seiferd*, 18 Misc. 188, 41 N. Y. Supp. 289; *Mason v. Tietig*, 23 Misc. 443, 52 N. Y. Supp. 249.

⁵⁶ *Wolffe v. Wolff*, 69 Ala. 549, 44 Am. Rep. 526; *McKinney v. Peck*, 28 Ill. 174; *Clapp v. Noble*, 84 Ill. 62; *New York, C. & St. L. R. Co. v. Randall*, 102 Ind. 453, 26 N. E. 122; *McNatt v. Grange Hall Ass'n*, 2 Ind. App. 341, 27 N. E. 325; *Baylies v. Ingram*, 84 App. Div. 360, 82 N. Y. Supp. 891; *Id.*, 181 N. Y. 518, 73 N. E. 1119; *Merchants' State Bank v. Ruettell*, 12 N. D. 519, 97 N. W. 853;

were created with the tenant's consent.⁵⁷

§ 210. New tenancy by agreement.

a. **Agreement express or implied.** Without reference to the doctrine, just discussed, that the landlord has an option to regard the tenant holding over as in for another period or succession of periods, it is evident that the landlord and tenant may agree upon a continuance, or rather renewal, of the tenancy, that is, there may be a new demise by the former to the latter, with a consequent right of possession in the latter. Such a demise may be, and frequently is, in express terms, but it may be inferred from the acts of the parties, such as the payment and receipt of rent. In either case there is, strictly speaking, a "renewal lease," but this expression is ordinarily restricted to the case of a new demise for a fixed term.

The presumption is, it has been said, in the absence of evidence on the subject, that the retention of possession is wrongful, and not under a new letting, expressed or inferred from the acts of the parties.⁵⁸

The agreement for a new tenancy is, as is above suggested, ordinarily inferred from the payment of rent by the overholding tenant and its acceptance by the landlord, but other circumstances may be considered.⁵⁹ By a considerable number of cases, an agreement for a new tenancy at a particular rent is to be inferred from the facts that the landlord notifies the tenant that if he holds over he will be held liable at that rent, and that the tenant, without making any protest, does hold over.⁶⁰ It has been said that a mere demand by the landlord, made after the end

Stevens v. New York, 111 App. Div. 362, 97 N. Y. Supp. 1062; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

⁵⁷ See post, § 210 c.

⁵⁸ *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258.

⁵⁹ When a subtenant being in possession, the landlord arranged with the tenant to collect the rent from the subtenant, and to pay over to the tenant the difference between the rent paid by the subtenant and the smaller rent payable by the tenant,

and after the term the landlord continued to collect the same rent from the subtenant, and no notice of the termination of the original lease was given, the jury were allowed to find that the former tenant still continued as such and that the landlord was still bound to pay to the tenant the excess of rent collected. *Schwarzler v. McClenahan*, 38 App. Div. 525, 56 N. Y. Supp. 611.

⁶⁰ See post, at note 111.

of the term, for rent then accruing, shows permission by the landlord that the tenant may remain,⁶¹ but it has been decided not to be conclusive evidence of his assent to a new tenancy.⁶²

✓ The mere fact that the landlord fails promptly to demand possession, or to take steps to recover it, does not show that he has consented to the creation of a new tenancy.⁶³ And the fact that he brings a suit for rent, which may be intended to apply only to rent accrued during the original tenancy, cannot have such an effect.⁶⁴ That the landlord, after making another lease to another person, tells his tenant that he does not wish to disturb him and will not do so until compelled so to do by his new lessee, is obviously too loose and indefinite to constitute a new letting.⁶⁵ Nor does the action of the landlord in listening to a proposition from the tenant for a new lease have such an effect.⁶⁶

The payment and receipt of rent, though *prima facie* it shows a consent to a new tenancy, may, under particular circumstances, fail to do so, as when the landlord received it in ignorance that the original tenancy had come to an end,⁶⁷ or the payment is

⁶¹ Willis v. Harrell, 118 Ga. 906, 45 S. E. 794.

The landlord's consent to a further holding has been regarded as shown by a month's notice, given by the landlord, to quit on a day three months later than the end of the term, the notice declaring that day to be the end of a monthly term, the landlord also, in his affidavit for the tenant's removal, stating that the tenant held at a monthly rental of a certain amount, payable monthly. Baker v. Kelny, 69 N. J. Law, 180, 54 Atl. 526.

⁶² Condon v. Barr, 47 N. J. Law, 113, 54 Am. Rep. 121. In Banbury v. Sherin, 4 S. D. 88, 55 N. W. 723, it was decided that there was no renewal for another year because the landlord demanded rent for the first month after the expiration of the lease, where a notice given before its expiration demanded possession, not on the day of its expiration, but a

month thereafter, since the effect of such notice was to allow the tenant to hold over a month, paying rent.

⁶³ Cairo & St. L. R. Co. v. Wiggins Ferry Co., 82 Ill. 230; Den d. Decker v. Adams, 12 N. J. Law (7 Halst.) 99; Jackson v. McLeod, 12 Johns. (N. Y.) 182.

⁶⁴ Felton v. Chellis (Vt.) 69 Atl. 149. But *contra* when the suit was specifically for rent accruing since the end of the original tenancy. Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151.

⁶⁵ Ball v. Peck, 43 Ill. 482.

⁶⁶ Mastin v. Metzinger, 99 Mo. App. 613, 74 S. W. 431.

The landlord does not, by accepting a bond, in the course of proceedings by him to recover the land, to relinquish possession to him, admit the tenant's possession to be rightful. Dorrell v. Johnson, 34 Mass. (17 Pick.) 263.

⁶⁷ Doe d. Lord v. Crago, 6 C. B. 90.

made after suit to recover possession has been brought by the landlord.⁶⁸ It is a question of fact in each case whether a new tenancy is created.⁶⁹

The fact that one of the several joint lessees holds over under a tacit agreement with the landlord for a new tenancy does not bind the other joint tenants for a further period,⁷⁰ unless, it seems, they assent to such holding and agreement.⁷¹

In Wyoming it is provided by statute that there shall be no implied renewal of a lease, for any period whatever, either by the tenant holding over or by the landlord accepting rent, and that a holding over shall, in the absence of an express contract in writing for renewal, create a tenancy at sufferance only.⁷² It is difficult to perceive the object of such legislation, apparently making one retaining possession by his landlord's assent, even though paying rent to him, a wrongdoer.

b. **Character of new tenancy.** The weight of authority is to the effect that if the previous tenancy was for one or more years, the new tenancy thus created "by implication" is, presumptively, one from year to year.⁷³ This view, in the ordinary case, when the

⁶⁸ *Vanderford v. Foreman*, 129 N. C. 217, 39 S. E. 839.

⁶⁹ *Dougal v. McCarthy* [1893] 1 Q. B. 736; *Pusey v. Presbyterian Hospital*, 70 Neb. 353, 97 N. W. 475, 113 Am. St. Rep. 788; *Wilcox v. Montour Iron & Steel Co.*, 147 Pa. 540, 23 Atl. 840; *White v. Sohn*, 63 W. Va. 80, 59 S. E. 890. In *Williamson v. Paxton*, 18 Grat. (Va.) 475, where a contract for the sale of land to a trustee provided that, if he failed to obtain a decree ratifying the purchase by a time named, the purchaser should occupy the property as tenant for a year, and the sum previously paid by him should be regarded as rent, and he did fail to obtain such decree, it was held that the fact that he continued to hold after the year, paying rent, did not make him tenant from year to year, since the circumstances showed that

he was allowed to hold over by the vendor merely in hopes that he would obtain the decree and the sale be carried through.

⁷⁰ *James v. Pope*, 19 N. Y. 324. See *Draper v. Crofts*, 15 Mees. & W. 166.

⁷¹ See *Christy v. Tancred*, 9 Mees. & W. 438; *Tancred v. Christy*, 12 Mees. & W. 316.

⁷² *Wyoming Rev. St.* 1899, §§ 2772, 2773. And see the *Connecticut statute*, ante, note 30.

⁷³ *Doe d. Clarke v. Smaridge*, 7 Q. B. 957; *Manning v. Dever*, 35 U. C. Q. B. 294; *Dougal v. McCarthy* [1893] 1 Q. B. 736; *Singer Mfg. Co. v. Sayre*, 75 Ala. 270; *Belding v. Texas Produce Co.*, 61 Ark. 377, 33 S. W. 421; *Strousse v. Bank of Clear Creek County*, 9 Colo. App. 478, 49 Pac. 260; *Roberson v. Simmons*, 109 Ga. 360, 34 S. E. 604; *Clinton Wire*

new tenancy is based upon the payment and acceptance of rent, accords with the general rule as to the inference of a tenancy from year to year from the payment of a yearly rent,⁷⁴ since the rent reserved on a lease for one or more years, even though payable monthly, is usually an annual rent, that is, adjusted with reference to yearly periods, and like sums, paid and accepted periodically after the termination of the lease, may well be regarded also as constituting annual rent. Likewise, adjudications that, if the original tenancy was for one or more months, at a certain monthly rent, the payment and acceptance of a like rent, after the expiration of the original tenancy, create a tenancy from month to month,⁷⁵ are in accord with the general rule as to the inference of a monthly tenancy from the payment of monthly rent.⁷⁶

In some cases the continuance of the relation by the assent of

Cloth Co. v. Gardner, 99 Ill. 151; *Hately v. Myers*, 96 Ill. App. 217; *Gardner v. Dakota County Com'rs*, 21 Minn. 33; *Love v. Law*, 57 Miss. 596; *Schneider v. Lord*, 62 Mich. 141, 28 N. W. 773; *Goldsborough v. Gable*, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; *Streit v. Fay*, 230 Ill. 319, 82 N. E. 648, 120 Am. St. Rep. 304; *Hall v. Myers*, 43 Md. 446; *Hammon v. Douglas*, 50 Mo. 434; *Critchfield v. Remaley*, 21 Neb. 178, 31 N. W. 687; *West v. Lungren*, 74 Neb. 105, 103 N. W. 1057; *Baltimore & O. R. Co. v. West*, 57 Ohio St. 161, 49 N. E. 344; *Borough of Phoenixville v. Walters*, 147 Pa. 501, 23 Atl. 776; *Matthews v. Hipp*, 66 S. C. 162, 44 S. E. 577; *Hart v. Finney*, 1 Strob. Law (S. C.) 250; *Hibbard v. Newman*, 61 Tenn. (2 Baxt.) 285; *Amsden v. Atwood*, 69 Vt. 527, 38 Atl. 263; *Emerick v. Tavener*, 9 Grat. (Va.) 224; *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771; *King v. Wilson*, 98 Va. 259, 35 S. E. 727; *Allen v. Bartlett*, 20 W. Va. 46.

⁷⁴ See ante, § 14 b (2) (a).

⁷⁵ *Stoppelkamp v. Mangeot*, 42 Cal. 316; *Williams v. Apothecaries Hall Co.*, 80 Conn. 503, 69 Atl. 12; *Shirk v. Hoffman*, 57 Minn. 230, 58 N. W. 990; *Backus v. Steinberg*, 59 Minn. 403, 61 N. W. 335; *Simmons v. Jarman*, 122 N. C. 195, 29 S. E. 332; *Condon v. Barr*, 47 N. J. Law, 113, 54 Am. Rep. 121; *Baker v. Kenny*, 69 N. J. Law, 180, 54 Atl. 526; *Providence County Sav. Bank v. Hall*, 16 R. I. 154, 13 Atl. 122; *Barlum v. Berger*, 125 Mich. 504, 84 N. W. 1070; *Eastman v. Richard*, 29 Can. Sup. Ct. 438 (semble). Compare *Schilling v. Klein*, 41 Ill. App. 209. In *Hammon v. Douglas*, 50 Mo. 434, it is said that if a yearly rent is received from the overholding tenant, there is a tenancy from year to year, while if a monthly rent is so received, he is a tenant from month to month. This it is conceived, is the proper rule, subject, however, to evidence of a different intention.

⁷⁶ See ante, § 16 c (1).

both parties has been spoken of, not as creating a periodic tenancy, such as one from year to year or from month to month, but as creating a new tenancy for another year,⁷⁷ while occasionally the new tenancy is said to be for the same period as the original term, without reference to whether it be greater or less than a year.⁷⁸ It has also been stated that if a tenant for a term less than a year holds over, and the landlord accepts or demands rent, there is a new demise for another term of the same duration, while if the original term is for a year or more, there is created a tenancy from year to year.⁷⁹

The doctrine that a tenancy from year to year is to be inferred from a holding over and the payment of rent has been applied, not only when the holding is after the expiration of the term of a lease, but also when a lease is given by a tenant for life, and, after its termination by his death, rent is accepted by the remainderman from the tenant previously holding under the lease.⁸⁰

In Maine and Massachusetts, where the statutory provision that no estate or interest, unless created by writing, shall have greater force and effect than a tenancy at will, is construed as excluding the inference of a tenancy from year to year from the payment of a yearly rent,⁸¹ the new tenancy, ordinarily to be inferred from the actions of the parties in case of a holding over, is at will, and terminable as such by either party.⁸²

In a number of states the character of the tenancy created by such a holding over with the landlord's consent is determined

⁷⁷ *Cole v. Sanford*, 77 Hun, 198, 59 N. Y. St. Rep. 763, 28 N. Y. Supp. 358; *Bateman v. Maddox*, 86 Tex. 546, 26 S. W. 51; *Baltimore & O. R. Co. v. West*, 57 Ohio St. 161, 49 N. E. 344; *Zippar v. Reppy*, 15 Colo. 260, 25 Pac. 164; *Usher v. Moss*, 50 Miss. 208.

⁷⁸ *Rothschild v. Williamson*, 83 Ind. 387; *Bollenbacker v. Fritts*, 98 Ind. 50.

⁷⁹ *Prickett v. Ritter*, 16 Ill. 96; *Field v. Herrick*, 14 Ill. App. (14 Bradw.) 181; *Kleespies v. McKenzie*, 12 Ind. App. 404, 40 N. E. 648.

⁸⁰ *Doe d. Martin v. Watts*, 7 Tenn.

R. 85; *Doe d. Tucker v. Morse*, 1 Barn & Adol. 365; *Oakley v. Monck*, L. R. 1 Exch. 159. See *Bernstein v. Demmert*, 73 N. J. Law, 118, 62 Atl. 187.

⁸¹ See ante, § 14 b (2) (a), at note 480.

⁸² *Wheeler v. Cowan*, 25 Me. 283; *Kendall v. Moore*, 30 Me. 327; *Franklin Land, Mill & Water Co. v. Card*, 84 Me. 528, 24 Atl. 960; *Perry v. Rockland & R. Lime Co.*, 94 Me. 325, 47 Atl. 534; *Emmons v. Scudder*, 115 Mass. 367; *Walker Ice Co. v. American Steel & Wire Co.*, 185 Mass. 463, 70 N. E. 937.

by the language of a local statute. These statutes are referred to in the notes.⁸³

⁸³In California (Civ. Code, § 1945) it is provided that if rent is paid and accepted after the end of the term, the parties are presumed to have renewed the lease on the same terms and for the same time, not exceeding "one month when the rent is payable monthly, nor in any case" one year. In Montana (Rev. Codes 1907, § 5230), North Dakota (Rev. Codes 1905, § 5531), and South Dakota (Rev. Civ. Code 1903, § 1437), there are like provisions, in the latter two states the words in quotation marks being omitted. See *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. 723. The next section of the California Code provides that a hiring of real property, for a term not specified by the parties, is deemed to be renewed, as stated in the previous section, at the end of the term implied by law, unless one of the parties gives notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month. Like provisions are found in North Dakota and South Dakota. Presumably, by "the term implied by law" is meant the term arising under the previous section by reason of the holding over and payment and acceptance of rent.

In Iowa, under the statute providing that any person in possession of land with the assent of the owner is presumed to be a tenant at will until the contrary is shown (ante, § 13 a (6), note 393), a tenant holding over and paying rent is, in the absence of stipulation to the contrary, merely a tenant at will.

O'Brien v. Troxel, 76 Iowa, 760, 40 N. W. 704; *German State Bank v. Herron*, 111 Iowa, 25, 82 N. W. 430.

In Kansas (Gen. St. 1905, § 4052) and Oklahoma (Rev. St. 1903, § 3321), when a tenant under a lease for one or more years continues to occupy with the landlord's assent, he is to be deemed a tenant from year to year. See *Ware v. Nelson*, 4 Kan. App. 258, 45 Pac. 923.

Minnesota Rev. Laws 1905, § 3333, provides that when a tenant of urban real estate holds over without an express contract, no tenancy for any other period than the shortest interval between the times of payment of rent under the terms of the original lease shall be implied. This provision was held to be inapplicable when the original lease gave the tenant an option to renew. *Quade v. Fitzloff*, 93 Minn. 115, 100 N. W. 660. As to what constitutes "an express contract," see *Stees v. Bergmeier*, 91 Minn. 513, 98 N. W. 648. As to recovery, by one holding as tenant from month to month under the statute, for injuries to his goods caused by the landlord's negligence, see *Slafter v. Siddall*, 97 Minn. 291, 106 N. W. 308.

In Missouri, where the statute provides that an oral lease of a building in a city shall create a tenancy from month to month (ante, § 14 c [2], note 508), a tenant of such a building, holding over, is a tenant from month to month. *Hammon v. Douglas*, 50 Mo. 442; *Drey v. Doyle*, 28 Mo. App. 249; *Smith v. Smith*, 62 Mo. App. 596.

Nevada Comp. Laws, § 3827, provides that in case of a lease for a

Any inference, from the payment and receipt of rent, or from other circumstances, as to the character of the tenancy created, upon a holding over with the landlord's consent, is one of fact, and may be excluded by evidence that another class of tenancy was intended, the rule in this regard being the same as in the case of an original entry under a "general letting."^{84, 85} Thus the lease may expressly determine the character of the holding in case the tenant fails to vacate at the end of the term,⁸⁶ or the holding over may be by virtue of a provision for renewal in the lease.⁸⁷ So a new agreement between the landlord and the tenant as to the future holding necessarily excludes any contrary inference,⁸⁸ as when the landlord acquiesced in the tenant's proposal to remain but a limited time,⁸⁹ or when the landlord told the tenant that if he held over it must be as tenant from month to month.⁹⁰ It has been held that the fact that a tenant, holding over after a term of several years, pays as rent for a month a sum different

month, or for any term less than a year, if the tenant holds over by the landlord's consent, the tenancy shall be construed to be a tenancy from month to month, or a tenancy for such term less than a year, as the case may be.

In Wisconsin Rev. St. 1898, § 2187, the statute provides that "if a tenant for a year or more shall hold over after the expiration of his term, he may, at the election of his landlord, be considered a tenant from year to year upon the terms of the original lease." This is stated to be in confirmation of the common-law rule. *Brown v. Kayser*, 60 Wis. 1, 18 N. W. 523. See ante, § 209.

^{84, 85} See ante, § 14 b (2).

⁸⁶ *Pappe v. Trout*, 3 Okl. 260, 41 Pac. 397. So in *McDevitt v. Lambert*, 80 Ala. 536, 2 So. 438, where the lease gave the lessee the "option to continue to occupy by the month," the lessee, holding over, became tenant from month to month.

⁸⁷ *Montgomery v. Hamilton County Com'rs*, 76 Ind. 362, 40 Am. Rep.

250. See *Harty v. Harris*, 120 N. C. 408, 27 S. E. 90.

⁸⁸ *Secor v. Pestana*, 37 Ill. 525; *Johnson v. Foreman*, 40 Ill. App. 456; *Walker v. Githens*, 156 Pa. 178, 27 Atl. 36; *Insurance & Law Bldg. Co. v. National Bank*, 71 Mo. 58; *Gunso-lus v. Lormer*, 54 Wis. 630, 12 N. W. 62.

⁸⁹ *Lally v. New Voice*, 128 Ill. App. 455; *Montgomery v. Willis*, 45 Neb. 434, 63 N. W. 794. So, where the overholding tenant's offer of a certain rent was refused, but, to his proposal to pay that rent till he found another place, the landlord made no reply, and the property was placed by the latter in the hands of his agent to rent to others, it was held that there was a tenancy in accordance with the tenant's proposal till he found another place. *Hoffman v. McCollum*, 93 Ind. 326.

⁹⁰ *Shipman v. Mitchell*, 64 Tex. 174. And see *Brownell v. Welch*, 91 Ill. 523; *Gardner v. Dakota County Com'rs*, 21 Minn. 33.

from that payable monthly under the original lease, renders the new holding one from month to month, on the theory, it seems, that, there being nothing to show that these payments are not of a monthly rent, they are to be regarded as such, while in the ordinary case of the payment of sums similar to those stipulated for in the instrument of lease, the payments are to be construed with reference thereto, and consequently as being installments of yearly rent, if such was the character of the payments under the lease.⁹¹

It has been said that a holding over pending a treaty for a new lease creates a tenancy at will,⁹² and this accords with the ordinary rule that a permissive holding without the payment of a periodic rent constitutes such a tenancy, provided there is no payment of a periodic rent during the negotiations. Permission to hold until the tenant could remove his fixtures has been regarded as creating a tenancy at will,⁹³ and such a tenancy has been regarded as arising when the landlord told the tenants holding over, before accepting any payments from them, that he would not consent to a tenancy from year to year, but that they should remain as they were on the expiration of the lease.⁹⁴

Conceding that the new tenancy, created by a permissive holding over, is in the particular case periodic, that is, from period to period, it can, by the weight of authority, be determined only by notice, as in the case of a similar periodic tenancy otherwise

⁹¹ *Blumenberg v. Myres*, 32 Cal. 93, 91 Am. Dec. 560; *Fall v. Moore*, 45 Minn. 515, 48 N. W. 404. That the rent, being an annual rent, is paid monthly, is immaterial. See *Bernstein v. Demmert*, 73 N. J. Law, 118, 62 Atl. 187.

⁹² *Doe d. Hollingsworth v. Stennett*, 2 Esp. 717; *Grant v. White*, 42 Mo. 285; *City of Dubuque v. Miller*, 11 Iowa, 583; *Jackson v. Miller*, 7 Cow. (N. Y.) 747.

Where a tenant held over, having made an agreement with the landlord for the leasing to him of the premises previously leased to him, and also of adjoining premises, which lease was not, however, ex-

ecuted, it was held that the fact that he subleased the adjoining premises to the former occupant thereof, and paid the rent named in the new agreement, although the payment was under protest because the adjoining premises needed repairs, sufficiently showed an entry under the new agreement, so as to make him tenant at will rather than tenant at sufferance, and so to require notice before he could quit. *Emmons v. Scudder*, 115 Mass. 367.

⁹³ *Landsberg v. Tivoli Brew. Co.*, 132 Mich. 651, 94 N. W. 197.

⁹⁴ *Idington v. Douglas*, 6 Ont. Law Rep. 266.

created.⁹⁵ In one state at least, however, a different view has been taken, to the effect that such a new tenancy can be terminated without notice, a distinction being made between a tenancy from year to year arising from holding over and one arising otherwise.⁹⁶ There are in England several decisions as to the mode of determining the time at which the notice to quit must, in such a case, expire.⁹⁷⁻⁹⁹

c. **Terms of new tenancy.** The new tenancy created by the mutual assent of the landlord and tenant is presumptively on the same terms as the original lease, so far as these are applicable to the new tenancy.¹⁰⁰ So it has been held that a proviso for re-

⁹⁵ *Hately v. Myers*, 96 Ill. App. 217; *Wilgus v. Lewis*, 8 Mo. App. 336; *Hall v. Myers*, 43 Md. 446; *Shirk v. Hoffman*, 57 Minn. 230, 58 N. W. 990; *Critchfield v. Remaley*, 21 Neb. 178, 31 N. W. 687; *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771; *Allen v. Bartlett*, 20 W. Va. 46; *Brown v. Kayser*, 60 Wis. 1, 18 N. W. 523. In Wisconsin the statute now provides that the tenancy from year to year created by holding over may be terminated by thirty day's notice at the end of any year. Rev. St. 1898, § 2187. See *Peehl v. Bumbalek*, 99 Wis. 62, 74 N. W. 545.

⁹⁶ *Gladwell v. Holcomb*, 60 Ohio St. 427, 54 N. E. 473, 71 Am. St. Rep. 724.

In *Adams v. Cohoes*, 127 N. Y. 175, 28 N. E. 25, likewise, it seems to be held that the tenant holding over becomes a tenant from year to year, with the right, however, to terminate his tenancy at the end of any year without notice. But the case is by no means clear. *Rohrbach v. Crossett*, 46 N. Y. St. Rep. 426, 19 N. Y. Supp. 450, seems to be to the same effect. And see *Thompson v. Chich*, 92 Hun, 510, 72 N. Y. St. Rep. 212, 37 N. Y. Supp. 59. If the ten-

ancy from year to year, created by holding over, is terminable without notice, it is practically equivalent to a tenancy for another year, it seems.

The tenancy thus arising from a holding over by consent is not within the statute providing that leases of land in New York City not specifying the duration of the tenancy shall run until the first day of May. *Laimbeer v. Tailer*, 21 N. Y. St. Rep. 380, 4 N. Y. Supp. 588; *Id.*, 125 N. Y. 725, 26 N. E. 756; *Furman v. Galanopulo*, 92 N. Y. Supp. 730.

⁹⁷⁻⁹⁹ See ante, § 200, at notes 182-186.

¹⁰⁰ *Morgan v. Harrison* [1907] 2 Ch. 137; *In re Canada Coal Co.*, 27 Ont. 151; *Isaacs v. Ferguson*, 26 New Br. 1; *Wolffe v. Wolff*, 69 Ala. 549, 44 Am. Rep. 526; *Singer Mfg. Co. v. Sayre*, 75 Ala. 270; *Belding v. Texas Produce Co.*, 61 Ark. 377, 33 S. W. 421; *Zippar v. Reppy*, 15 Colo. 260, 25 Pac. 164; *McKinney v. Peck*, 28 Ill. 174; *Goldsborough v. Gable*, 152 Ill. 594, 38 N. E. 1025; *Ridgeway v. Hannum*, 29 Ind. App. 124, 64 N. E. 44; *De Young v. Buchanan*, 10 Gill & J. (Md.) 149, 32 Am. Dec. 156; *Dimock v. Van Bergen*, 94 Mass. (12 Allen) 551; *Weston v. Weston*, 102

entry on nonpayment of rent attaches to the tenancy created by the permissive holding over,¹⁰¹ and likewise a covenant to repair¹⁰² or improve.¹⁰³

It was held that the rent could not be presumed to be the same when the lease, which was for a year, provided for several collateral matters to be done by each party, which could not be performed in a subsequent year,¹⁰⁴ and when the lease provided that, as compensation for the use of the land, the lessee should reduce it from wild land to a state of cultivation, this not being applicable to the new tenancy, since there was no more wild land, the tenant was regarded as liable for the value of the use and occupation.¹⁰⁵ And it has been suggested that a change in the condition of the premises, rendering them less valuable, might rebut the presumption that the rent is the same.¹⁰⁶

The tenant's covenant to put the premises in the same state of repair at the end of the term as at the beginning has been regarded as not binding him to put them in such a state of repair at the end of the new tenancy.¹⁰⁷

If the original lease specifically provides different terms in case of continuance of the tenancy, the original terms obviously cannot apply thereto.¹⁰⁸

Mass. 514; *Brown v. Magorty*, 156 Mass. 209, 30 N. E. 1021; *Faxon v. Jones*, 176 Mass. 138, 57 N. E. 360; *Gardner v. Dakota County Com'rs*, 21 Minn. 33; *Love v. Law*, 57 Miss. 596; *Coatsworth v. Ray*, 52 N. Y. Supp. 498; *Baylies v. Ingram*, 84 App. Div. 360, 82 N. Y. Supp. 891; *Id.*, 181 N. Y. 518, 73 N. E. 1119; *Pflum v. Spencer*, 123 App. Div. 742, 108 N. Y. Supp. 344; *Finney v. St. Louis*, 39 Mo. 177; *Haeussler v. Holman Paper-Box Co.*, 49 Mo. App. 631; *Moore v. Harter*, 67 Ohio St. 250, 65 N. E. 883; *Williams v. Foss-Armstrong Hardware Co.*, 135 Wis. 280, 115 N. W. 803; *Phillips v. Monges*, 4 Whart. (Pa.) 226; *Wilson v. Alexander*, 115 Tenn. 125, 88 S. W. 935; *Amsden v. Atwood*, 69 Vt. 527, 38 Atl. 263; *Allen v. Bartlett*, 20 W. Va. 46.

¹⁰¹ *Thomas v. Packer*, 1 Hurl. & N. 669; *Baylies v. Ingram*, 84 App. Div. 360, 82 N. Y. Supp. 891; *Id.*, 181 N. Y. 518, 73 N. E. 1119.

¹⁰² *Digby v. Atkinson*, 4 Camp. 275. See *Haeussler v. Holman Paper-Box Co.*, 49 Mo. App. 631; *Hett v. Zanzen*, 22 Ont. 414. *Frederick v. Daniels*, 74 Conn. 710, 52 Atl. 414, appears, however, to be *contra*.

¹⁰³ *Slafter v. Siddall*, 97 Minn. 291, 106 N. W. 308.

¹⁰⁴ *Diller v. Roberts*, 13 Serg. & R. (Pa.) 60, 15 Am. Dec. 578.

¹⁰⁵ *Martin v. Hamersky*, 63 Kan. 360, 65 Pac. 637.

¹⁰⁶ *Whittenmore v. Moore*, 39 Ky. (9 Dana) 315.

¹⁰⁷ *Johnson v. St. Peter*, Hereford, 4 Adol. & E. 520.

¹⁰⁸ See *City of Plattsmouth v. New*

While, in the absence of anything to show the contrary, the courts assume, as a matter of law apparently, that the new holding is subject to the terms of the original lease, so far as applicable, the question whether it is so subject becomes one of fact if there is any evidence that the new holding is on different terms.¹⁰⁹

The holding over may be upon a rent different from that before reserved, though otherwise the terms are the same.¹¹⁰ A contract for a different rent has been held to arise when the landlord notifies the tenant that if he holds over he must pay an increased rent, and the tenant makes no reply and does hold over, this being regarded as an acceptance of the landlord's proposition.¹¹¹ If, however, the tenant protests against such increase, there can, by the cases generally, be no implication of assent by him, and no greater rent can be demanded than before.¹¹²

Hampshire Sav. Bank (C. C. A.) 139 Fed. 631.

¹⁰⁹ *City of Thetford v. Tyler*, 8 Q. B. 95; *Hyatt v. Griffiths*, 17 Q. B. 505; *Elgar v. Watson*, Car. & M. 494; *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499; *Goldsbrough v. Gable*, 152 Ill. 594, 38 N. E. 1025; *Hitt v. Greiser*, 71 Mo. App. 206; *Diller v. Roberts*, 13 Serg. & R. (Pa.) 60, 15 Am. Dec. 578.

¹¹⁰ *Kelly v. Patterson*, L. R. 9 C. P. 681; *Digby v. Atkinson*, 4 Camp. 275.

¹¹¹ *Roberts v. Hayward*, 3 Car. & P. 482; *Reithman v. Brandenburg*, 7 Colo. 480, 4 Pac. 788; *Griffin v. Knisely*, 75 Ill. 411; *Galloway v. Kerby*, 9 Ill. App. (9 Bradw.) 501; *Easton v. Mitchell*, 21 Ill. App. 189; *Rand v. Purcell*, 58 Ill. App. 228; *Gardner v. Dakota County Com'rs*, 21 Minn. 33; *Columbia Brew. Co. v. Miller*, 124 Mo. App. 384, 101 S. W. 711; *Hunt v. Bailey*, 39 Mo. 257; *Hulett v. Nugent*, 71 Mo. 131; *Despard v. Walbridge*, 15 N. Y. 874; *Coit v. Planer*, 51 N. Y. 647; *Mack v. Burt*, 5 Hun (N. Y.) 28; *Frost v. Akron Iron Co.*, 12 Misc.

348, 33 N. Y. Supp. 654; *Thorp v. Philbin*, 15 Daly, 155, 3 N. Y. Supp. 939; *Moore v. Harter*, 67 Ohio St. 250, 65 N. E. 883; *Pittsfield v. Ewing*, 6 Phila. (Pa.) 455; *Williams v. Foss-Armstrong Hardware Co.*, 135 Wis. 280, 115 N. W. 803; *Amsden v. Blaisdell*, 60 Vt. 386, 15 Atl. 332; *Appleton Waterworks Co. v. Appleton*, 132 Wis. 563, 113 N. W. 44; *Hilliard v. Genmell*, 10 Ont. 504. The doctrine referred to cannot apply, it has been decided, if before giving such notice the landlord has made a new lease extending the term, even though such lease does not name any rent. *Schickedantz v. Rincker*, 75 Neb. 312, 106 N. W. 441.

In *Murphy v. Little*, 69 Vt. 261, 37 Atl. 968, it was held that the landlord, by accepting and receipting for payments at the old rate, waived the notice of the proposed increase in rent.

¹¹² *Meaher v. Pomeroy*, 49 Ala. 146; *Hunt v. Bailey*, 39 Mo. 257; *Gallagher v. Himmelberger*, 57 Ind. 63; *Atkinson v. Cole*, 16 Colo. 83, 26 Pac. 815; *Canning v. Fibush*, 77 Cal. 196, 19 Pac. 376; *Lasher v. Helst*, 126

Occasional decisions and *dicta* to the effect that even if the tenant objects to the payment of the increased rent, he will be liable therefor so long as he retains possession,¹¹³ are objectionable, as in effect imputing to the tenant an intention which he has expressly disclaimed, and as enabling the landlord to fix a penalty of any amount for a wrongful holding over by the tenant.¹¹⁴ It might indeed be questioned whether, in the ordinary case, the tenant, by retaining possession even without objection to the proposed increase of rent, intends to indicate assent to such increase. The courts have, however, assumed that he does so intend. It may be remarked that, if holding over the term after such a notification of increase in rent is to be regarded as showing an acceptance of the landlord's proposition to remain in possession at that rent, the agreement should bind the landlord as well as the tenant. In one case, however, it appears to have been decided that the landlord is not bound by the terms of his notice though the tenant does hold over.¹¹⁵

§ 211. Liability in use and occupation.

We have thus far considered the liability of the tenant to the landlord upon the theory that there was a continuation of the tenancy with the landlord's consent, either with or without the tenant's consent. We will now consider the liability of the tenant to the landlord in case he holds over without the landlord's assent, and the landlord does not assert that a new tenancy has been created.

There is at common law no liability for rent on the part of a

Ill. App. 82; *De Young v. Buchanan*, 10 Gill & J. (Md.) 149, 32 Am. Dec. 156. And see *Mitchell v. Clary*, 20 Misc. 594, 46 N. Y. Supp. 446, where the tenant showed his nonassent by immediately leaving.

¹¹³ There are *dicta* to that effect in *Stees v. Bergmeier*, 91 Minn. 513, 98 N. W. 648; *Moore v. Harter*, 67 Ohio St. 250, 65 N. E. 883, and a dictum, if not a decision, in *Griffin v. Knisely*, 75 Ill. 411. See comments on this latter case in *Galloway v. Kerby*, 9 Ill. App. 501. In *Brinkley*

v. Walcott, 57 Tenn. (10 Heisk.) 22, the tenant was regarded as liable for the increased rent for the whole year, though he objected that the rent was too great, he paying, however, a month's rent at the rate named, and expressing a willingness to pay it until he could get another suitable place.

¹¹⁴ See *McClung v. McPherson*, 47 Or. 73, 81 Pac. 567, 82 Pac. 13.

¹¹⁵ *Lautman v. Miller*, 158 Ind. 382, 63 N. E. 761.

tenant wrongfully holding over, a tenant at sufferance. This, it has been said,¹¹⁶ is "because it was the folly of the owners to suffer them to continue in possession after the determination of the preceding estate,"¹¹⁶ but a more satisfactory reason is that an obligation to pay rent is the result of a contract or reservation, and there is ordinarily no contract to pay rent after the term, nor a reservation of rent then to accrue.¹¹⁷ It is only by means of a new agreement between the landlord and the tenant, in effect a renewal of the lease, or by means of the application of the doctrine, before referred to, of the landlord's option, as against the tenant wrongfully holding over, to assert a renewal of the tenancy,¹¹⁸ that the tenant can be subjected to liability as for rent accruing after the expiration of the original term.

It has been decided in a number of cases that a tenant holding over without permission is liable in assumpsit for use and occupation for such period as he so holds over,¹¹⁹ and a like view has

¹¹⁶ *Finch's Case*, 2 Leon. 143; 1 Cruise's Dig., tit. 9, c. 2, § 5.

¹¹⁷ *Hogsett v. Ellis*, 17 Mich. 351.

¹¹⁸ See ante, § 209.

¹¹⁹ *Ibbs v. Richardson*, 9 Adol. & E. 849; *Jennier v. Clegg*, 1 Moody & R. 213; *Bayley v. Bradley*, 5 C. B. 396; *Leigh v. Dickerson*, 15 Q. B. Div. 60; *Christy v. Tancred*, 9 Mees. & W. 438; *Hogsett v. Ellis*, 17 Mich. 357; *Meaher v. Pomeroy*, 49 Ala. 146; *Pitkin County v. Brown*, 2 Colo. App. 473, 31 Pac. 525; *Abeel v. Radcliff*, 13 Johns. (N. Y.) 297, 7 Am. Dec. 377; *Smith v. Singleton*, 71 Ga. 68; *Stuart v. Hamilton*, 66 Ill. 253; *Van Brunt v. Pope*, 6 Abb. Pr. (N. S., N. Y.) 217; *Harris v. Foster*, 97 Cal. 292, 32 Pac. 246, 33 Am. St. Rep. 187; *Williams v. Ladew*, 171 Pa. 369, 33 Atl. 329; *Bacon v. Brown*, 9 Conn. 334; *Fish v. Ryan*, 88 Ill. App. 524; *Lautman v. Miller*, 158 Ind. 382, 63 N. E. 761; *Longfellow v. Longfellow*, 54 Me. 240; *Schwoebel v. Fugina*, 14 N. D. 375, 104 N. W. 848; *Chambers v. Ross*, 25 N. J. Law (1 Dutch.) 293;

Poole v. Engelke, 61 N. J. Law, 124, 38 Atl. 823. See post, § 306 d. Occasional statements that the holding over tenant is liable for rent (*Chapin v. Foss*, 75 Ill. 280; *Ventura Hotel Co. v. Pabst Brew. Co.*, 33 Ky. Law Rep. 149, 109 S. W. 354; *Forbes v. Smiley*, 56 Me. 174) presumably mean little, if anything, more than that he is liable in use and occupation. In one case a tenant who held over was made liable for the value of the use and occupation when the circumstances prevented the exercise by the landlord of the option to hold him as tenant for another year. *San Antonio v. French*, 80 Tex. 575, 16 S. W. 440, 26 Am. St. Rep. 763. But in *Herter v. Mullen*, 52 App. Div. 325, 65 N. Y. Supp. 279, the court appears to have decided that in such case the tenant is liable for rent, as distinct from the value of the use and occupation, a view not concurred in by one of the judges.

In *Coleman v. Fitzgerald Bros.*

been asserted with reference to a lessee under a life tenant who holds over after the death of the latter.¹²⁰ Such a liability has been imposed when the tenant himself was not in possession, but the holding over was by a subtenant without the tenant's consent,¹²¹ though if the landlord accepts the

Brew. Co., 29 Misc. 349, 60 N. Y. Supp. 460, the court held that a landlord could not recover rent for one month, during which the tenant held over after the three years term, if after that month the landlord made a lease to another, in effect construing the statement, frequently found, that the landlord has the option to treat the tenant holding over as a tenant for another term, or as a trespasser (ante, § 209), as excluding any other alternative, such as to hold him liable as tenant for the time during which he actually holds over. So in *Macklin v. McNetton*, 30 Misc. 749, 63 N. Y. Supp. 438, it is decided that a tenant holding over cannot be made liable in use and occupation, the landlord having the option to treat him as a tenant for another year, or as a trespasser.

In *Merrill v. Bullock*, 105 Mass. 486, it is said, per Gray, J., that, at common law, a tenant at sufferance, occupying by permission of the landlord, was liable, upon an implied contract, in assumpsit for use and occupation." But, it is submitted, there is no such thing as a "tenant at sufferance, occupying by permission of the landlord." One is a tenant at sufferance because he occupies *without* permission. See ante, § 15 a. In view of the context, it may be that by "occupying by permission" is meant commencing occupation, that is, taking possession, by permission.

¹²⁰ *Guthmann v. Vallery*, 51 Neb.

824, 71 N. W. 734, 66 Am. St. Rep. 475; *Hoagland v. Crum*, 113 Ill. 365, 55 Am. Rep. 424. In *Mackey v. Robinson*, 12 Pa. 170, where one having control over the premises for his life only made a lease for years, it was held that the lessees, holding over after his death, were tortfeasors, and consequently not liable in debt for rent, or even in assumpsit, but that they might have been held liable for mesne profits in ejectment. See post, § 212, and compare post, § 306 d, at note 105.

¹²¹ *Henderson v. Squire*, L. R. 4 Q. B. 170; *Harding v. Crethorn*, 1 Esp. 57; *Ibbs v. Richardson*, 9 Adol. & E. 849; *McKenzie v. City of Lexington*, 34 Ky. (4 Dana) 129; *Dimock v. Van Bergen*, 94 Mass. (12 Allen) 551; *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938.

According to *Schilling v. Holmes*, 23 Cal. 227, 83 Am. Dec. 111, it would seem that a tenant might be so liable even when he had been evicted by a wrongdoer, and was so unable to return the premises at the end of the term. In that case he was held liable under such circumstances for double rent, under the statute. But when the lessee was deprived of the possession by the military authorities during the term, without his consent, he was held not to be liable in case they held over, though during the term he received rent from them, indirectly, through lessees of other parts of the building. *Constant v. Abell*, 36 Mo. 174.

subtenant as his tenant the former tenant is discharged.¹²² In such an action the tenant is liable for the reasonable value of the use and occupation of the premises, and, while presumably this would be regarded as *prima facie* equal to the rent reserved by the lease, in the absence of evidence to the contrary, it may be either more or less, as may appear proper on the evidence.^{123,124}

In Massachusetts and Rhode Island it is provided by statute that "tenants at sufferance in possession of land or tenements shall be liable to pay rent therefore for such time as they may occupy or detain the same."¹²⁵ It has been held that a tenant at will who becomes a tenant at sufferance by reason of a lease or other conveyance made by the landlord,¹²⁶ is, under such a statute, liable to the lessee or grantee alone,¹²⁷ and is not liable even to him unless he, the tenant, has notice of the conveyance.¹²⁸ Such a statute does not, it has been decided, apply as against one who originally entered otherwise than under the plaintiff or one under whom the plaintiff claims, and who wrongfully retains possession after his interest has come to an end.¹²⁹ In Kansas a

¹²² *Harding v. Crethorn*, 1 Esp. 57; *Dimock v. Van Bergen*, 94 Mass. (12 Allen) 551.

^{123,124} *Hogsett v. Ellis*, 17 Mich. 367; *City of Detroit v. Gleason*, 116 Mich. 564, 74 N. W. 880; *Poole v. Engelke*, 61 N. J. Law, 124, 38 Atl. 823; *Van Brunt v. Pope*, 6 Abb. Pr. (N. S., N. Y.) 217. In *Clapp v. Noble*, 84 Ill. 62, it was held that the rent named in the lease fixes conclusively the liability of the tenant holding over in defiance of the landlord. In *Dubuque Lumber Co. v. Kimball*, 111 Iowa, 48, 82 N. W. 458, the tenant holding over was held liable for the rent fixed in the lease, and not for that named in a subsequent lease, but there it seems that the tenant held over from the first by permission.

In *Ambrose v. Hyde*, 145 Cal. 555, 79 Pac. 64, it was held that there could be no recovery in use and occupation against the overholding

tenant by reason of the lack of evidence as to the value of the use and occupation or as to the rent reserved on the expired lease.

¹²⁵ Massachusetts Rev. Laws, c. 129, § 3; Rhode Island Gen. Laws 1896, c. 269, § 2.

¹²⁶ See ante, § 15 b, at note 586.

¹²⁷ *Bunton v. Richardson*, 92 Mass. (10 Allen) 260; *Cofran v. Shepard*, 148 Mass. 582, 20 N. E. 181, 3 L. R. A. 257, 12 Am. St. Rep. 601.

¹²⁸ *Dixon v. Smith*, 181 Mass. 218, 63 N. E. 419.

Under this statute, if a tenant at will continues to occupy the premises after a portion thereof has been conveyed by his landlord, he becomes tenant at sufferance as to all, and is liable to his former landlord for the reasonable value of the use and occupation of such portion as is still retained by the latter. *Emmes v. Feeley*, 132 Mass. 346.

¹²⁹ *Merrill v. Bullock*, 105 Mass.

tenant holding over has been regarded as within a statute,¹³⁰ providing that an occupant without special contract of any land shall be liable for rent to any person entitled thereto.¹³¹

§ 212. Liability as tortfeasor.

If the tenant fails to relinquish possession at the end of the term,¹³² or his subtenant fails to do so,^{132a} he is liable to the landlord in damages for the resulting injury to the latter. Thus it has been held that the landlord may recover for the loss of an opportunity to let to another,¹³³ and likewise the expense of a suit to recover possession.¹³⁴ But usually the damages sought and allowed are the value of the land for use or rental for the time during which the landlord was kept out of possession,¹³⁵ the action for damages being thus in effect one for mesne profits.¹³⁶ It seems to be immaterial, for most purposes, whether the landlord brings an action of tort for damages from holding over, or an action for use and occupation, which, as stated in the preceding section, he has the right to bring.

The lease may provide for liquidated damages, in a reasonable amount, in case the tenant holds over.¹³⁷ And an express stipu-

486; *Carpenter v. Allen*, 189 Mass. 246, 75 N. E. 622.

¹³⁰ Gen. St. 1901, § 3864.

¹³¹ *Benton v. Beakey*, 71 Kan. 872, 81 Pac. 196.

¹³² *Bramley v. Chesterton*, 2 C. B. (N. S.) 592; *Canning v. Fibush*, 77 Cal. 196, 19 Pac. 376; *Snideman v. Snideman*, 118 Ind. 162, 20 N. E. 723, 6 Am. Rep. 460; *Russell v. Fabyan*, 34 N. H. 225; *Moore v. Davis*, 49 N. H. 45.

^{132a} *Henderson v. Squire*, L. R. 4 Q. B. 170.

¹³³ *Stoddard v. Waters*, 30 Ark. 156. But it has been decided that damages cannot be allowed for the failure to relinquish possession till after the most favorable season for letting it, it not appearing that the landlord could have leased it even if sooner returned. *Watrigant v. Dufort*, 28 La. Ann. 892.

¹³⁴ *Bramley v. Chesterton*, 2 C. B. (N. S.) 592. The tenant is so liable though it was a subtenant who kept the landlord out. *Henderson v. Squire*, L. R. 4 Q. B. 170.

¹³⁵ *Buhman v. Nickels* (Cal. App.) 95 Pac. 177; *Barnett v. Feary*, 101 Ind. 95; *Keegan v. Kinnare*, 123 Ill. 280, 14 N. E. 14; *Butterfield v. Kirtley*, 115 Iowa, 207, 88 N. W. 371.

¹³⁶ *Sargent v. Smith*, 78 Mass. (12 Gray) 426. And see *Russell v. Kilhion*, 7 Phila. (Pa.) 110; *Henderson v. Squire*, L. R. 4 Q. B. 170. That an action for mesne profits will lie, see *Comyn, Landl. & Ten.* 510; *Adams, Ejectment* (Waterman's Ed.) at pp. 383, 446; 1 *Stephen's Commentaries* (7th Ed.) 294. Compare ante, § 15a, at note 560.

¹³⁷ *Poppers v. Meagher*, 148 Ill. 192, 35 N. E. 805. There the rent reserved was \$500 per month, with

lation that the tenant shall in that case pay double rent has as such been sustained.¹³⁸ A provision of this character, it has been held, imposes the liability on the tenant, although the holding over is not by him, but is by one to whom he has transferred the possession.¹³⁹ The landlord cannot recover liquidated damages for holding over, as provided by the lease, if he has recognized the overholding tenant as rightfully in possession, as by accepting payments from the tenant as of rent,¹⁴⁰ or even by demanding the payment of rent.¹⁴¹

§ 213. Liability for double rent or value.

a. **After notice or demand by landlord.** By St. 4 Geo. 2, c. 28, § 1, it is enacted that "in case any tenant or tenants for any term of life, lives or years," or other person or persons in possession of any lands, tenements or hereditaments, by, from or under, or by collusion with, such tenant or tenants, shall "willfully hold over" after the determination of such term or terms, and "after demand made, and notice in writing given," for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion belongs, his or their agents lawfully authorized, such person or persons so holding over shall, "for and during the time he, she and they shall so hold over," pay to the person or persons kept out of possession, "at the rate of double the yearly value of the lands, tenements and hereditaments so detained, for so long time as the same are detained." This statute is in force in at least one state,¹⁴² and has been re-enacted in another,¹⁴³ and in others there are statutes to an approximately similar effect.¹⁴⁴ In some

a provision for the payment of \$30 per day in case of holding over, and this was regarded as valid, testimony showing that the premises were worth \$7,000 a year.

¹³⁸ Walker v. Engler, 30 Mo. 130.

¹³⁹ Kerr v. Simmons, 8 Mo. App. 431.

¹⁴⁰ Chicago Theological Seminary v. Chicago Veneer Co., 94 Ill. App. 492.

¹⁴¹ Kelso v. Crilly, 85 Ill. App. 568.

¹⁴² See Alexander's British Statutes in force in Maryland.

¹⁴³ 2 New Jersey Gen. St. p. 1921, § 27.

¹⁴⁴ Illinois, Hurd's Rev. St. 1905, c. 80, § 2 (If tenant, or person holding under or in collusion with him, willfully holds over after expiration of term and after written demand for possession, he is liable for double the yearly value for the time of such holding over); Iowa Code

states the statute makes the tenant wrongfully holding over liable, not for double the yearly value of the premises, but for double rent,¹⁴⁵ and occasionally the statute makes the tenant holding over liable for treble rent.¹⁴⁶

1897, § 2989 (Tenant willfully holding over after term and after notice to quit, liable for double the rental value during the time of holding over); *Missouri* Rev. St. 1899, § 4106 (Substantially same as Illinois); *New York* Real Prop. Law, § 200 (Substantially same as Illinois, except that holding over must be after expiration of thirty days from service of demand for possession. Liable in addition for special damages); *South Carolina* Civ. Code 1902, § 2411 (Tenant, or person in collusion with him, holding over after termination of his estate, and after demand in writing for possession, for the space of three months after such demand, shall forfeit double the value of the use of the premises). The sum recoverable is to be calculated from the time of demand, and not from the expiration of the three months. *Reeves v. McKenzie*, 1 *Bailey Law* (S. C.) 497. *Wisconsin* St. 1898, § 2186 (Tenant, or person in possession under or by collusion with him, willfully holding over after demand made and one month's notice in writing, liable at rate of double the yearly value for time of holding over, and also for all special damage).

¹⁴⁵ *Alabama* Code 1907, § 4273 (One entering under lease, who unlawfully retains possession after end of term and demand to surrender, liable for double agreed rent and for special damages); *Arkansas*, Kirby's Dig. § 4696 (If any tenant, or person coming into possession un-

der or by collusion with him, shall willfully hold over after the termination of the term and thirty days' written notice requiring possession, he shall pay double the yearly rents for the time of such holding over); *Delaware* Rev. Code 1893, p. 866, § 5 (Tenant holding over, or person in collusion with him so doing, after notice by landlord, is liable for double rent); *Florida* Gen. St. 1906, § 2235 (If tenant refuse to give up possession at end of lease, landlord may demand double the monthly rent, and may recover it at the end of every month, or in the same proportion for a longer or shorter time); *Georgia* Code 1895, § 3124 (If tenant holds over after his term expires, the landlord may recover double rent for such time); *Kentucky* St. 1903, § 2293 (Tenant whose term expires at time certain and who refuses to deliver possession, and tenant who, having agreed to dispend with notice, refuses to deliver possession when demanded, shall pay double the rent he would otherwise have been bound to pay, computing from the time he should have delivered possession); *Mississippi* Code 1906, § 2883 (Where tenant, being lawfully notified by his landlord, shall fail or refuse to quit, he shall thenceforward pay double the rent which he would otherwise have paid).

¹⁴⁶ *California* Civ. Code, § 3345 (If tenant, or person in collusion with him, holds over after demand and one month's notice in writing re-

Statutes of this character have been regarded as penal, and therefore to be strictly construed.¹⁴⁷ Accordingly, the English statute, which specifies tenancies for "life, lives or years," has been construed not to apply to a weekly tenancy,¹⁴⁸ nor, apparently, to a tenancy from quarter to quarter,¹⁴⁹ though it does apply to a tenancy from year to year.¹⁵⁰ A statute referring to a holding over "after the expiration of the term" has been held not to apply to a holding over after a forfeiture enforced by the landlord.¹⁵¹

The holding over must, by the terms of most of the statutes, be willful, and a holding over under a reasonable mistake as to his rights does not make the tenant liable.¹⁵² The holding over is not other than willful merely because the tenant cannot vacate without great inconvenience and injury to his business.¹⁵³

It has been held that a tenant is not liable under such a statute when the holding over is by a subtenant,¹⁵⁴ nor, apparently, when

quiring the possession, such person must pay treble rent during his continuance in possession after such notice). See *Watson v. Whitney*, 23 Cal. 378; *Tewksbury v. Whitney*, 25 Cal. 265; *Kower v. Gluck*, 33 Cal. 402. *Montana Rev. Codes* 1907, § 6076 (same).

¹⁴⁷ *Lloyd v. Rosbee*, 2 Camp. 453; *Robinson v. Learoyd*, 7 Mees. & W. 54; *Chapman v. Wright*, 20 Ill. 120. But in *Beynroth v. Mandeville*, 68 Ky. (5 Bush.) 584 it is said that "the statute allowing double rent is not so much penal as compensatory, not so much to punish a delinquent tenant as to indemnify a disappointed landlord for the vexations and losses resulting from a tortious detention of that which it may be often very important otherwise to dispose of, and from, also, expensive litigation. There is no reason, therefore, for any other than a rational and consistent interpretation of the statute." Per Robertson, J.

That the action for double rent is

in contract, see *State v. Helms*, 101 Wis. 280, 77 N. W. 194. As between the common-law forms of action, debt is the appropriate remedy. See 1 Chitty, Pleading (7th Ed.) 112.

¹⁴⁸ *Lloyd v. Rosbee*, 2 Camp. 453.
¹⁴⁹ *Wilkinson v. Hall*, 3 Bing. N. C. 508.

¹⁵⁰ *Ryal v. Rich*, 10 East, 48. A contrary view was adopted in *Nixdorff v. Wells*, 4 Cranch, C. C. 350, Fed. Cas. No. 10,280.

¹⁵¹ *Stuart v. Hamilton*, 66 Ill. 253.

¹⁵² *Swinfen v. Bacon*, 6 Hurl. & N. 184; *Poole v. Warren*, 8 Adol. & E. 582; *Belles v. Anderson*, 38 Ill. App. 128. But where the claim of a right to hold over was based on a local custom plainly not applicable, the tenant was held liable for double value. *Hirst v. Horn*, 6 Mees. & W. 393.

¹⁵³ *Driver v. John W. Edrington & Co.*, 74 Ark. 12, 84 S. W. 783.

¹⁵⁴ *Rands v. Clark*, 19 Wkly. Rep. 48.

by his cotenant, without his assent.¹⁵⁵ In one state, however, the tenant was held liable for double rent when he could not return the possession to his landlord owing to his expulsion by a wrong-doer.¹⁵⁶

The English statute refers to a holding over "after a demand made and notice in writing given,"¹⁵⁷ but this does not necessitate a demand in addition to a valid notice to quit.¹⁵⁸ The notice or demand need not include a statement that double value or rent will be claimed.¹⁵⁹ The notice or demand may either be given before the expiration of the term, requiring the tenant to relinquish possession at such expiration,¹⁶⁰ or may be given after the term, provided the landlord has done no act in the meantime involving an acknowledgment of a continuance of the tenancy, but if the demand is made after the term, the landlord can, under the English statute, recover double value calculated from the date of the demand only and not from the expiration of the term.¹⁶¹

Under a state statute which omitted the words of the English statute "for so long time as the same are retained," or equivalent words, but made the tenant holding over in terms liable for "double the amount of the annual rent agreed to be paid," it was held that he was so liable for double the full annual rent, however short the period during which he held over.¹⁶²

A provision making the tenant holding over liable for "three

¹⁵⁵ *Draper v. Crofts*, 15 Mees. & W. 166. a question for the jury. *Beynroth v. Mandeville*, 68 Ky. (5 Bush) 584.

¹⁵⁶ *Schilling v. Holmes*, 23 Cal. 227, 83 Am. Dec. 111. ¹⁵⁸ *Messenger v. Armstrong*, 1 Term R. 53; *Wilkinson v. Colley*, 5 Burrow, 2694; *Johnstone v. Hudlestone*, 4 Barn. & C. 922; *Page v. More*, 15 Q. B. 684.

¹⁵⁷ As to necessity of demand under particular statutes, see *Salas v. Davis*, 120 Ga. 95, 47 S. E. 644; *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794; *Chapman v. Wright*, 20 Ill. 120; *Belles v. Anderson*, 38 Ill. App. 128; *Thompson v. Marsh*, 67 Ky. (4 Bush) 423. It has been held that under a statute providing that the tenant shall be liable for double rent if he "shall refuse to deliver possession," a formal demand is not necessary, and the tenant's conduct may amount to a refusal, this being

¹⁵⁹ *Ullman v. Herzberg*, 91 Ala. 458, 8 So. 408, 11 L. R. A. 619, 24 Am. St. Rep. 929.

¹⁶⁰ *Cutting v. Derby*, 2 Wm. Bl. 1075.

¹⁶¹ *Cobb v. Stokes*, 8 East, 358.

¹⁶² *Ullman v. Herzberg*, 91 Ala. 458, 8 So. 408, 11 L. R. A. 619, 24 Am. St. Rep. 929; *Lykes v. Schwarz*, 91 Ala. 461, 8 So. 71.

times the value of the rents which may have accrued" has been held to refer, not to the rent reserved, but to the rental value, which, in the case of a renting on shares, may be calculated without reference to the value of the crops actually raised by the tenant.¹⁶³

In determining the value, under the English statute, it has been said that the rental value of the premises as a whole, with all incidental rights, easements and appurtenances, is to be considered, but in the same case it was determined that this did not justify the inclusion of the value of power supplied by the landlord to the tenant under the lease, this not being within the meaning of the phrase "lands, tenements or hereditaments."¹⁶⁴

The landlord may waive his right to recover under the statute,¹⁶⁵ but it has been held that he does not, by agreeing with the tenant that the latter may retain the premises for a limited time without incurring this liability, waive the right to assert it in case the tenant holds over thereafter.¹⁶⁶ Whether the acceptance of single rent after the right to double value has accrued is a waiver of the latter right is, it has been said, a question of fact.¹⁶⁷ That the landlord recovered judgment on an appeal bond given by the tenant in an action of forcible entry and detainer, and accepted payment of the judgment, was held not to bar recovery of double rent under the statute.¹⁶⁸

The right to recover double value under the English statute exists although the landlord has already elected to treat the overholding tenant as a trespasser by bringing ejectment against him.¹⁶⁹ And the recovery may be against one other than the person to whom the notice and demand were given, as when there was a transfer of the possession after the service of the notice.¹⁷⁰

It has been decided that a lessee in reversion, not being the landlord of the prior lessee,¹⁷¹ cannot recover under the English statute.¹⁷²

¹⁶³ *Hendrick v. Cannon*, 5 Tex. 248.

¹⁶⁸ *Alexander v. Loeb*, 230 Ill. 454,

¹⁶⁴ *Robinson v. Learoyd*, 7 Mees. &

82 N. E. 833.

W 48.

¹⁶⁹ *Soulshy v. Neving*, 9 East, 310.

¹⁶⁵ *Rawlinson v. Marriott*, 16 Law T. (N. S.) 297.

¹⁷⁰ *Lake v. Smith*, 1 Bos. & P. (N. R.) 174; *Schilling v. Holmes*, 23 Cal.

¹⁶⁶ *Ullman v. Herzberg*, 91 Ala.

227, 33 Am. Dec. 111.

458, 8 So. 408, 11 L. R. A. 619, 24 Am. St. Rep. 929.

¹⁷¹ See ante, § 146 d, at notes 22, 23.

¹⁶⁷ *Ryal v. Rich*, 10 East, 48.

¹⁷² *Blatchford v. Cole*, 5 C. B. (N.

If the statute provides for double rent or value in the case of a "willful" holding over, the complaint must, it has been decided, allege that the holding over was "willful," in order to authorize a recovery to such an extent.¹⁷³

b. *After notice by tenant.* It was provided by St. 11 Geo. 2, c. 19, § 18, that in case any tenant or tenants shall give notice of an intention to quit the premises, at a time mentioned in such notice and shall not accordingly deliver up the possession at the time named in such notice, the said tenant or tenants, or their representatives, shall pay double the rent which should otherwise have been paid, such double rent to be sued for and recovered at the same times and in the same manner as the single rent could have been recovered. A substantially similar enactment is to be found in a number of states.¹⁷⁴ In two states at least the tenant's liability in such case is for treble rent.¹⁷⁵

The English statute applies to any tenancy, although created merely by parol,¹⁷⁶ provided the tenancy be such as the tenant has power to terminate by notice.¹⁷⁷ If the tenancy is one which expires at a certain time by the terms of the demise, the giving of notice by the tenant "is a work of supererogation, which furnishes no rights and creates no liabilities."¹⁷⁸

S.) 514. That the lessor may, in spite of such lease in reversion, recover double rent, see *Alexander v. Loeb*, 230 Ill. 454, 82 N. E. 833. In the latter case there was a provision that the possession should not pass to the second lessee so long as the possession could not be delivered to him by reason of the first lessee, and this is referred to as a basis for the decision. Its presence would seem, however, to be immaterial. That the lease in reversion does not prevent recovery by the lessor of liquidated damages as stipulated for a holding over by the prior lessee, see *Thomas v. Wightman*, 129 Ill. App. 305.

¹⁷³ *Paeson v. Mulligan*, 191 N. Y. 306. 84 N. E. 75; *Stevens v. New*,

York, 111 App. Div. 362, 97 N. Y. Supp. 1062.

¹⁷⁴ *Arkansas*, Kirby's Dig. 1904, § 4694; *Delaware* Rev. Code 1893, p. 866; *District of Columbia* Code 1901, § 1224; *Illinois*, Hurd's Rev. St. 1905, c. 80, § 3; *Kentucky* St. 1903, § 2293; *Mississippi* Code 1906, § 2883; *Missouri* Rev. St. 1899, § 4104; *New Jersey*, 2 Gen. St. p. 1921, § 28; *New York* Real Prop. Law, § 199; *South Carolina* Civ. Code 1902, § 2424.

¹⁷⁵ *California* Civ. Code, § 3344; *Montana* Rev. Codes 1907, § 6076.

¹⁷⁶ *Timmins v. Rowlinson*, 3 Burrow, 1603.

¹⁷⁷ *Johnstone v. Hudlestone*, 4 Barn. & C. 922.

¹⁷⁸ *Regan v. Fosdick*, 19 Misc. 489, 43 N. Y. Supp. 1102.

The notice must be a valid notice, sufficient to terminate the tenancy.¹⁷⁹ Consequently, a notice by the tenant that he will quit upon a contingency will not render him liable if he fails to quit on the happening of the contingency,¹⁸⁰ and a notice that he will quit "about January 10th or 15th" has likewise been held not to subject the tenant to such a liability.¹⁸¹

A holding over by one who entered under the tenant, after the giving of the notice by the latter, is sufficient to subject the latter to the double liability.¹⁸²

§ 214. Cotenant lessee holding over.

In case one holding under a lessee is himself a tenant in common of the reversion, as when one tenant in common takes a lease of the undivided interest of the other tenant,¹⁸³ or when the lessee of an undivided interest thereafter acquires the other undivided interest in fee, a question may arise as to the status of such tenant in case he retains possession after the term named in the lease, that is, whether he is to be regarded as a tenant holding over, or as a tenant in common rightfully in possession as such. It has in England been decided that in such case the possession of such cotenant is, as to the undivided half interest not belonging to him, *prima facie* that of a tenant at sufferance, and that he is as such liable in use and occupation,¹⁸⁴ and there are cases in this country which make a cotenant so continuing in possession liable for rent or in use and occupation, upon a presumption, apparently, that his continuance in possession is by force of a renewal or extension of the prior lease.¹⁸⁵ In two states, however, the continued possession of such cotenant is presumed to be based on his right as tenant in common,¹⁸⁶ and he has consequently in one of

¹⁷⁹ Johnstone v. Hudlestone, 4 Barn. & C. 922.

¹⁸⁰ Farrance v. Elkington, 2 Camp. 591.

¹⁸¹ Pitkin v. Lloyd, 47 Mo. App. 280.

¹⁸² Morris v. Burton, 1 Houst. (Del.) 213.

¹⁸³ See ante, § 71 c.

¹⁸⁴ Leigh v. Dickeson, 15 Q. B. Div. 60.

¹⁸⁵ Chapin v. Foss, 75 Ill. 289; Harry v. Harry, 127 Ind. 91, 26 N.

E. 562; O'Connor v. Delaney, 53 Minn. 247, 54 N. W. 1108. 39 Am. St. Rep. 601; Carson v. Broady, 56 Neb. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Clayton v. McCay, 143 Pa. 225, 22 Atl. 754.

¹⁸⁶ See McKay v. Mumford, 10 Wend. (N. Y.) 351, 25 Am. Dec. 566. In Mumford v. Brown, 1 Wend. (N.

such states been held not to be liable in use and occupation,¹⁸⁷ and likewise, such continued possession has been decided not to involve a holding over for the purpose of giving an option to the other cotenant or cotenants to hold him for another term, this view being asserted even though he was only one of several lessees, all of whom constituted a partnership, and such partnership, and not he alone, retained the possession.¹⁸⁸

§ 215. Proceeding to recover possession.

Originally, at common law, the proper form of action by a landlord to recover possession from the tenant was a writ of entry *ad terminum qui praeteriit*.¹⁸⁹ Subsequently, upon the introduction of the action of ejectment, this became the recognized mode of recovery by the landlord. In England and in most of the states, statutes have now been enacted providing for proceedings of a summary character on the part of the landlord to recover possession from the tenant. An action of ejectment brought by a landlord against his tenant does not differ from such an action when brought by any other person, and a discussion of the law of ejectment will not here be attempted. The general characteristics of a summary proceeding by a landlord to recover possession will be discussed in a subsequent chapter.^{189a} Equity has no jurisdiction to expel a tenant at the suit of the landlord.¹⁹⁰

A transferee of the entire reversion has no doubt the same right to recover possession from the tenant as has the lessor.¹⁹¹ In the case, however, of a transfer of an undivided interest in the rever-

Y.) 52, 19 Am. Dec. 461, it was decided that the person remaining in possession under such circumstances was not liable for double rent as a tenant holding over. In *Rockwell v. Luck*, 32 Wis. 70, it was decided that the cotenant remaining in possession was presumed to be in as cotenant, but that this presumption was rebutted by the evidence in that particular case.

¹⁸⁷ *Dresser v. Dresser*, 40 Barb. (N. Y.) 300; *McKay v. Mumford*, 10 Wend. (N. Y.) 351, 25 Am. Dec. 566.

¹⁸⁸ *Valentine v. Healey*, 158 N. Y.

369, 52 N. E. 1097, 43 L. R. A. 667; *Id.*, 178 N. Y. 391, 70 N. E. 913.

¹⁸⁹ See *Stearns, Real Actions* (2d Ed.) 129.

^{189a} See post, chapter XXVIII.

¹⁹⁰ *Torrent v. Muskegon Booming Co.*, 22 Mich. 354; *Blain v. Everitt*, 36 Md. 73. See *Montague v. Hood*, 78 S. C. 222, 58 S. E. 767.

¹⁹¹ See *Green v. Missouri Pac. R. Co.*, 82 Mo. 653, to the effect that the purchaser at a foreclosure sale of the reversion may sue for possession after the expiration of the term.

sion, all those interested in the reversion should, it seems, ordinarily join in the proceeding to recover possession.¹⁹²

One to whom a lease in reversion¹⁹³ of the premises is made, being the person entitled to possession on the expiration of the prior term, would seem to be the proper person, rather than the landlord, to bring an action of ejectment to recover the possession from a tenant holding over.¹⁹⁴ There is, however, one decision that the landlord may bring such action against the overholding tenant in spite of the reversionary lease,¹⁹⁵ and so far as in any jurisdiction the lessor may be under an obligation to put his lessee in possession, as against a third person holding without right,^{195a} he should, it seems, be given the right of recovering the possession from another wrongfully withholding it. Whether a summary proceeding may be brought against an over holding tenant by a landlord who has made a lease in reversion, or whether it may be brought by the lessee in reversion, or whether it may

¹⁹² In *Holt v. Martin*, 51 Pa. 499, it was decided that the lessor could recover the premises although he had conveyed an undivided interest in the reversion, the tenant not having attorned to the grantee, and the latter having done no act "to sever the possession."

¹⁹³ See ante, § 146 d.

¹⁹⁴ In *Gardner v. Keteltas*, 3 Hill (N. Y.) 330, 38 Am. Dec. 637, it is said by Nelson, C. J., in reference to this question, that "as to the remedy by ejectment, the suit must be brought by the lessee, the right of entry being in him alone at the time." In *Gazzolo v. Chambers*, 73 Ill. 75, it is likewise said that, in such a case, "the landlord is not entitled to possession and can maintain no action to recover the premises. The right of immediate possession is alone in the lessee, and he must bring the action."

¹⁹⁵ *Fox v. Macaulay*, 12 U. C. C. P. 298. The decision is in terms based on the dicta of Cockburn, C. J.,

in *Blatchford v. Cole*, 5 C. B. (N. S.) 514, which case involved the question of the right of the lessee in reversion to recover double value against a prior tenant wrongfully holding over (see ante, note 172). These dicta were as follows: "The tenant by his contract engages to give up possession to the landlord. As against him, therefore, the landlord must be the person entitled to the possession;" and, "as regards the tenant, the person entitled to possession is the landlord, whether for the purpose of enjoying it himself or giving the possession to a new tenant." A right in the landlord to maintain an action for possession, in spite of the lease in reversion, is recognized in general terms in *King v. Reynolds*, 67 Ala. 229; *Hammond v. Jones*, 41 Ind. App. 32, 83 N. E. 257; *Vincent v. Defield*, 98 Mich. 84, 56 N. W. 1104.

^{195a} See ante, §§ 88, 182 a (2), note 815.

be brought by either, is properly a question of the construction of the statute authorizing such proceedings.¹⁹⁶

§ 216. Forceble resumption of possession by landlord.

a. **General considerations.** Not infrequently the landlord, upon the failure of the tenant to relinquish possession when his right thereto expires, has undertaken to resume possession by force, and the question of the nature of the liabilities to which the landlord may thereby subject himself has been the subject of considerable controversy. He is, under the English statutes of forcible entry and detainer, and under the local statutes of some states, liable to a criminal prosecution in such a case, his right to possession being no justification for his disturbance of the public peace.¹⁹⁷ And in many of the states, the tenant can, in case of such forcible entry by the landlord, maintain an action to recover possession of the premises under the statutes of forcible entry and detainer, it being usually considered that one cannot defend such an action by showing that he was entitled to the possession which he thus forcibly took.¹⁹⁸ A more difficult question arises, however, when the tenant undertakes to assert a pecuniary liability in damages on the part of the landlord for thus taking possession.

There are several decisions to the effect that even though the forcible entry or forcible expulsion would otherwise be ground for recovery of damages, the lease may, by a special provision authorizing such acts as against a tenant holding over, relieve the landlord from liability.¹⁹⁹ There might, however, be some

¹⁹⁶ See post, § 273 n.

¹⁹⁷ See Y. B. 9 Hen. 6, f. 19, pl. 12; 1 Hawkins, Pleas of the Crown, c. 64, § 3; McClain, Criminal Law, §§ 836-841; Edwick v. Hawkes, 18 Ch. Div. 199; Turner v. Meymott, 1 Bing. 158; Taunton v. Costar, 7 Term R. 431; Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272; Wood v. Hyatt, 4 Johns. (N. Y.) 313; Manning v. Brown, 47 Md. 506; Souter v. Codman, 14 R. I. 119, 51 Am. Rep. 364. In Com. v. Haley, 86 Mass. (4 Allen) 318, the landlord was held to be liable criminally for an assault

in case the tenant resisted his removal of the latter's furniture and the landlord sought to overcome that resistance.

¹⁹⁸ See Vinson v. Flynn, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415; Phelps v. Randolph, 147 Ill. 335, 35 N. E. 243; Scott v. Willis, 122 Ind. 1, 22 N. E. 786; Smith v. Reeder, 21 Or. 541, 28 Pac. 890, 15 L. R. A. 172; and cases cited 13 Am. & Eng. Enc. Law (2d Ed.) 753, 756; 19 Cyclopaedia Law & Proc. 1125.

¹⁹⁹ Goshen v. People, 22 Colo. 270, 44 Pac. 503; Page v. De Puy, 40 Ill.

question whether a license to use force in contravention of the provisions of the forcible entry and detainer acts is valid.²⁰⁰

b. **Liability for entry on the land.** The cases are usually to the effect that the mere entry on the land by the reversioner in such case, although forcible, does not constitute a trespass, giving a right of action in damages, in view of the well recognized rule that a plea of *liberum tenementum* or title in the defendant is a good defense to an action of trespass *quare clausum fregit*. The fact that the statutes make such an entry a criminal offense, and give the person entered upon a right to recover the possession of which he has thus been deprived, cannot be regarded as authorizing a recovery of damages on account of such entry.²⁰¹

That the reversioner, after entering, commits some wrongful act, does not make him a trespasser *ab initio*, since the principle of the Six Carpenters' Case²⁰² applies only when there is a special authority given by the law to do some particular act which would, apart from such special authority, be a trespass, and not to the case of one exercising a right which appertains to all persons,²⁰³ such as that of the owner of land to enter thereon.²⁰⁴

506; *Fabri v. Bryan*, 80 Ill. 182; *Kavanagh v. Gudge*, 7 Man. & G. 316.

²⁰⁰ See *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53; *Edwick v. Hawkes*, 18 Ch. Div. 199. And compare *Fifty Associates v. Howland*, 59 Mass. (5 Cush.) 214.

²⁰¹ *Taunton v. Costar*, 7 Term R. 431; *Argent v. Durrant*, 8 Term R. 403; *Turner v. Meymott*, 1 Bing. 158; *Harvey v. Brydges*, 14 Mees. & W. 437; *Burling v. Read*, 11 Q. B. 904; *Pollen v. Brewer*, 7 C. B. (N. S.) 371; *Meriton v. Coombes*, 9 C. B. 787; *Beddall v. Maitland*, 17 Ch. Div. 174; *Beattie v. Mair*, 10 L. R. Ir. 208; *Vinson v. Flynn*, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 29 L. R. A. 415; *Tribble v. Frame*, 30 Ky. (7 J. J. Marsh.) 599, 23 Am. Dec. 439; *Manning v. Brown*, 47 Md. 506; *Moore v. Mason*, 83 Mass. (1 Allen) 406; *Low v. Elwell*, 121 Mass. 309,

23 Am. Rep. 272; *Smith v. Detroit Loan & Bldg. Ass'n*, 115 Mich. 340, 73 N. W. 395, 39 L. R. A. 410, 69 Am. St. Rep. 575; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484; *Krevet v. Meyer*, 24 Mo. 107 (but see *Emerson v. Sturgeon*, 59 Mo. 404); *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Weeks v. Sly*, 61 N. H. 89; *State v. Morgan*, 59 N. H. 322; *Wilde v. Cantillon*, 1 Johns Cas. (N. Y.) 123; *Hyatt v. Woods*, 4 Johns (N. Y.) 150; *Livingston v. Tanner*, 14 N. Y. (4 Kern.) 64 (dictum); *Overdeer v. Lewis*, 1 Watts & S. (Pa.) 90, 37 Am. Dec. 440; *Willoughby v. Northeastern R. Co.*, 32 S. C. 410, 11 S. E. 339; *Rush v. Aiken Mfg. Co.*, 58 S. C. 145, 36 S. E. 497, 79 Am. St. Rep. 836; *Souter v. Codman*, 14 R. I. 119, 15 Am. Rep. 364.

²⁰² 8 Coke, 146 a.

²⁰³ *Johnson v. Hannahan*, 1 Strob. Law (S. C.) 313. See *Esty v. Wil-*

Though, as above stated, the weight of authority is otherwise, there are occasional decisions to the effect that a forcible entry by the reversioner does make him liable in trespass or its equivalent for breaking the close;²⁰⁵ this view being ordinarily based on the theory that, since this is illegal as being forbidden by the statutes of forcible entry and detainer, there must be a right to recover damages on account thereof, while occasionally the fact that there is a summary proceeding provided by statute for the recovery of possession is referred to as showing a legislative intent that he shall not take possession by force.²⁰⁶

mot, 81 Mass. (15 Gray) 168; *Turner v. Footman*, 71 Me. 218; 1 Smith's Leading Cases (8th Am. Ed.) at p. 263.

²⁰⁴ *Johnson v. Hannahan*, 1 Strob. Law (S. C.) 313.

²⁰⁵ *Larkin v. Avery*, 23 Conn. 304; *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552; *Entleman v. Hagood*, 95 Ga. 390, 22 S. E. 545; *Reeder v. Purdy*, 41 Ill. 279; *Brock v. Berry*, 31 Me. 293; *Thiel v. Bull's Ferry Land Co.*, 58 N. J. Law, 212, 33 Atl. 281 (Only nominal damages recoverable. And compare *Mershon v. Williams*, 62 N. J. Law, 779, 42 Atl. 778); *Whitney v. Brown*, 75 Kan. 678, 90 Pac. 277, 121 Am. St. Rep. 446; *Dustin v. Cowdry*, 23 Vt. 631; *Griffin v. Martel*, 77 Vt. 19, 58 Atl. 788. The earlier Vermont case is to a considerable extent based on a misreading of the old authorities on the English statutes of forcible entry, as is shown in the article in 4 Am. Law Rev. hereafter referred to. *Hillary v. Gay*, 6 Car. & P. 284, a *nisi prius* decision by Lord Lyndhurst, so far as it is to be regarded as a decision that trespass *quare clausum* will lie in such case, must be regarded as overruled by the later English decisions.

In *Fort Dearborn Lodge v. Klein*,

115 Ill. 177, 3 N. E. 279, 56 Am. Rep. 133, it is decided that a peaceable entry will not entitle the tenant to maintain trespass *quare clausum*, it being said, however, that a forcible entry will do so. But the law in that state is that even a peaceable entry by the person entitled to possession is within the forcible entry and detainer statute (*Phelps v. Randolph*, 147 Ill. 335, 35 N. E. 243), and since the view that trespass *quare clausum* will lie is based chiefly on the fact that there is a violation of such statute, there seems some inconsistency.

In *Emerson v. Sturgeon*, 59 Mo. 404, it is decided that the plea of *liberum tenementum* is no defense to an action of trespass *quare clausum*, and this seems in effect to overrule the cases cited ante, note 201, deciding that the tenant forcibly ejected by the landlord cannot bring that action.

²⁰⁶ *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552; *Enthelman v. Hagood*, 95 Ga. 390, 22 S. E. 545; *Thiel v. Bull's Ferry Land Co.*, 58 N. J. Law, 212, 33 Atl. 281. That the tenant has delivered the key to the landlord, the tenant retaining the possession, gives the landlord no right in this regard which he would

c. **Liability for injury to the person.** In jurisdictions in which the forcible entry on land is itself regarded as constituting a cause of action in trespass *quare clausum*, any violence employed against the tenant or his family could, no doubt, be alleged in aggravation of damages,²⁰⁷ though ordinarily there would be a separate count inserted for the assault. But in most jurisdictions, as above stated, there can be no recovery as for trespass on the land in such case, and the question arises whether there is nevertheless a distinct right of recovery for an assault made upon the person of the tenant or a member of his family in entering on the premises or in expelling such person therefrom. In the numerous cases above referred to as denying any right of recovery for the entry on the land, there is no suggestion of a distinct cause of action arising from the use of force against the tenant, provided such force is no greater than is necessary for the purpose of effecting an entrance, or of expelling the tenant if he refuses to leave, and there are cases which in terms deny any such liability on the part of the landlord.²⁰⁸ It is said that the landlord, "not being liable to the tenant in an action of tort for the principal act of entry upon the land, cannot be liable to an action for the incidental act of expulsion, which the landlord, merely because of the tenant's unlawful resistance, has been obliged to resort to in order to make

otherwise not have. *Griffin v. Martel*, 77 Vt. 19, 58 Atl. 788.

²⁰⁷ *Sedgwick, Damages*, § 929. See *Taylor v. Cole*, 1 H. Bl. 555; *Davison v. Wilson*, 11 Q. B. 890.

²⁰⁸ *Harvey v. Brydges*, 14 Mees. & W. 437; *Blades v. Higgs*, 10 C. B. (N. S.) 713; *Burling v. Read*, 11 Q. B. 904; *Meriton v. Coombes*, 9 C. B. 787; *Vinson v. Flynn*, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415; *Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 442; *Manning v. Brown*, 47 Md. 506; *Jackson v. Farmer*, 9 Wend. (N. Y.) 201; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80 (semble); *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272; *Stone v. Lahey*, 133 Mass. 426; *Smith v. Reeder*, 21 Or. 541, 28 Pac.

890, 15 L. R. A. 172 (dictum); *Souter v. Codman*, 14 R. I. 119, 51 Am. Rep. 364; *Dawson v. Marsh*, 74 Conn. 498, 51 Atl. 529. That the tenant mistakenly believes that he is entitled to possession is immaterial in this regard. *Allen v. Keily*, 17 R. I. 731, 24 Atl. 776, 16 L. R. A. 798, 33 Am. St. Rep. 905. For an admirable discussion of the whole subject in support of the view that the tenant has no such right of action, and a review of the authorities up to that time, see an article by Joseph Willard, Esq., in 4 Am. Law Rev. 429, referred to by Gray, C. J., in the case cited in the next note, as rendering superfluous further consideration of the cases.

his entry effectual,'²⁰⁹ and the same principle would be applicable to the force incidental to an entry against the tenant's resistance. But there are English cases which support a different view, to the effect that, while the law does not support an action against the reversioner for the forcible entry on his own land, it will recognize the statutes of forcible entry and detainer to the extent of holding that a possession obtained by force in defiance of these statutes does not justify acts such as would otherwise be ground for a recovery in damages;²¹⁰ and to the same effect, apparently, are cases in this country, which assert that, if the reversioner enters peaceably, he may thereafter expel the tenant or remove his furniture, thereby implying that he cannot do so if he enters otherwise than peaceably.²¹¹ There are also authorities to the effect that an entry is necessarily forcible if followed by a forcible expulsion of the person in possession, although the actual entrance on the premises was effected without the use of force.²¹² There seems, indeed, no substantial distinction between the case of one who "slips in" without opposition, and then forcibly expels the person in possession, and that of one who effects an entrance by forcibly overcoming resistance. The latest of the English cases referred to adopts this view, that the landlord is liable for a forcible expulsion, even though there was no force in the actual entry, since this is made forcible by the subsequent expulsion,²¹³ and there are

²⁰⁹ Per Gray, C. J., in *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272.

²¹⁰ *Newton v. Harland*, 1 Man. & G. 644; *Beddall v. Maitland*, 17 Ch. Div. 174; *Edwick v. Hawkes*, 18 Ch. Div. 199. The decision in the first case was in effect by a divided court, and in the last two, by one judge alone (Fry, J.). This view is approved in *Lightwood. Possession of Land*, 141, and is referred to, without approval or disapproval, in *Pollock, Torts* (5th Ed.) 358, 359.

²¹¹ *Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 412; *Smith v. Detroit Loan & Bldg. Ass'n*, 115 Mich. 340, 73 N. W. 395, 39 L. R. A. 410, 69 Am. St. Rep. 575; *Whitney v. Swett*, 22

N. H. 10, 53 Am. Dec. 228. And see *Whittaker v. Perry*, 38 Vt. 107.

²¹² *Bacon's Abr., Forcible Entry* (B), citing *Dalton's Justice*, 299; *Lambarde's Eirenarcha*, chap. 4, p. 142 (Ed. 1610), quoted in *Pollock, Torts* (5th Ed.) p. 359; *Seitz v. Miles*, 16 Mich. 456; *Willard v. Warren*, 17 Wend. (N. Y.) 257; *Winterfield v. Stauss*, 24 Wis. 394.

²¹³ *Edwick v. Hawkes*, 18 Ch. Div. 199, *supra*, where Fry, J., says that "if the operation of the statute is confined to the mere act of getting over the border, the edge, of the property in question peaceably, the statute is evidently not adequate to meet the evil which it was intended to repress."

several cases in this country which, without considering the mode of entry, decide that the reversioner is liable in damages if he forcibly expels the tenant.²¹⁴

For any excess of force used in expelling the tenant the reversioner would, no doubt, in all jurisdictions, be liable in damages,²¹⁵ and the possibility that the jury might find that such excessive force was used seems to render the forcible eviction of a tenant holding over his term a somewhat precarious proceeding in any jurisdiction.

An entry in the absence of the tenant and his family has been regarded as a peaceable entry, which gives a valid possession to the reversioner,²¹⁶ even though the entry involves the breaking open of doors,²¹⁷ so as to entitle him to use force in excluding

²¹⁴ *Entelman v. Hagood*, 95 Ga. 390, 22 S. E. 545; *Reeder v. Purdy*, 41 Ill. 279; *Jones v. Pereira*, 13 La. Ann. 102; *Boniel v. Block*, 44 La. Ann. 514, 10 So. 869; *Flaherty v. Andrews*, 2 E. D. Smith (N. Y.) 529; *Marchand v. Haber*, 16 Misc. 322, 37 N. Y. Supp. 952; *Wamsganz v. Wolff*, 86 Mo. App. 205 (semble); *Thiel v. Bull's Ferry Land Co.*, 58 N. J. Law, 212, 33 Atl. 281 (but see *Mershon v. Williams*, 62 N. J. Law, 779, 42 Atl. 778); *Rush v. Aiken Mfg. Co.*, 58 S. C. 145, 36 S. E. 497, 79 Am. St. Rep. 836 (semble); *Larkin v. Avery*, 23 Conn. 304; *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53. And see *Sharp v. Kinsman*, 18 S. C. 108, where it is said that the landlord has no right to eject the overholding tenant.

²¹⁵ *Vinson v. Flynn*, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415; *Sampson v. Henry*, 28 Mass. (11 Pick.) 379, 30 Mass. (13 Pick.) 36; *Whitney v. Swett*, 22 N. H. 10, 53 Am. Dec. 228; *Gregory v. Hill*, 8 Term R. 299.

²¹⁶ *Davis v. Burrell*, 10 C. B. 821; *Winn v. State*, 55 Ark. 360, 18 S. W. 375; *Marsh v. Bristol*, 65 Mich. 373,

32 N. W. 645; *Todd v. Jackson*, 26 N. J. Law (2 Dutch.) 525; *Smith v. Detroit Loan & Bldg. Ass'n*, 115 Mich. 340, 73 N. W. 395, 39 L. R. A. 410, 69 Am. St. Rep. 575; *Bliss v. Johnson*, 73 N. Y. 529, 29 Am. Rep. 500; *Mussey v. Scott*, 32 Vt. 82, 76 Am. Dec. 151; *Sage v. Harpending*, 49 Barb. (N. Y.) 166, 34 How. Pr. 1. But *Wilder v. House*, 48 Ill. 279, is contra, and in *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552, it was even held that the landlord was liable in damages though he entered in the tenant's absence and removed the latter's furniture carefully, and did not prevent the latter from re-entering.

²¹⁷ *Mershon v. Williams*, 62 N. J. Law, 779, 42 Atl. 778; *Hoske v. Gentzlinger*, 87 Hun. 3, 33 N. Y. Supp. 747; *Mussey v. Scott*, 32 Vt. 82, 76 Am. Dec. 151.

That breaking open a door is not a forcible entry, see *Smith v. Reeder*, 21 Or. 541, 28 Pac. 890, 15 L. R. A. 172; and *Williams v. Taperell*, 8 Times Law R. 241, contains a dictum to that effect by Wills, J.

Entry by unlocking a door, in the absence of the tenant and his family,

the tenant afterwards seeking to re-enter, without thereby subjecting himself to liability in damages. There are statements to be found, however, to the effect that an entry by breaking open a door is within the forcible entry and detainer statute,²¹⁸ and, under such a view, a possession so obtained would seem not to justify the forcible exclusion of the tenant, in jurisdictions in which it is held that, because of such statutes, a forcible entry will not justify his forcible expulsion.²¹⁹ In jurisdictions where the landlord's right to expel the tenant forcibly is recognized,²²⁰ the former has, no doubt, the right to forcibly exclude the latter, if he attempts to re-enter after the landlord has taken possession in the tenant's absence.²²¹

d. **Liability for removal of chattels.** The question of the landlord's liability in damages for removal of the tenant's personal chattels on the premises would ordinarily be determined by the same considerations as his liability for injuries to the person. If he is regarded as being liable in trespass *quare clausum*, the removal of the chattels would presumably be a matter of aggravation. And if he would be liable for the forcible removal of the tenant or members of his family by force, he would, it seems, be liable for the removal of the tenant's chattels.²²²

is not a forcible entry. *Smith v. Detroit Loan & Bldg. Ass'n*, 115 Mich. 340, 73 N. W. 395, 39 L. R. A. 410, 69 Am. St. Rep. 575. See Com. Dig., Forcible Entry (A 3).

²¹⁸ Anonymous, 2 Rolle, 2; Com. Dig., Forcible Entry (A 2). And see *Willard v. Warren*, 17 Wend. (N. Y.) 257. In *Whittaker v. Perry*, 38 Vt. 107, it is apparently the view of the court that the breaking in of the door when the tenant is in the house is a forcible entry.

²¹⁹ In *Todd v. Jackson*, 26 N. J. Law (2 Dutch.) 525, it is decided that even if any entry by breaking open a door is within the statute, the landlord obtains thereby a possession sufficient to support trespass against the tenant returning to the premises. This case is re-

ferred to approvingly in *Mershon v. Williams*, 62 N. J. Law, 779, 42 Atl. 778. That trespass may be maintained by a landlord who re-entered by forcing open a door against the tenant returning, see, also, *Mussey v. Scott*, 32 Vt. 82, 76 Am. Dec. 151.

²²⁰ See ante, at note 208.

²²¹ See *Tribble v. Frame*, 30 Ky. (7 J. J. Marsh.) 599, 23 Am. Dec. 439; *Freeman v. Wilson*, 16 R. I. 524, 17 Atl. 921.

²²² *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552; *Wilder v. House*, 48 Ill. 279. In *Griffin v. Martel*, 77 Vt. 19, 58 Atl. 788, he was held liable under a count in trespass *de bonis asportatis*, the other counts being, it seems, in trespass *q. c. f.*

In several cases it has been decided that, if the landlord enters peaceably, he may remove the tenant's chattels without incurring any liability for so doing,²²³ and this accords with the view that, after a peaceable entry, he may expel the tenant by force,²²⁴ with the difference that the removal of the chattels could not relate back so as to render the entry forcible.²²⁵ In jurisdictions where the landlord has a right to expel the tenant even after a forcible entry,²²⁶ he would, no doubt, have the right to remove the latter's furniture in a like case.²²⁷

The landlord is liable for any unnecessary injury to such chattels,²²⁸ but is not, it would seem, in any case liable for injury caused by their exposure to the weather after their removal, such injury being avoidable by the tenant by having them placed under shelter.²²⁹

§ 217. Rights of landlord after resuming possession.

After the landlord has re-entered without using force, he has such possession as will justify an action of trespass *quare clausum* by him against the tenant if the latter remains in possession,²³⁰

²²³ Todd v. Jackson, 26 N. J. Law (2 Dutch.) 525; Mershon v. Williams, 62 N. J. Law, 779, 42 Atl. 778; Smith v. Detroit Loan & Bldg. Ass'n, 115 Mich. 340, 73 N. W. 395, 39 L. R. A. 410, 69 Am. Rep. 575; Whitney v. Swett, 22 N. H. 10, 53 Am. Dec. 228; Mussey v. Scott, 32 Vt. 82, 76 Am. Dec. 151; Losch v. Pickett, 36 Kan. 216, 12 Pac. 822; Weeks v. Sly, 61 N. H. 89; Ish v. Marsh, 1 Neb. Unoff. 864, 96 N. W. 58.

²²⁴ See ante, at note 208.

²²⁵ See ante, at notes 202, 212.

²²⁶ See ante, at note 208.

²²⁷ See Weeks v. Sly, 61 N. H. 89; Freeman v. Wilson, 16 R. I. 524, 17 Atl. 921; Souther v. Codman, 14 R. I. 119, 51 Am. Rep. 364.

²²⁸ Vinson v. Flynn, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415; Whitney v. Swett, 22 N. H. 10, 53 Am. Dec. 228; Mershon v. Williams, 62 N. J. Law, 779, 42 Atl. 778;

Adams v. Adams, 7 Phila. (Pa.) 160; Overdeer v. Lewis, 1 Watts & S. (Pa.) 90, 37 Am. Dec. 440; Kellam v. Janson, 17 Pa. 467. Compare post, §§ 216 d, 285, at notes 543-546.

²²⁹ Weeks v. Sly, 61 N. H. 89. But Wetzel v. Meranger, 85 Ill. App. 457, is to the effect, apparently, that the landlord, though entitled to remove the goods, is liable if he places them where they will be exposed to injury by the weather.

²³⁰ Butcher v. Butcher, 7 Barn. & C. 399; Hey v. Moorehouse, 6 Bing. N. C. 52; Whittaker v. Perry, 38 Vt. 107; Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442. And see statements referred to ante, § 15 a, at notes 557, 565, that not until entry can the landlord maintain trespass against the tenant at sufferance, implying that he can do so after entry.

in accordance with the rule that where two persons are upon land claiming adversely to one another, the possession will be imputed to the one who has the title.²³¹ And he would, it seems, have the right to maintain an action for assault if the tenant undertakes to expel him by force.

The landlord may ordinarily, it seems, after a peaceable re-entry, use force to exclude the tenant seeking to re-enter,²³² though in some jurisdictions the forcible retention of possession after a peaceable entry is regarded as being within the forcible entry and detainer laws.²³³

Presumably, even in jurisdictions where the landlord is held liable for a forcible expulsion of the tenant, he would incur no liability if, after obtaining entrance peaceably, he dismantles the house in such a way as to render it uninhabitable, as by removing a door or a window, provided he does not, in so doing, commit any trespass upon the persons of the tenant or his family, or upon the chattels belonging to them,²³⁴ and he might, it would seem, use force in case a tenant attempts to interfere with him in so doing.²³⁵

²³¹ Litt. § 701; Lightwood, Possession of Land, 36; Pollock & Wright, Possession, 24; Reading v. Royston, 2 Salk. 423; Winter v. Stevens, 91 Mass. (9 Allen) 526. See remarks of Maule, J., in Jones v. Chapman, 2 Exch. 821, quoted by Lord Selborne in Lows v. Telford, 1 App. Cas. 414.

²³² See ante, at note 216.

²³³ See Phelps v. Randolph, 147 Ill. 335, 35 N. E. 243; Winterfield v. Stauß, 24 Wis. 394; and cases cited 13 Am. & Eng. Enc. Law (2d Ed.) 763.

²³⁴ In Jones v. Foley [1891] 1 Q. B. 730, it was decided that the landlord entering peaceably was not liable for injuries to the tenant's furniture caused by the act of the former in removing the roof. But in Preiser v. Wielandt, 48 App. Div. 569, 62 N. Y. Supp. 890, it was held that the landlord was liable in damages if, by tearing down the house

on the leased premises after the end of the tenancy, the tenant's sick wife was so disturbed and agitated as to become mortally ill. There is no discussion of the question, but the theory seems to be that the tenant's right of possession is extended by illness in his family rendering removal hazardous to the patient. Citing Herter v. Mullen, 159 N. Y. 28, 53 N. E. 700, 44 L. R. A. 703, 70 Am. St. Rep. 517, ante, note 46, which, however, involved a different question.

²³⁵ See Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442; Mugford v. Richardson, 88 Mass. (6 Allen) 76, 83 Am. Dec. 617; Harris v. Gillingham, 6 N. H. 11, 23 Am. Dec. 701. But in Com. v. Haley, 86 Mass. (4 Allen) 318, it was held that the landlord was criminally liable for assault if he resisted the interference of the tenant.

CHAPTER XXII.

STIPULATIONS FOR RENEWAL OR EXTENSION.

- § 218. Renewal and extension distinguished.
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- 220. Sufficiency and construction of stipulation for renewal.
- 221. Stipulations for perpetual renewal.
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§ 218. Renewal and extension distinguished.

The validity of a covenant by the lessor to “renew” the lease, that is, upon the expiration of the lease, to make another lease to the same tenant which will have the effect of creating another tenancy in him for a further period, has been uniformly recognized, both in England and this country. To be distinguished from such a provision for renewal, is a provision for an “extension” of the term for a certain time at the tenant’s option, “the privilege of a further term,” as it is sometimes expressed. A provision for an extension does not, as does a covenant to renew, involve an agreement to make a lease for an additional term, but rather serves to extend the operation of the original

lease, so as to make this latter a lease not only for the term originally named, but also for the additional term, subject to the lessee's election as to whether the tenancy shall continue during such latter term, and consequently no further lease is necessary in order to vest the leasehold in the lessee for such additional term in case he elects in favor of a continuance.¹ Such a lease for a certain term, with a provision giving the lessee a right of extension for another term named, may be regarded in either one of two ways: (1) As creating a leasehold estate in the lessee of a duration measured by the sum of the two terms, with an option in the lessee to terminate it at the end of the first named term, either by relinquishing possession, or failing to give notice of a desire to continue possession, or otherwise, according as the language conferring the privilege may provide,² or (2) as creating two estates in the lessee, one to commence upon the termination of the other, provided all conditions precedent as to election and notice are satisfied.³

¹ *Brown v. Samuels*, 24 Ky. Law Rep. 1216, 70 S. W. 1047; *Holley v. Young*, 66 Me. 520; *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612; *Kramer v. Cook*, 73 Mass. (7 Gray) 550; *De Friest v. Bradley*, 192 Mass. 346, 78 N. E. 467; *Clarke v. Merrill*, 51 N. H. 415; *Swan v. Inderlied*, 187 N. Y. 372, 80 N. E. 195; *House v. Burr*, 24 Barb. (N. Y.) 525; *Voege v. Ronalds*, 83 Hun, 114, 31 N. Y. Supp. 353; *Caley v. Thornquist*, 89 Minn. 348, 94 N. W. 108; *McClelland v. Rush*, 150 Pa. 57, 24 Atl. 354, 16 L. R. A. 554; *Quinn v. Valiquette*, 80 Vt. 434, 68 Atl. 515, 14 L. R. A. (N. S.) 962. But in *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434, it was said, in considering the applicability of the statute of frauds, that "an option for an extension." existing in connection with a lease for four months, "did not render the agreement a lease for a longer period than four months." This would seem to in-

volve the view that, by the mere subsequent exercise of the option, an estate for the additional period is transferred to the lessee, a legal impossibility, it would seem. To transfer an estate, a conveyance of some sort is necessary. See post, at note 160.

² See *Chretien v. Doney*, 1 N. Y. (1 Comst.) 419; *Walker v. Wadley*, 124 Ga. 275, 52 S. E. 904; *Montgomery v. Hamilton County Com'rs*, 76 Ind. 362, 40 Am. Rep. 250; *Heffron v. Treber* (S. D.) 110 N. W. 781. See, as tending to favor such a view, *Hemming v. Brabason*, O. Bridg. p. 1, 1 Lev. 45, 1 Keb. 154; 3 *Preston's Conveyancing*, 75.

³ This view is perhaps indicated in *Kramer v. Cook*, 73 Mass. (7 Gray) 550; *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612; *Sheppard v. Rosenkrans*, 109 Wis. 58, 85 N. W. 199, 53 L. R. A. 650, 83 Am. St. Rep. 886.

In a number of cases, what might well be regarded as a covenant to renew, as apparently looking towards the making of a new lease by the lessor, has been regarded as in effect a stipulation for an extension, vesting in the lessee an estate extending to the end of the second period named, without any necessity of the making of a second lease.⁴ The same courts, however, which have thus in effect regarded a stipulation for a renewal as equivalent to a provision for an extension, would presumably recognize and enforce a stipulation which in terms called for the making of a new lease and expressly stipulated that until this was done no legal interest should vest in the lessee for the additional term.⁵ Conceding this, the rule in those states would seem to be one of construction merely, that is, that unless a clear intention

⁴ *Holley v. Young*, 66 Me. 520; *Co. v. Newell*, 32 Ky. Law Rep. 396, 105 S. W. 972).
⁵ *Perry v. Rockland & R. Lime Co.*, 94 Me. 325, 47 Atl. 534; *Ferguson v. Jackson*, 180 Mass. 557, 62 N. E. 965 (semble); *Wood v. Edison Elec. Illuminating Co.*, 184 Mass. 523, 69 N. E. 364, 100 Am. St. Rep. 573; *Ranlet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92; *Caley v. Thornquist*, 89 Minn. 348, 94 N. W. 1084; *Harding v. Seeley*, 148 Pa. 20, 23 Atl. 118. So it has been decided that the lessee had a term for the full period named when there was merely an option "of renting" the property for the further term (*Walker v. Wadley*, 124 Ga. 275, 52 S. E. 904), when there was a covenant "to let and demise for a further term" (*Trustees of Congregation of Sons of Abraham v. Gerbert*, 57 N. J. Law, 395, 31 Atl. 383), when the lessee was given the "privilege of releasing" (*Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612), when the lessors agreed to "renew" (*Ranlet v. Cook*, 44 N. H. 512, 84 Am. Dec. 93), and when the lessee was given the "privilege of renewal" (*Insurance & Law Bldg. Co. v. National Bank*, 71 Mo. 58; *Kentucky Lumber*

In *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 777, it is said by Marshall, J., that "there is much respectable authority to the effect that the words 'renew' and 'extend' should be construed in accordance with their ordinary meaning. Obviously, one means to prolong or to lengthen out; the other, to make over, to re-establish, or to rebuild; and those courts and writers that have construed them accordingly certainly have the best of the argument, if the judicial construction is to follow the true definitions of the words. We apprehend that no one would seriously contend that an agreement to renew a note would be satisfied otherwise than by making a new note in place of the old one. It would seem that the construction adhered to in some jurisdictions, that to renew is equivalent to extend, violates the rules of language to reach a judicial construction out of harmony with the universally accepted meaning of the words as defined by lexicographers."

⁵ See *Kentucky Lumber Co. v.*

otherwise shall appear, a provision which is in terms a covenant for renewal is to be construed as a provision for extension.

When the words "renewal," "reletting," and the like, occurring in a stipulation of this character, are given their ordinary meaning, the lessee has, until the renewal lease is executed, no legal interest beyond the original term, as distinct from a right of action for breach of the covenant, or for specific performance,⁶ though a stipulation for a renewal has been asserted to constitute an equitable defense to an action by the lessor for possession after the lapse of the original term, under a statute allowing equitable defenses.⁷ That such a covenant does not give a legal interest seems to be by implication recognized in those cases upholding the right of the lessee to specific performance of a covenant to make a renewal lease, since such relief would be entirely superfluous if the covenant itself conferred such an interest.^{7a}

Occasionally it has been said that a provision giving to the lessee the privilege of continuing in possession after the term named is equivalent to a covenant for renewal.⁸ Whether, however, such

Newell, 32 Ky. Law Rep. 396, 105 S. W. 972.

⁶ *Platt v. Cutler*, 75 Conn. 183, 52 Atl. 819; *Hunter v. Silvers*, 15 Ill. 174; *Sutherland v. Goodnow*, 108 Ill. 528, 43 Am. Rep. 569; *Finney v. Cist*, 34 Mo. 303, 84 Am. Dec. 82; *Swank v. St. Paul City R. Co.*, 61 Minn. 423, 63 N. W. 1088; *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776; *Orton v. Noonan*, 27 Wis. 272; *Tscheider v. Biddle*, 4 Dill. 58, Fed. Cas. No. 14,210; *Fenny v. Child*, 2 Maule & S. 255; *Andrews v. Marshall Creamery Co.*, 118 Iowa, 595, 92 N. W. 706, 60 L. R. A. 399, 96 Am. St. Rep. 412; *Werlein v. Janssen*, 112 La. 31, 36 So. 216. In *Steen v. Scheel*, 46 Neb. 252, 64 N. W. 957, it was so decided where the lease gave the lessee "the refusal of leasing said property for two years longer;" and in *James v. Kibler's Adm'r*, 94 Va. 165, 26 S. E. 417, a provision that if, at the end

of the term, the lessee desired to retain the premises, he might do so provided he gave six months' notice, was construed as a covenant to make a renewal lease, and as consequently not constituting a lease for the whole time, including the renewal term.

⁷ *Ferguson v. Jackson*, 180 Mass. 557, 62 N. E. 965; *Pittsburg Drove Yard Co.'s Appeal*, 123 Pa. 250, 16 Atl. 625. In *McAdoo v. Callum*, 86 N. C. 419; *Barbee v. Greenberg*, 144 N. C. 430, 57 S. E. 125, it is decided that while a covenant for renewal is not itself a renewal so as to vest a subsequent term in the lessee, it gives him an equity which, while not enforceable before a justice of the peace, will constitute a defense to summary proceedings.

^{7a} See post, § 233.

⁸ *Crawford v. Kastner*, 26 Hun (N. Y.) 440; *Western New York & P. R.*

a provision is, in any particular case, so to be regarded, would seem to be a question of construction.⁹ Ordinarily in this country, such a provision would not be construed as contemplating the making of a new lease.

§ 219. Additional term as part of original term.

In a number of cases the question has arisen whether a lease for a certain term, with a right of renewal for another term, was a lease for the sum of the two terms, for the purpose of determining whether it was within the operation of a particular statute. It has been decided, for the purpose of determining the applicability of a statute restricting the period for which a lease can be made, that the lease is invalid if the sum of the original term and of the renewal term exceed the period named in the statute,¹⁰ and a like view has occasionally,¹¹ though not always,¹² been asserted in determining the applicability of the Statute of Frauds. Likewise, such a lease has been regarded as within a recording act which purports to cover only leases for a period longer than the original term.¹³

A statutory provision that a tenant under a lease for more than a period named should have a right to purchase the reversion has been held to apply to a lease for a shorter period than that named, when there was a right of renewal which might extend the holding beyond that period.¹⁴ And conversely, a prohibition of the assignment of a lease of less than a certain period has been held not to apply when there was such a right of renewal.¹⁵ In one

Co. v. Rea, 83 App. Div. 576, 81 N. Y. Supp. 1093. See Ward v. Hasbrouck, 169 N. Y. 407, 62 N. E. 434.

⁹ See Orton v. Noonan, 27 Wis. 272; Kollock v. Scribner, 98 Wis. 104, 73 N. W. 776. And ante, at notes 4, 5. ¹³ Toupin v. Peabody, 162 Mass. 473, 39 N. E. 280; Leominster Gas-light Co. v. Hillery, 197 Mass. 267, 83 N. E. 870, 15 L. R. A. (N. S.)

¹⁰ Moore v. Clench, 1 Ch. Div. 447; Hart v. Hart, 22 Barb. (N. Y.) 606. 243, 125 Am. St. Rep. 361. Contra, Doe d. Kinkstan Bldg. Soc. v. Rainsford, 10 U. C. Q. B. 236.

¹¹ Schmitz v. Lauferty, 29 Ind. 400; Williams v. Mereshon, 57 N. J. Law, 242, 30 Atl. 619 (semble); Rosen v. Rose, 13 Misc. 565, 34 N. Y. Supp. 467; Hess v. Martin, 36 Misc. 561, 73 N. Y. Supp. 946. ¹⁴ See post, § 269, at note 105. ¹⁵ Jones v. Hamm (Mo. App.) 74 S. W. 150; Jones v. Kansas City Board of Trade, 99 Mo. App. 433, 78 S. W. 843.

¹² Hand v. Hall, 2 Exch. Div. 355.

state, on the other hand, the view has been taken that the period for which a renewal could be obtained should not be added to that of the original term for the purpose of making up a term of five years within the statute allowing a redemption, under the summary proceeding statute, in the case of such a term.¹⁶

Where a privilege of extension, as distinct from a right of renewal, is given, since the lease creates both the original term and the period of the extension,¹⁷ the lease would seem to be invalid if it is oral merely, and the sum of the two periods exceeds the limits imposed by the Statute of Frauds, even though the first term named is within those limits. There are decisions to that effect,¹⁸ but the contrary view has also been taken.¹⁹

§ 220. Sufficiency and construction of stipulation for renewal.

Occasionally, without the use of the word "renew," or of ordinary words of agreement or covenant, the language of the lease has been construed as equivalent to a covenant for renewal. Such has been the construction placed on a lease "with the option of renewal,"²⁰ with "the privilege of six years more at the same rent,"²¹ with "the refusal" of the premises,²² or with the refusal of "leasing" the premises²³ for a longer time named, or giving the lessee "the option to take the premises" for a longer time.²⁴

It has been decided that when the covenant is in terms merely to renew, without more, the renewal lease must be for the same

¹⁶ *Bokee v. Hamersley*, 16 How. Pr. (N. Y.) 461.

¹⁷ See ante, at note 1.

¹⁸ *Hand v. Osgood*, 107 Mich. 55, 64 N. W. 867, 30 L. R. A. 379, 61 Am. St. Rep. 312; *Donovan v. Schoenhoefen Brew. Co.*, 92 Mo. App. 341; *Bateman v. Maddox*, 86 Tex. 546, 26 S. W. 51.

¹⁹ *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434. The decision is arrived at by applying the rule that an agreement is not within the provision of the statute of frauds applying to contracts not to be performed within a year, if it might be

performed within the year. The rule has, it is submitted, no proper application to a conveyance as distinguished from a contract.

²⁰ *Lewis v. Stephenson*, 67 Law J. Q. B. 296, 78 Law T. (N. S.) 165.

²¹ *Crawford v. Kastner*, 26 Hun (N. Y.) 440, 63 How Pr. 90.

²² *Tracy v. Albany Exch. Co.*, 7 N. Y. (3 Seld.) 472, 57 Am. Dec. 538; *McAdoo v. Callum*, 86 N. C. 419.

²³ *Steen v. Scheel*, 46 Neb. 252, 64 N. W. 957.

²⁴ *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560.

length of term as the original lease,²⁵ and that it must contain the same stipulations.²⁶ Consequently, such a clause is not bad for uncertainty. So a clause "with the privilege of renting same for three years longer" has been regarded as giving a right of renewal on the terms of the original lease,²⁷ as has a provision that at the expiration of the term the lessee should have the refusal of the premises for a time named.²⁸ But when the language of the covenant or stipulation is such as to exclude any inference that the terms are to be the same as before, it is unenforceable if it does not name any terms. Thus a covenant to renew, the rent to be proportioned to the valuation of the premises, is void if there is no provision for determining the valuation;²⁹ and the same view has been taken of a provision that the lessee is "to have the preference of renting said property so long thereafter as it shall be rented for a store."³⁰ A provision that the lessor shall "let" the land at the expiration of the term to the lessee, without naming any term,³¹ and one that the renewal shall be "for such time as shall

²⁵ *Tracy v. Albany Exch. Co.*, 7 N. Y. (3 Seld.) 474, 57 Am. Dec. 538; *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776; *Lewis v. Stephenson*, 78 Law T. (N. S.) 165. See *Phillips v. Reynolds*, 20 Wash. 374, 55 Pac. 316, 72 Am. St. Rep. 107. But in *Wallace v. Dorris*, 218 Pa. 534, 67 Atl. 858, it was considered, apparently, that such a provision for renewal called for a renewal for such a length of time as might subsequently be agreed upon. In *Austin v. Newham* [1906] 2 K. B. 167, a lease "for a period of twelve months with the option of a lease after the aforesaid time at the rental of thirty pounds per annum" was construed to entitle the lessee to a further lease of at least one year, the words "per annum" showing an intention to this effect.

²⁶ *Rutgers v. Hunter*, 6 Johns. Ch. (N. Y.) 215; *Cunningham v. Pattee*, 99 Mass. 248; *Ranlet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92; *McAdoo v. Callum*, 86 N. C. 419; *Tracy v. Al-*

bany Exch. Co., 7 N. Y. (3 Seld.) 472, 57 Am. Dec. 538; *Hughes v. Windpfennig*, 10 Ind. App. 122, 37 N. E. 432; *Steen v. Scheel*, 46 Neb. 252, 64 N. W. 957; *Cairns v. Llewellyn*, 2 Pa. Super. Ct. 599; *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776; *Lewis v. Stephenson*, 78 Law T. (N. S.) 165; *Price v. Assheton*, 1 Younge & C. 82; *Rickards v. Rickards*, 2 Younge & C. Ch. 427.

²⁷ *Hughes v. Windpfennig*, 10 Ind. App. 122, 37 N. E. 432.

²⁸ *Tracy v. Albany Exch. Co.*, 7 N. Y. (3 Seld.) 472; *McAdoo v. Callum*, 86 N. C. 419.

²⁹ *Pray v. Clark*, 113 Mass. 283; *Morrison v. Rossignol*, 5 Cal. 64; *Streit v. Fay*, 230 Ill. 319, 82 N. E. 648, 120 Am. St. Rep. 304. And see ante, § 12 c (3) (d), at notes 144-147.

³⁰ *Delashmutt v. Thomas*, 45 Md. 140.

³¹ *Abeel v. Radcliff*, 13 Johns. (N. Y.) 297, 7 Am. Dec. 377.

prove mutually profitable,'³² have also been regarded as too indefinite.

A mere "preference" or "first right" in the lessee as to a subsequent lease of the premises,³³ such as that given by a stipulation that the lessee may retain possession upon his giving the same rent as the lessor "might be able to obtain from other parties;" has been regarded as unenforceable,³⁴ though in one state a covenant for renewal in case the lessee was willing "to give as much as any other responsible party will agree to give" was held to fix the amount of rent with sufficient certainty.³⁵ A lease for one year "with privilege of longer" gives the lessee no rights after the year.³⁶ An "option" in the lessee to renew on such terms as may be satisfactory to both parties is obviously nugatory, it giving him merely the right to enter into a new contract with the owner of the reversion, which right he would have had without any such provision.³⁷

It has in one case been decided that a stipulation, giving the lessee "the privilege of keeping and occupying said lots for such further time, after the expiration of said term, as said party of the second part (the lessee) shall choose or elect," is invalid as not fixing the period during which the lessee may retain the possession, and not even authorizing the lessee to fix the period.³⁸ Reference is also made in the opinion in this case to the fact that no term was named by the lessee during the life of the lessor, the rule being stated to be that when the ascertainment of the duration of a term depends on matter *ex post facto*, that matter must occur in the lifetime of both the lessor and lessee.³⁹ The same case apparently decides that such a stipulation, regarded as an option for an extension, creates merely a tenancy at will after the end of the original term, on the ground that a lease at the will of

³² Lloyd v. Worrell, 37 How. Pr. (N. Y.) 75.

³³ Reed v. Campbell, 43 N. J. Eq. 406. See Crawford v. Morris, 5 Grat. (Va.) 90.

³⁴ Gelston v. Sigmund, 27 Md. 335.

³⁵ Arnot v. Alexander, 44 Mo. 25, 100 Am. Dec. 252.

³⁶ Howard v. Tomicich, 81 Miss. 118, 703, 33 So. 493.

³⁷ Pause v. Atlanta, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290; Duffield v. Whitlock, 26 Wend. (N. Y.) 55, 37 Am. Dec. 246; Howe v. Larkin, 119 Fed. 1005.

³⁸ Western Transp. Co. v. Lansing, 49 N. Y. 499.

³⁹ See ante, § 12 c (2) (b), at note

the lessee is at the will of the lessor as well, a doctrine which, as we have before stated, is open to question.⁴⁰ There seems no reason, on principle, why an agreement for a renewal lease, to be made for such a term as the lessee may name, should not be upheld.⁴¹ In one state a provision for an extension for such a period as the lessee desires has been given effect, without, however, any clear statement as to the exact interest thereby created in the lessee.⁴²

A lease for three years "with the privilege of five years" has been construed to give the privilege of five years in all, and not of five years in addition to the three years.⁴³

A covenant or stipulation to give a renewal lease may be contained in an instrument separate from the original instrument of lease,⁴⁴ and it may be made subsequently thereto. Such a subsequent stipulation must, at least if not under seal, be supported by a consideration, though it is sufficient for this purpose if the other party is bound to accept a renewal.⁴⁵ In the case of a renewal clause in the original lease, there can be no question of consideration, the requirements in this regard being fully satisfied by the acceptance of the lease and the consequent assumption by the lessee of the burden of the stipulations therein.⁴⁶

§ 221. Stipulations for perpetual renewal.

The validity of a covenant for perpetual renewal, that is, of a covenant for a renewal upon the termination of the first term, and

⁴⁰ See ante, § 13 a (1).

⁴¹ See comments by Lord Ellenborough, C. J., in *Iggulden v. May*, 7 East, 237, on *Bridges v. Hitchcock*, 5 Bro. Parl. Cas. 6. In *Hyde v. Skinner*, 2 P. Wms. 196, the term of the renewal lease seems to have been at the option of the lessee, and the court consented to compel a renewal for no more than twenty-one years, that being "the usual term for leasing."

⁴² *Sweetser v. McKenney*, 65 Me. 225; *Holley v. Young*, 66 Me. 520.

⁴³ *Gensler v. Nicholas*, 151 Mich. 529, 15 Det. Leg. N. 13, 115 N. W.

458. So a lease for one year "and the privilege of four years" was held to give the privilege of four years in all. *Willis v. Weeks*, 129 Iowa, 525, 105 N. W. 1012. And to the same effect is *Connors v. Clark*, 79 Conn. 100, 63 Atl. 951.

⁴⁴ *Hunter v. Silvers*, 15 Ill. 174; *Winters v. Cherry*, 78 Mo. 344.

⁴⁵ *Robertson v. St. John*, 2 Bro. Ch. 140; *Dowling v. Mill*, 1 Madd. 541.

⁴⁶ *Monihon v. Wakelin*, 6 Ariz. 225, 56 Pac. 735; *Spear v. Orendorf*, 26 Md. 37.

for another renewal upon the termination of the term created by such first renewal, and so on indefinitely, so long as the holder of the term then existing may choose to call for a renewal, has been frequently recognized.⁴⁷ In at least one state, however, such a covenant has been decided to be invalid under the rule against perpetuities.⁴⁸ Conceding that the rule referred to is directed against the unrestricted creation of future limitations which "are not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested in that limitation,"⁴⁹ on the ground that the effect of the existence of such a limitation, not to vest until the remote future, is to render both the present and the future interests uncertain in value and so to affect their vendibility,⁵⁰ it is difficult to perceive its applicability to a covenant to create an estate to commence in the future, when the right to call for the creation of such an estate is in the person alone who has the present estate in possession. The case of a covenant to renew at the demand of the person who has the vested interest under the lease is entirely different from a covenant to convey to one who has no vested interest, which has been decided to be within the rule, if not to be performed within the time prescribed by the rule.⁵¹ "An estate for years with a perpetual covenant for renewal is, so far as questions of remoteness are concerned, substantially a fee, and as such it is regarded. If the right of renewal, however, is not within the control of those having vested interests under the lease, and if the interest of the person within whose

⁴⁷ *Hare v. Burges*, 4 Kay & J. 45; *London & S. W. R. Co. v. Gomm*, 20 Ch. Div. 562; *Muller v. Trafford* [1901] 1 Ch. 54; *Banks v. Haskie*, 45 Md. 207; *Boyle v. Peabody Heights Co.*, 46 Md. 623; *Blackmore v. Boardman*, 28 Mo. 420; *Creighton v. McKee*, 2 Brewst. (Pa.) 383; *Gomez v. Gomez*, 81 Hun. 566, 31 N. Y. Supp. 206; *Page v. Esty*, 54 Me. 319; *Hoff v. Royal Metal Furniture Co.*, 117 App. Div. 884, 103 N. Y. Supp. 371; *Id.*, 189 N. Y. 555, 82 N. E. 1128.

to the effect that such a covenant is invalid is quoted in *Brush v. Beecher*, 110 Mich. 597, 68 N. W. 420, 64 Am. St. Rep. 373, without, however, any decision of the question.

⁴⁹ *Lewis, Perpetuity*, 164, quoted *London & S. W. R. Co. v. Gomm*, 20 Ch. Div. 562.

⁵⁰ See *Lewis, Perpetuity*, Supp. 16-19; *Gray, Rule Against Perpetuities*, § 269; 1 *Tiffany, Real Prop.* § 152.

⁵¹ *London & S. W. R. Co. v. Gomm*, 20 Ch. Div. 562.

⁴⁸ See *Morrison v. Rossignol*, 5 Cal. 64. The language of this case

absolute control the right will be may not vest within the period required by the rule against perpetuities, the limitation to such person is bad.⁵² Thus, if an estate for lives or years with a covenant for perpetual renewal is devised to A for life, and on his death to his (unborn) children and their heirs, but if all his children die under twenty-five then to C and his heirs, the devise to C is bad.⁵³ It may be added that if a covenant for perpetual renewal were to be regarded as contravening the rule, the same would be true in the case of any covenant for renewal to be performed after the termination of a previous term of twenty-one years or more, the rule being that if the period after which the future interest is to vest is not measured by lives, but is merely a definite number of years, it is necessary that this be less than twenty-one years, in order that the limitation be valid.⁵⁴

It is the generally accepted rule at the present day that a covenant by the lessor to grant a renewal lease, to contain the same covenants as the original lease, does not bind him to insert in the renewal lease the covenant for renewal itself,⁵⁵ since otherwise the covenant would be in effect one for perpetual renewal, and the courts have always leaned against construing a covenant as being of this character.⁵⁶ But it may be expressly stipulated that the

⁵² See *Hope v. City of Gloucester*, 7 De Gex, M. & G. 647.

⁵³ Gray. Rule against Perpetuities, § 230.

⁵⁴ Marsden, Perpetuities, 34; Leake, Digest of Law of Prop. in Land, 441; Palmer v. Holford, 4 Russ. 403; Rolfe & Rumford Asylum v. Lefebvre, 69 N. H., 238, 45 Atl. 1087.

⁵⁵ Hyde v. Skinner, 2 P. Wms. 196; Tritton v. Foote, 2 Bro. Ch. 636; Iggulden v. May, 9 Ves. Jr. 325; Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 47 Law. Ed. 635; Cunningham v. Pattee, 99 Mass. 248; Piggott v. Mason, 1 Paige (N. Y.) 412; Carr v. Ellison, 20 Wend. (N. Y.) 178; Diffendoffer v. St. Louis Public Schools, 120 Mo. 447, 25 S. W. 542; Muhlenbrinck v. Pooler, 40 Hun (N. Y.) 526; Leary v. Hutton, 129 N.

Y. 649, 29 N. E. 1028, affg. 35 N. Y. St. Rep. 773, 12 N. Y. Supp. 476; Swigert v. Hartzell, 20 Pa. Super. Ct. 56.

⁵⁶ Eaynham v. Guy's Hospital, 3 Ves. Jr. 295; Moore v. Foley, 6 Ves. Jr. 232; Swinburne v. Milburn, 9 App. Cas. 844; Drake v. Board of Education, 208 Mo. 540, 106 S. W. 650, 14 L. R. A. (N. S.) 829, 123 Am. St. Rep. 448; Brush v. Beecher, 110 Mich. 597, 68 N. W. 420, 64 Am. St. Rep. 373; Syms v. New York, 105 N. Y. 153, 11 N. E. 369, 59 Am. Rep. 483; Tischner v. Rutledge, 35 Wash. 285, 77 Pac. 388; King v. Wilson, 98 Va. 259, 35 S. E. 727. See article upon the construction, in this regard, of covenants for renewal, by I. Homer Sweetser, Esq., in 13 Harv. Law Rev. at p. 472.

“same covenants” to be contained in the renewal lease should include the covenant for renewal.^{57, 58}

It was at one time decided that the fact that the lease was actually renewed on several occasions was to be regarded as a construction of such a covenant by the lessor as one for perpetual renewal, by which he was bound.⁵⁹ This decision has, however, been frequently questioned and is presumably to be regarded as overruled.⁶⁰ It has been decided in one case in this country that where the covenant was to make another lease at the end of the term, “with a like covenant for future renewals of the lease as is contained in this present indenture,” the facts that the first renewal lease provided for but one renewal, and the second lease did not provide for any, were of great weight in favor of construing the covenant as one for but two renewals.⁶¹ A covenant that “at the end of the term hereby demised, this lease shall be renewable” at the option of the lessee, his representatives or assigns, “and every renewed lease shall contain all the covenants” contained in the first, except that the renewal rents to be reserved “on every renewal” shall be determined in a certain way, was held to call for one renewal only.⁶² In one case it was decided that the fact that the lease is not in terms made binding on the heirs of either party, and that there is no right of re-entry for nonpayment of rent, tends to show that the renewals are not to be perpetual.⁶³

In England it has been decided that an undertaking to renew

A grant of the “privilege of re-renting and remaining on said premises at the same rental and conditions for any number of years” does not entitle the lessee to subsequent renewals after obtaining a single renewal for one year. *Swigert v. Hartzell*, 20 Pa. Super. Ct. 56. It has been held that a covenant for repeated renewals, not in terms binding on the lessor’s heirs, must be regarded as intended to be effective only during his life, and so not to provide for perpetual renewals. *Brush v. Beecher*, 110 Mich. 597, 68 N. W. 420, 64 Am. St. Rep. 373;

Hudgins v. Bowes (Tex. Civ. App.) 110 S. W. 178.

^{57, 58} *Job v. Banister*, 2 Kay & J. 374; *Hare v. Burges*, 4 Kay & J. 45.

⁵⁹ *Cooke v. Booth*, Cowp. 819.

⁶⁰ *Baynham v. Guy’s Hospital*, 3 Ves. Jr. 295; *Eaton v. Lyon*, 3 Ves. Jr. 690; *Moore v. Foley*, 6 Ves. Jr. 232; *Iggulden v. May*, 9 Ves. Jr. 325, 7 East, 237, 2 Bos. & P. (N. R.) 449.

⁶¹ *Syms v. New York*, 105 N. Y. 153, 11 N. E. 369, 59 Am. Rep. 483.

⁶² *Diffenderfer v. St. Louis Public Schools*, 120 Mo. 447, 25 S. W. 542.

⁶³ *Brush v. Beecher*, 110 Mich. 597, 68 N. W. 420, 64 Am. St. Rep. 373.

“from time to time” is not one for perpetual renewal,⁶⁴ while a different view has been taken of a stipulation that the lessor and his successors in interest should “continue the renewing” of the lease to the lessee and his successors,⁶⁵ or that they should renew to them “always at any time upon request,”⁶⁶ and even where the covenant was to “grant such further lease as should by the lessee or his successors be desired, under the same rent and covenants.”⁶⁷

§ 222. Election by lessee to extend.

a. **Retention of possession.** It has been decided in numerous cases that if the lessor gives the lessee the right to an extension of the term, and does not specifically require him to give notice of his election to avail himself of such right,⁶⁸ his mere continuance in possession after the original term is to be regarded as showing his election to that effect.⁶⁹ “Such a notice had it been given would have been a notice only of the lessee’s intention to continue the same occupation, upon the same terms as before. And upon principle it would certainly seem that the actual continuance of such occupation was the best and most conclusive evidence of his

⁶⁴ *Brown v. Tighe*, 2 Clark & F. 396.

⁶⁵ *Furnival v. Crew*, 3 Atl. 83.

⁶⁶ *Copper Min. Co. v. Beach*, 13 Beav. 478.

⁶⁷ *Bridges v. Hitchcock*, 5 Brown Parl. Cas. 6. See 13 Harv. Law Rev. 472.

⁶⁸ See post § 222 b.

⁶⁹ *City of Plattsburgh v. New Hampshire Sav. Bank (C. C. A.)* 139 Fed. 631; *Hays v. Goldman*, 71 Ark. 251, 72 S. W. 563; *Terstegge v. First German Mut. Ben. Soc.*, 92 Ind. 82, 47 Am. Rep. 135; *Montgomery v. Hamilton County Com’rs*, 76 Ind. 362, 40 Am. Rep. 250; *Andrews v. Marshall Creamery Co.*, 118 Iowa, 595, 92 N. W. 706, 60 L. R. A. 399, 96 Am. St. Rep. 412; *Cusack v. The Gunning System*, 109 Ill. App. 588; *Brown v. Samuels*, 24 Ky. Law Rep.

1216, 70 S. W. 1047; *Holley v. Young*, 66 Me. 520; *Clarke v. Merrill*, 51 N.

H. 415; *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522; *Mershon v. Williams*, 62 N. J. Law, 779, 42 Atl. 778;

Voegel v. Ronalds, 83 Hun, 114, 31 N. Y. Supp. 353; *Kelly v. Varnes*, 64 N. Y. Supp. 1040; *Harding v. Seeley*, 148 Pa. 20, 23 Atl. 1118; *Cairns v.*

Llewellyn, 2 Pa. Super. Ct. 599; *Ewing v. Miles*, 12 Tex. Civ. App. 19, 33 S. W. 235; *Peehl v. Bumbalek*, 99 Wis. 62, 74 N. W. 545; *Brandenburg v. Reithman*, 7 Colo. 323, 3 Pac. 577; *Quinn v. Valiquette*, 80 Vt. 434, 68 Atl. 515, 14 L. R. A. (N. S.) 962; *Spangler v. Rogers*, 123 Iowa, 724, 99 N. W. 580.

That the possession must be actual, visible and exclusive, see *Wright v. Kaynor*, 150 Mich. 7, 14 Det. Leg. N. 631, 113 N. W. 779.

intention to continue. The inference is that he intends to continue in possession rightfully according to the terms of his lease, rather than wrongfully.⁷⁰ This doctrine, that the lessee's retention of possession shows an election to extend, applies not only against the lessee, when the extension is asserted as ground for a continued liability on his part, but also in the latter's favor, when it is asserted by him as against the lessor, seeking to recover possession,⁷¹ or otherwise to assert a liability against him as wrongfully holding over.⁷² In one state it has been decided that the fact that the tenant so retains possession after the original term is not conclusive that he has elected to hold for the extended term, even though his retention of possession is accompanied by payment of rent. This, it was said, "is a piece of evidence, a strong piece of evidence,—a piece of evidence sufficient of itself, if unexplained and uncontrolled, to raise a fair inference and presumption that the option has been exercised, and thus to make out a *prima facie* case. But this is the most that can be said of it, and it is still competent for the tenant to offer opposing evidence."⁷³

When the provision for extension fails to specify the length of the extension, or names alternative periods for which the lessee

⁷⁰ Per Christiancy, J., in *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392.

⁷¹ *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392; *Holley v. Young*, 66 Me. 520; *Woodcock v. Roberts*, 66 Barb. (N. Y.) 498.

⁷² *Insurance & Law Bldg. Co. v. National Bank*, 71 Mo. 58.

⁷³ *Atlantic Nat. Bank v. Demmon*, 139 Mass. 420, 1 N. E. 833, per C. Allen, J., who proceeds: "This doctrine is in full accord with the decision in *Kramer v. Cook*, 73 Mass. (7 Gray) 550, where it was held that such election may be inferred from proof of the tenant's continuing to occupy, and paying rent for two quarters, without showing any formal election or notice to the lessor at the time of the expiration of the first term, and that it ought to

be so inferred in the absence of evidence to control the effect of those acts." That the retention of possession raises a presumption of an election to extend, see *Lyons v. Osborn*, 45 Kan. 650, 26 Pac. 31.

Where a lease was for one year, with the privilege of "continuing" for five years, and the lessee, having erected a building on the land, remained thereon after the year, and subsequently told the lessor that he did not wish to stay longer, and the lessor told him that he might leave if he removed his building, which he failed to do, it was held that this was sufficient to warrant a finding that he elected to remain five years and was bound for the rent for that time. *Kimball v. Cross*, 136 Mass. 300. And see *Gilbert v. Price*, 18 Pa. Super. Ct. 359.

may extend, the mere holding over has been decided to be insufficient as notice of an election to extend,⁷⁴ though in one state, when there was such an option to extend for either of two or more periods, the retention of possession was regarded as an election to extend for the shorter period.⁷⁵

A tenant does not bind himself for the extended term, it has been decided, by holding over the original term, if he does so on the strength of an agreement by the landlord to repair, which the latter fails to do,⁷⁶ nor when he so holds over on the strength of an agreement by the landlord to make another and different lease to him, which agreement is not carried out.⁷⁷ Somewhat similar in principle is a decision to the effect that the lessee, having refused to accept a renewal at a rent fixed by appraisement, which renewal the lessor had covenanted to make, did not show an acceptance thereof by subsequently holding over and asserting that the appraisement was invalid.⁷⁸

It has been decided that if the lessee, before the end of the original term, notifies the lessor that he will not avail himself of the option to extend, and the lessor acts upon such notification, the lessee is bound thereby, and cannot afterwards assert that, by continuing in possession, he has shown an election to extend.⁷⁹ And a like decision was made when the lessee, having an option to extend for four years, notified the lessor that he would extend for one year, this being regarded as equivalent to notice that he would not exercise the option.⁸⁰ A similar view has been asserted in favor of the lessee, it being decided that the landlord cannot assert an extension under the extension clause of the lease by reason of the fact that the lessee held over, if the latter had previ-

⁷⁴ *Perry v. Rockland & R. Lime Co.*, 94 Me. 325, 47 Atl. 534; *Strousse v. Bank of Clear Creek County*, 9 Colo. App. 478, 49 Pac. 260. And see *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612.

⁷⁵ *Folley v. Giles*, 29 Ind. 114; *Whetstone v. Davis*, 34 Ind. 510.

⁷⁶ *Fisher v. Nergararian*, 112 Mich. 327, 70 N. W. 1009. See *Williams v. Houston Cornice Works* (Tex. Civ. App.) 18 Tex. Ct. Rep. 240, 546, 101 S. W. 839, 1195.

⁷⁷ *Crouch v. Trimby & Brewster Shoe Co.*, 83 Hun. 276, 31 N. Y. Supp. 932; *Henderson v. Schuylkill Valley Clay Mfg. Co.*, 24 Pa. Super. Ct. 422.

⁷⁸ *Zorkowski v. Astor*, 156 N. Y. 393, 50 N. E. 983.

⁷⁹ *Barnett v. Feary*, 101 Ind. 95; *Greiner v. Cota*, 92 Mich. 32, 52 N. W. 77.

⁸⁰ *Mershon v. Williams*, 62 N. J. Law, 779, 42 Atl. 778.

ously notified the lessor that he would not exercise the right of extension.⁸¹ But the lessee's statement that he would not remain, when made merely in answer to the lessor's wrongful demand of an increased rent, was held not to show an election not to extend, the lessee retaining possession after the term.⁸² A statement by the lessee to the lessor, made before the end of the first term, of his election to extend, is, it seems, if acted on by the lessor, binding on the lessee to the same extent as his notice of election not to extend.⁸³

Occasionally the lease, instead of providing in terms for an extension at the option of the lessee, provides that if he shall fail to relinquish possession he will hold for another term or as a tenant from year to year.⁸⁴ A provision that "if the tenant should continue on the premises after the termination of the contract" it should "continue in force for another year and so on" has been held to refer to a "lawful continuance" on the premises, and not to a continuance in violation of the lessee's covenant to relinquish possession at the end of the term on demand.⁸⁵

b. Requirement of express notice. Where the stipulation for an extension at the option of the lessee provides for a notice by him of a particular character of his election to exercise the option, his mere retention of possession will not be sufficient to entitle him to possession for the extended period.⁸⁶ It has been held that a requirement of a notice in writing was satisfied by a notice written in the third person, naming the lessee, and enclosed in his business envelope, although the notice was not signed.⁸⁷

The lessor may waive any requirements as to notice.⁸⁸ In one

⁸¹ *Racke v. Anheuser-Busch Brew. Ass'n*, 17 Tex. Civ. App. 167, 42 S. W. 774. See *Lindsay v. Robertson*, 30 Ont. 223, apparently to this effect.

⁸² *Hughes v. Windpfennig*, 10 Ind. App. 122, 37 N. E. 432.

⁸³ See *Chandler v. McGinney*, 8 Kan. App. 421, 55 Pac. 103.

⁸⁴ See *McPherson v. Norris*, 13 U. C. Q. B. 472; *Crawford v. Kline*, 74 N. J. Law, 203, 65 Atl. 441; *Steen v. Scheel*, 46 Neb. 252, 61 N. W. 957.

⁸⁵ *MacGregor v. Rawle*, 57 Pa. 184.

⁸⁶ *Cooper v. Joy*, 105 Mich. 374, 63

N. W. 414; *Mershon v. Williams*, 62 N. J. Law, 779, 42 Atl. 778; *Ocuppaugh v. Engel*, 121 App. Div. 9, 105 N. Y. Supp. 510; *Powell v. Harrison*, 10 Wkly. Law Bul. (Ohio) 215. See *Murtland v. English*, 214 Pa. 325, 63 Atl. 852, 112 Am. St. Rep. 747. Compare *Gardiner v. Bair*, 10 Pa. Super. Ct. 74.

⁸⁷ *Wiener v. Graff & Co.* (Cal. App.) 95 Pac. 167.

⁸⁸ *Wood v. Edison Elec. Illuminating Co.*, 184 Mass. 523, 69 N. E. 364, 100 Am. St. Rep. 573; *Hausauer*

case it was decided that a provision for a written notice of the lessee's election to extend cannot be verbally waived without a violation of the provision of the Statute of Frauds prohibiting the creation of a term of years without writing,⁸⁹ but this decision, based as it apparently is, on the theory that the extended term is created by the notice and not by the original lease, seems erroneous, and has been controverted in other states.⁹⁰ In another case it was decided that, in view of the provision for notice of his election to extend, the lessee's retention of possession, without the giving of the notice, was insufficient to impose liability on him for rent for the extended term, the theory being, apparently, that the lessor could not, by waiving the requirement of notice, give to the retention of possession a meaning which, in view of the requirement of notice, the lessee could not have intended it to have.⁹¹ In that case it was held to be a question of fact whether the holding over and payment of the stipulated rent showed an election by the lessee.

The acceptance by the lessor, without objection, of a notice given after the time named for giving it, has been held to involve a waiver of the requirement as to time,⁹² and the requirement of notice itself was regarded as waived when the lessor joined in naming appraisers to fix the rent on the extended term.⁹³ Likewise, the acceptance by the lessor, after the end of the original term, of an increased rent, which was to be paid in case of ex-

v. Dahlman, 18 App. Div. 475, 45 N. Y. Supp. 1038; Id., 163 N. Y. 587, 57 N. E. 1111.

⁸⁹ *Beller v. Robinson*, 50 Mich. 264, 15 N. W. 448, opinion per Cooley, J.

⁹⁰ *McClelland v. Rush*, 150 Pa. 57, 24 Atl. 354, 16 L. R. A. 554; *Sheppard v. Rosenkrans*, 109 Wis. 58, 85 N. W. 199, 53 L. R. A. 650, 83 Am. St. Rep. 886; *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522; *In re Zillig*, 13 N. Y. St. Rep. 891; *Lewis v. Perry*, 149 Mo. 257, 50 S. W. 821. See *In re Thompson's Estate*, 205 Pa. 555, 55 Atl. 539. Where the provision was for an extension at a rent

to be settled by appraisal, however, it was held, apparently, that the requirement of notice could not be waived, so as to give the lessee a right of possession at law, though it might be ground for relief in equity. *Tilleny v. Knoblauch*, 73 Minn. 108, 75 N. W. 1039.

⁹¹ *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25, 84 S. W. 216. See ante, note 86.

⁹² *Sheppard v. Rosenkrans*, 109 Wis. 58, 85 N. W. 199, 53 L. R. A. 650, 83 Am. St. Rep. 886.

⁹³ *Vian v. Ferran*, 5 Abb. Pr. (N. S.; N. Y.) 110, 54 Barb. 529.

tension, has been regarded as a waiver of the requirement of notice,⁹⁴ as has the acceptance of the same rent, when there was no provision for an increase of rent.⁹⁵

A notice in accordance with the terms of the lease is not invalidated by the fact that there is coupled therewith a suggestion on the part of the lessee that he desires to extend for a longer period than that named, to which the lessor refuses consent.⁹⁶

A deposit of the notice in the mail, before the time named in the lease, in accordance with instructions from the lessor, has been regarded as sufficient, though the notice is not received by the latter, residing in another state, till after the date named.⁹⁷

It has been decided that, in the case of a lease to two, the option to extend must be exercised by both in order to be effective, and that the expressed dissent of one to an extension precludes an extension in favor of the other.⁹⁸ In the case of a covenant to renew made by colessors, a notice to one has been regarded as sufficient as against all.⁹⁹

Occasionally a provision is found that, if the lessee fails to give notice a certain length of time before the end of his term, the tenancy shall continue for another term, or as one from year to year.¹⁰⁰ One purpose of such a provision is, it is said, to put the landlord and tenant on an equal footing, so that the former may know a reasonable time before the end of the term whether he must seek another tenant, and the latter will know whether

⁹⁴ Long v. Stafford, 103 N. Y. 274, 8 N. E. 522; Kramer v. Cook, 73 Mass. (7 Gray) 550; Stone v. St. Louis Stamping Co., 155 Mass. 267, 29 N. E. 623.

⁹⁵ Probst v. Rochester Steam Laundry Co., 171 N. Y. 584, 64 N. E. 504; Lewis v. Perry, 149 Mo. 257, 50 S. W. 821 (semble); Bailie v. Plant, 11 Misc. 30, 31 N. Y. Supp. 1015.

⁹⁶ Chamberlain v. Dunlap, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807.

⁹⁷ Reed v. St. John, 2 Daly (N. Y.) 213.

⁹⁸ Tweedie v. P. E. Olson Hardware & Furniture Co., 96 Minn. 238, 104 N. W. 895, 1089; Id., 98 Minn. 11, 107 N. W. 557. See Howell v. Behler, 41 W. Va. 610, 24 S. E. 646.

⁹⁹ Wright v. Kaynor, 150 Mich. 7, 14 Det. Leg. N. 631, 113 N. W. 779.

¹⁰⁰ Chretien v. Doney, 1 N. Y. (1 Comst.) 419; Dix v. Atkins, 130 Mass. 171; Wilcox v. Montour Iron & Steel Co., 147 Pa. 540, 23 Atl. 840; Lipper v. Bouve, Crawford & Co., 6 Pa. Super. Ct. 452; Megargee v. Longaker, 10 Pa. Super. Ct. 491; Trainor v. Schutz, 98 Minn. 213, 107 N. W. 812.

he must seek other premises,¹⁰¹ and it will, it seems, be strictly applied.¹⁰²

§ 223. Election by lessee to renew—Notice to lessor.

In order to obtain the benefit of a covenant for renewal, in jurisdictions where such a covenant is clearly distinguished from a mere option to extend, the lessee must, at least at law, before the end of the previous term, notify the owner of the reversion of his desire for a renewal.¹⁰³ Frequently, especially in England, the lease itself names the time at which such notice is to be given, and such a requirement must ordinarily be complied with.^{104,105}

The notice or demand for renewal need not be in writing unless the lease expressly so provides.¹⁰⁶ And any requirement

¹⁰¹ Lane v. Nelson, 167 Pa. 602, 31 Atl. 864.

¹⁰² See Gardiner v. Bair, 10 Pa. Super. Ct. 74.

¹⁰³ Eaton v. Lyon, 3 Ves. Jr. 690; City of London v. Mitford, 14 Ves. Jr. 41; Nicholson v. Smith, 22 Ch. Div. 640; Shamp v. White, 106 Cal. 220, 39 Pac. 537; Thiebaud v. First Nat. Bank of Vevay, 42 Ind. 212; Maughlin v. Perry, 35 Md. 352; Caggiano v. Galloreni, 26 Misc. 819, 57 N. Y. Supp. 2; McClintock v. Joyner, 77 Miss. 678, 27 So. 837, 78 Am. St. Rep. 541; Atlantic Product Co. v. Dunn, 142 N. C. 471, 55 S. E. 299; Mack v. Eckerlin, 27 Ohio Cir. Ct. R. 133. See I. X. L. Furniture & Carpet Installment House v. Berets, 32 Utah, 454, 91 Pac. 279. So a covenant that, after the expiration of said term of five years, the lessor will, if thereto desired by the lessee, make and execute a lease for the further term of five years, upon the same terms, was held not to entitle the lessee to exercise his election after the original term. Re-

noud v. Daskam, 34 Conn. 512. But in Brewer v. Conger, 27 Ont. App. 10, it was considered that, when the covenant was to grant another lease "provided the lessee should desire to take a further lease," the existence of a desire was sufficient, without the giving of any notice thereof.

^{104,105} See Rubery v. Jervoise, 1 Term R. 229; McFadden v. McCann, 25 Iowa, 252; Jackson Brew. Co. v. Wagner, 117 La. 875, 42 So. 356; Murtland v. English, 214 Pa. 325, 63 Atl. 882, 112 Am. St. Rep. 747; Morgan v. Goldberg, 9 Misc. 156, 29 N. Y. Supp. 52. In I. X. L. Furniture & Carpet Installment House v. Berets, 32 Utah, 454, 91 Pac. 279, it was held that a provision for the making of a renewal lease upon the lessee's election, "at the expiration of the term," required the election to be made before the term actually expired.

¹⁰⁶ Darling v. Hoban, 53 Mich. 599, 19 N. W. 545; Broadway & S. A. R. Co. v. Metzger, 27 Abb. N. C. 160, 15 N. Y. Supp. 662.

as to demand or notice may be waived by the owner of the reversion,¹⁰⁷ as in the case of an option for extension.¹⁰⁸

Though the lessee need not demand a renewal before the last day of the term, any statement previously made by him to the lessor as to his intention in this respect, if acted on by the lessor, is, it seems, binding on him.¹⁰⁹ The lessee may, ordinarily, make the demand for renewal before the end of the original term if he chooses so to do.¹¹⁰

The English courts of equity have in some cases asserted with considerable strictness the necessity that the demand for renewal and payment of the prescribed fine be promptly made at the time named, or before the end of the original term, in order that the lessee may have specific performance or other equitable relief,¹¹¹ while in other cases they appear to have relieved against delay in this respect, under particular circumstances, with considerable freedom.¹¹² In this country, it has been decided in several cases that equity would not relieve against a failure through forgetfulness or negligence to give notice at the time named, the parties having evidently intended that time should be of the essence of the contract for renewal.¹¹³ In one case specific performance was decreed when the failure to demand a renewal was owing to physical injury totally incapacitating the lessee from transacting business,¹¹⁴ and in another, when such failure

¹⁰⁷ *Viany v. Ferran*, 5 Abb. Pr. (N. S.; N. Y.) 110.

¹⁰⁸ See ante, at notes 88-95.

¹⁰⁹ See *McClintock v. Joyner*, 77 Miss. 678, 27 So. 837, 78 Am. St. Rep. 541; *Chandler v. McGinning*, 8 Kan. App. 421, 55 Pac. 103; *Moss v. Barton*, 35 Beav. 197.

¹¹⁰ *Tracy v. Albany Exch. Co.*, 7 N. Y. (3 Seid.) 472, 57 Am. Dec. 538; *I. X. L. Furniture & Carpet Installment House v. Berets*, 32 Utah, 454, 91 Pac. 279.

¹¹¹ *Allen v. Hinton*, 1 Fonbl. Eq. 432; *Baynham v. Guy's Hospital*, 3 Ves. Jr. 295; *City of London v. Mitford*, 14 Ves. Jr. 41; *Wight v. Hopetoun*, 4 Macq. H. L. Cas. 729; *Nicholson v. Smith*, 22 Ch. Div. 640.

¹¹² *Hunter v. Hopetoun*, 13 Law T. (N. S.) 130; *Ross v. Worsop*, 1 Brown Parl. Cas. 281; *Rawstorne v. Bentley*, 4 Brown Ch. 415; *Statham v. Trustees of Liverpool Docks*, 3 Younge & J. 565. And see *Brewer v. Conger*, 27 Ont. App. 10.

¹¹³ *Dikeman v. Sunday Creek Coal Co.*, 184 Ill. 546, 56 N. E. 864; *Thiebaud v. First Nat. Bank of Vevay*, 42 Ind. 212; *Doepfner v. Bowlers*, 55 Misc. 561, 106 N. Y. Supp. 932; *Keppler Bros. Co. v. Heinrichsdorf*, 26 Ohio Cir. Ct. R. 16; *I. X. L. Furniture & Carpet Installment House v. Berets*, 32 Utah, 454, 91 Pac. 279.

¹¹⁴ *Monihan v. Wakelin*, 6 Ariz. 225, 56 Pac. 735.

was owing to the lessee's mistake as to the time of the end of the term, a mistake which was owing in part to statements of the lessor's agent, and the lessee had made valuable improvements on the premises.¹¹⁵

In Maryland, quite frequently, consideration has been given to the right of one, holding under a form of lease there current, "for ninety-nine years, renewable forever," to specific performance of the covenant for renewal, when he failed to demand a renewal before the termination of the previous term, and it has been there decided, following the Irish decisions, in which the right of renewal in such cases has been strongly asserted,¹¹⁶ that in view of the well understood intention of the parties to such leases in that community, to vest a permanent interest in the lessee, there is a "local equity" in the lessee or his assignee to a renewal, which is lost only by gross laches.¹¹⁷ Accordingly, the tenant was held to be entitled to a renewal though the lessee failed to demand a renewal before the end of the first term, when his oversight in this respect was due to the failure of the landlord to demand rent for several years previous thereto, he having, immediately upon the bringing of ejectment by the landlord, three years after the end of the term, applied for a decree of specific performance.¹¹⁸ And a delay of seven years in this regard was likewise held not to prevent a decree for specific performance, the rent not having been claimed for many years, the reversion being vested in numerous parties scattered through different states, and the tenant supposing that the reversionary rights had in some way become extinguished.¹¹⁹ So in Virginia it was decided that the lessee under such a lease was entitled to specific performance of the covenant, though he did not demand a renewal or tender the prescribed fine till several years after the end of the term, the lessor having continued during that time to accept rent as before without objection.¹²⁰ The same

¹¹⁵ New York Life Ins. & Trust Co. *Myers v. Silljacks*, 58 Md. 319, 42 v. St. George's Church, 12 Abb. N. Am. Rep. 332.
C. (N. Y.) 50.

¹¹⁸ *Banks v. Haskie*, 45 Md. 207.

¹¹⁶ See *Lennon v. Napper*, 2 Schoales & L. 684; *Boyle v. Lysaght*, Vern. & S. 135; *O'Neill v. Jones*, 1 Ridg. Parl. Cas. 170.

¹¹⁹ *Worthington v. Lee*, 61 Md. 530.

¹²⁰ *Selden v. Camp*, 95 Va. 527, 28 S. E. 877.

¹¹⁷ *Banks v. Haskie*, 45 Md. 207;

principle, that laches, to prevent renewal, must be gross, has been asserted in a case in New York, in connection with a short-time lease.¹²¹

In some jurisdictions, in the case of a covenant to renew, as in that of a provision for extension,¹²² the retention of possession by the tenant has been regarded as sufficient to indicate his election to hold for the additional period,¹²³ the lease itself not imposing in express terms any requirement as to notice.¹²⁴ In other jurisdictions, however, a covenant for renewal being regarded as distinct from a provision for extension, such retention of possession alone has been decided to be insufficient to vest any rights in the tenant.¹²⁵ The rule of these latter decisions is in effect asserted by the cases above discussed, recognizing the necessity of a demand for a renewal lease previous to the end of the previous term, they ignoring any possibility that the lack of such demand could be supplied by the tenant's retention of possession.¹²⁶ There seems no particular reason why such retention of possession, whether or not with the landlord's consent,

¹²¹ *Reed v. St. John*, 2 Daly (N. Y.) 213. 257, 50 S. W. 821, as favoring this view.

¹²² See ante, § 222 a.

¹²³ *Holley v. Young*, 66 Me. 520; *McBrien v. Marshall*, 126 Pa. 390, 17 Atl. 647 (semble); *Creighton v. McKee*, 2 Brewst. (Pa.) 383 (semble); *Canal Elevator & Warehouse Co. v. Brown*, 36 Ohio St. 660 (semble); *Kelso v. Kelly*, 1 Daly (N. Y.) 419; *Clendenning v. Lindner*, 9 Misc. 682, 30 N. Y. Supp. 543; *Ewing v. Miles*, 12 Tex. Civ. App. 19, 33 S. W. 235; *Caley v. Thornquist*, 89 Minn. 348, 94 N. W. 1084; *Quade v. Fitzloff*, 93 Minn. 115, 100 N. W. 660; *Insurance & Law Bldg. Co. v. National Bank*, 71 Mo. 58; *Ranlet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92. See *Clarke v. Merrill*, 51 N. H. 415; *Wright v. Kaynor*, 150 Mich. 7, 14 Det. Leg. N. 631, 113 N. W. 779; *Harding v. Seeley*, 148 Pa. 20, 23 Atl. 1118, and *Lewis v. Perry*, 149 Mo. 257, 50 S. W. 821, as favoring this view.

¹²⁴ See *Murtland v. English*, 214 Pa. 325, 63 Atl. 882, 112 Am. St. Rep. 747.

¹²⁵ *Thiebaud v. First Nat. Bank of Vevay*, 42 Ind. 212; *Montgomery v. Hamilton County Com'rs*, 76 Ind. 362, 40 Am. Rep. 250; *Terstegge v. First German Mut. Ben. Soc.*, 92 Ind. 82, 47 Am. Rep. 135; *Shamp v. White*, 106 Cal. 220, 39 Pac. 537; *Kollock v. Scribner*, 98 Wis. 154, 73 N. W. 776; *Andrews v. Marshall Creamery Co.*, 118 Iowa, 595, 92 N. W. 706, 60 L. R. A. 399, 96 Am. St. Rep. 412. In *Huger v. Dibble*, 8 Rich. Law (S. C.) 222, it was decided that a tenant occupying and paying rent after the original term was a tenant from year to year and did not hold under the agreement to renew.

¹²⁶ See ante, at note 103.

should be regarded as showing a desire to have the landlord execute a renewal lease for the whole period named in the provision for renewal.¹²⁷

In one state¹²⁸ there is a statutory provision that, in the case of a lease with a covenant for perpetual renewal, the retention of possession by the lessee, or by a person claiming under him, for the period of twelve months, shall raise a conclusive presumption "in favor of said lessee or person claiming under him" that a new lease was executed before the expiration of the prior term. It seems that, apart from statute, the making of a renewal lease may occasionally be inferred from the conduct of the parties.¹²⁹

The construction and effect of any specific requirements as to notice would presumably be the same whether the stipulation is for a renewal or for an extension, and the same considerations would apply in the two cases in determining whether there has been a waiver of any such requirement. The decisions upon these matters have been previously referred to.¹³⁰

§ 224. Election by lessor.

Ordinarily the stipulation for renewal is so expressed as to bind the lessor to grant a renewal, without binding the lessee to take it, thus leaving the question of renewal optional with the lessee.¹³¹ Occasionally, however, the option is vested in the lessor, so that the lessee is bound to accept the renewal if tendered.¹³² And so the lessee may agree to take a renewal in a certain contingency, which contingency is itself in part dependent on the election of the landlord.¹³³ A covenant by the lessor to renew the lease or to sell to the lessee has been construed as

¹²⁷ See *Andrews v. Marshall Manny*, 52 Mo. 497; *Com. v. McNeille*, Creamery Co., 118 Iowa, 595, 92 N. 8 Phila. (Pa.) 438.
¹²⁸ *W. 706*, 60 L. R. A. 399, 96 Am. St. Rep. 412.

¹²⁹ *Maryland Code Pub. Gen. Laws*, art. 21, § 91.

¹³⁰ See *Wallace v. Dorris*, 218 Pa. 534, 67 Atl. 858.

¹³¹ See ante, § 222 b.

¹³² See *Swank v. St. Paul City R. Co.*, 72 Minn. 380, 75 N. W. 594; *Bruce v. Fulton Nat. Bank*, 79 N. Y. 154, 35 Am. Rep. 505; *Butler v.*

¹³³ *Darling v. Hoban*, 53 Mich. 599, 19 N. W. 545; *Stephens v. Hotham*, 1 Kay & J. 571. See *Laroussini v. Werlein*, 48 La. Ann. 13, 18 So. 704.

As when the lessee agrees to take a renewal in case the lessor obtains a renewal of his lease or procures the fee simple title. See *Canal Elevator & Warehouse Co. v. Brown*, 36 Ohio St. 660.

making it optional with the lessee which he will do,¹³⁴ as has a covenant to renew or to purchase the lessee's improvements.¹³⁵

When the lessor, rather than the lessee, is given the option as to a renewal, the election may, it has been held, be made on the last day of the term, without any writing or tender of a new lease, if the tenant is in possession and the first lease specifies the conditions of renewal.^{135a} The lessor's action in proceeding to appraise the value for the purpose of fixing the rent for the renewal term, thereby imposing expense and trouble upon the lessee, constitutes a sufficient election to grant a renewal, it has been decided.^{135b}

A provision for an extension, as distinguished from one for renewal, ordinarily makes the extension optional with the lessee and not the lessor. There is, however, it seems, no reason why a lease for a certain term should not provide that the lessor may, at his option, treat it as a lease for a further term, this in effect constituting a lease for the sum of the two terms, subject to termination at the option of the lessor at the end of the first term.^{135c}

§ 225. Compliance by lessee with covenants and conditions.

Quite frequently it is provided that the lessee's right to a renewal shall be dependent upon his previous compliance with his covenants, and such a provision has ordinarily been strictly applied as against the lessee.¹³⁶ So it has been decided that, where the renewal is in terms conditioned on compliance with covenants, if at the time a renewal is applied for there is an existing right of action in favor of the landlord for the tenant's breach of covenant, the right of renewal is lost, although the breach (as of a covenant to repair) is trivial in character.¹³⁷ And where the tenant had not performed the covenants to repair

¹³⁴ See post, § 258.

¹³⁵ See post, § 271 a.

^{135a} *Darling v. Hoban*, 53 Mich. 599, 19 N. W. 545.

^{135b} *Crosby v. Moses*, 48 N. Y. Super. Ct. (16 Jones & S.) 146, 92 N. Y. 634.

^{135c} Compare ante, at § 12e.

¹³⁶ In *Swift v. Occidental Min. &*

Petroleum Co., 141 Cal. 161, 74 Pac. 700, it was decided that the fact that the lessor might have asserted a forfeiture for breach of such covenants and did not do so was immaterial.

¹³⁷ *Behrman v. Barto*, 54 Cal. 131;

Finch v. Underwood, 2 Ch. Div. 310;

Bastin v. Bidwell, 18 Ch. Div. 238.

and insure, the court refused specific performance of a covenant to renew "provided the rent should have been paid and the covenants kept."¹³⁸ Where the covenant was to renew the lease at the expiration of the term, "if not sooner determined by the lessee's acts and defaults," it was held that breaches of covenant by him defeated his right to renewal, although, owing to the landlord's ignorance of such breaches, he had not asserted his right to enforce a forfeiture of the term.¹³⁹ The fact that the landlord had, in such a case, by acceptance of rent, waived his right to assert a forfeiture of the term,¹⁴⁰ was in England held not to entitle the tenant to the benefit of the covenant to renew.¹⁴¹ In one state, however, the fact that the landlord had waived his right to a forfeiture for breach of condition was apparently regarded as a waiver of his right to refuse renewal on that ground.¹⁴²

That there has been a breach of the covenant against assignment has been held to exclude the right of renewal, this being expressly made dependent on performance of covenants, even though there was a reassignment back to the lessee.¹⁴³ The fact, however, that the rent was not paid when due does not exclude the right of renewal, it has been decided, if the rent is afterwards accepted, even though such right is in terms excluded by the lease in case of default in any covenants.¹⁴⁴ It does not appear to have been decided whether a mere delay in performance of covenants other than that for payment of rent, such as that to make repairs, would bar a lessee whose right to renewal is con-

¹³⁸ *Job v. Banister*, 2 Kay & J. 374, 880, 124 Am. St. Rep. 525; post, note
afd. 3 Jur. (N. S.) 93. 148. In *Garnhart v. Finney*, 40 Mo.

¹³⁹ *Thompson v. Guyon*, 5 Sim. 449, 93 Am. Dec. 303, the fact that
65. the lessor accepted rent from the

¹⁴⁰ See ante, § 194 i (1) (b). assignees and permitted them to

¹⁴¹ *Bastin v. Bidwell*, 18 Ch. Div. 449, 93 Am. Dec. 303, the fact that
238; *Finch v. Underwood*, 2 Ch. Div. 310. the lessor accepted rent from the

¹⁴² *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303. assignees and permitted them to

¹⁴³ *McIntosh v. St. Phillips* 449, 93 Am. Dec. 303, the fact that

Church, 54 N. Y. Super. Ct. (22 144 *Lyons v. Osborn*, 45 Kan. 650,
Jones & S.) 291. See, also, *Finch v.* 26 Pac. 31 (option to extend); *Sel-*
Underwood, 2 Ch. Div. 310; *Squire v.* *den v. Camp*, 95 Va. 527, 28 S. E. 877.
Learned, 196 Mass. 134, 81 N. E.

ditioned upon the performance of covenants, he having complied with the covenant before the time for demanding a renewal.¹⁴⁵ An insufficient performance of such a covenant may, it has been decided, be accepted by the lessor as a complete performance, so as to entitle the lessee to a renewal.¹⁴⁶

It appears to be the rule in one state that, even when compliance by the lessee with his covenants is not in terms made a condition precedent to the right of renewal, his failure in this respect will be ground for refusing specific performance of the covenant for renewal.¹⁴⁷ And elsewhere it has been said that specific performance will not be decreed if there is a provision for re-entry, which would put an end to the renewed lease, or if there has been a gross breach of covenant, which could not be compensated by damages.¹⁴⁸ It has on the other hand been decided that the payment of all arrears of rent is not a condition precedent to the right of renewal, in the absence of any provision to that effect.¹⁴⁹

An actual re-entry for breach of condition, if not relieved against, destroys the right of renewal.¹⁵⁰

By his renewal of a lease the lessor does not waive his right

¹⁴⁵ See *Bastin v. Bidwell*, 18 Ch. Div. 238.

¹⁴⁶ *Garnhart v. Finney*, 40 Mo. 449, 23 Am. Dec. 303 (covenant to erect buildings). And see to the same effect, *Job v. Banister*, 3 Jur. (N. S.) 93.

¹⁴⁷ *Gannett v. Albree*, 103 Mass. 372; *Squire v. Learned*, 196 Mass. 134, 81 N. E. 880, 124 Am. St. Rep. 525. See an implication to this effect in *Incorporated Soc. in Dublin v. Rose*, 3 Ir. Eq. 257.

¹⁴⁸ Per *Cranworth, L. C.*, in *Hare v. Burges*, 5 Wkly. Rep. 585. In *Hill v. Barclay*, 18 Ves. Jr. 56, Lord Chancellor Eldon said: "I have intimated my opinion that a tenant who has committed waste, treated the land in an unhusbandlike manner, and been guilty of various breaches of covenant, for which the

lessor had a right of re-entry, should not have a specific performance of an agreement for a lease."

Where the person applying for specific performance is an assignee of the leasehold, the fact that the assignment to him was in violation of a covenant of the lease seems ground for refusal of specific performance, since the lessor was entitled to rely on the lessee's personal responsibility. See *Finch v. Underwood*, 2 Ch. Div. 310; *Squire v. Learned*, 196 Mass. 134, 81 N. E. 880, 124 Am. St. Rep. 525.

¹⁴⁹ *Tracy v. Albany Exch. Co.*, 7 N. Y. (3 Seld.) 472, 57 Am. Dec. 538; *Kelly v. Varnes*, 52 App. Div. 100, 64 N. Y. Supp. 1040. Compare *Kentucky Lumber Co. v. Newell*, 32 Ky. Law Rep. 396, 105 S. W. 972.

¹⁵⁰ *Mulloy v. Goff*, 1 Ir. Ch. 27.

of action on account of the breach of a stipulation of the original lease,¹⁵¹ even though the stipulation be one for the making of certain improvements, and this stipulation is repeated in the renewal lease.¹⁵²

§ 226. Form of renewal.

The lease may be renewed by an endorsement thereon,¹⁵³ provided this satisfies the requirements of the Statute of Frauds.

If the original lease contains a covenant for successive renewals, it is immaterial, it seems, that the first renewal lease contains no covenant for a further renewal,¹⁵⁴ though such omission may perhaps affect the construction of the original covenant.¹⁵⁵

A new oral lease, extending the period of the holding of a tenant who is in under a lease under seal, is not invalid as a parol modification of an executory agreement under seal.¹⁵⁶ The lease by which possession was originally given is not an executory agreement but is a conveyance, and the second lease is another conveyance.¹⁵⁷

A subsequent agreement by indenture, that the lessee may continue to occupy after the expiration of the term, until remunerated from rents and profits for improvements made by him, has been regarded as valid and operative.¹⁵⁸ And a mere agreement for the making of a renewal lease for another year has been regarded as binding the lessee's estate for the rent of such year, though no lease was made, owing to the lessee's death shortly after the expiration of the original term.¹⁵⁹ In order, however, that an agreement, made subsequently to the making of a lease

¹⁵¹ See *McGregor v. Board of Education*, 107 N. Y. 511, 14 N. E. 420; 288, 43 N. E. 393; *Martin v. Topliff*, 88 Ill. App. 362.

Buhier v. Gibbons, 3 N. Y. Supp. 815. ¹⁵⁷ See ante, § 16.

¹⁵² *Walker v. Seymour*, 13 Mo. 592. ¹⁵⁸ *Batchelder v. Dean*, 16 N. H.

¹⁵³ See *Crain v. Dresser*, 4 N. Y. 265.

Super. Ct. (2 Sandf.) 120; *Pittsburgh Mfg. Co. v. Fidelity Title & Trust Co.*, 207 Pa. 223, 56 Atl. 436. ¹⁵⁹ *American Security & Trust Co. v. Walker*, 23 App. D. C. 583. The reasoning of the opinion is not entirely clear. There is a reference to the doctrine of estoppel. It is possible, however, that the court regarded the agreement as constituting an actual lease, it being said that the holding over was "upon an

¹⁵⁴ *Gomez v. Gomez*, 81 Hun, 566, 31 N. Y. Supp. 206.

¹⁵⁵ *Wurster v. Armfield*, 67 App. Div. 158, 73 N. Y. Supp. 609.

¹⁵⁶ *West Chicago St. R. Co. v. Morrison, Adams & Allen Co.*, 160 Ill.

for a certain time, may have the effect of giving the lessee a right to continue in possession after such time, in the contemplation, at least, of a court of law, it would seem to be necessary that such agreement be construed to operate as a lease. A mere agreement for extension, made subsequently to the making of the lease, cannot, it is conceived, change the operation of the previous conveyance.¹⁶⁰

§ 227. Terms of new tenancy—Applicability of former stipulations.

As previously stated, the provision for renewal is presumed to contemplate a new lease with the same covenants and stipulations as the original lease, except that for renewal,¹⁶¹ unless it

express contract renewing the lease." the later arrangement or agreement was itself a lease. So in *Wood v. Edison Elec. Illuminating Co.*, 184

¹⁶⁰ That a lease for a certain period cannot be made to operate as a lease for a greater period merely because the parties agree that it shall so operate would seem to be beyond question. In order to transfer an estate for the additional period, a lease, that is, a conveyance, is necessary. There is no more reason that the parties should be able by agreement to cause a lease for one year to operate as a lease for eighteen months, for two years, or for ninety-nine years, than that they should be able so to cause it to operate as a conveyance in fee simple. There are, however, at least dicta by a court of high standing opposed to this view. In *DeFriest v. Bradley*, 192 Mass. 346, 78 N. E. 467, it is said that "it was within the contractual power of the parties by a later arrangement to prolong the term although the lease was silent on this subject," and that "the original demise was thereby lengthened to cover the longest time named." There is no suggestion that

¹⁶¹ *Walker v. Wadley*, 124 Ga. 275, 52 S. E. 904; *Belinski v. Brand*, 76 Ill. App. 404; *Hughes v. Windpfernig*, 10 Ind. App. 122; *Brown v. Parsons*, 22 Mich. 24; *McAdoo v. Callum*, 86 N. C. 419; *Bamman v. Binzen*, 65 Hun, 39, 19 N. Y. Supp. 627; *Phelps v. City of New York*, 61 Hun, 521, 16 N. Y. Supp. 321; *Whalen v. Leisy Brew. Co.*, 106 Iowa, 548, 76 N. W. 842; *Western New York & P. R. Co.*

is otherwise expressly provided.¹⁶² A stipulation clearly applicable only to the original lease is not, however, to be incorporated in the renewal lease.¹⁶³

v. Rea, 83 App. Div. 576, 81 N. Y. Supp. 3093; *Bernstein v. Heinenmann*, 23 Misc. 464, 51 N. Y. Supp. 467 (deposit to secure rent).

Where a lease provided that, unless notice was given by the lessor six months before the expiration of the term of fifteen years, to the effect that he would then take possession and pay for certain buildings to be erected by the lessee, the lease should be deemed to be renewed for another term of five years upon the same terms and conditions, it was held that the lessee's right to payment for the buildings continued after the expiration of the first fifteen years, if the lease was not then terminated, and the lessor was liable for the buildings upon his termination of the lease at any subsequent five-year period. *Schoellkopf v. Coatsworth*, 166 N. Y. 77, 59 N. E. 710. Compare *Precht v. Howard*, 187 N. Y. 136, 79 N. E. 847.

It has been decided that the renewal of a lease did not involve the renewal of a contract, made during the currency of the first lease, to furnish steam. *Slack v. Knox*, 213 Ill. 190, 72 N. E. 746, 68 L. R. A. 606, distinguishing *Thomas v. Wiggers*, 41 Ill. 470, on the ground that there the contract to furnish steam was contained in the original instrument of lease and was part of the consideration for the rent agreed to be paid.

¹⁶² An express provision as to the covenants to be inserted in the renewal lease must obviously be complied with. See *Martin v. Babcock & Wilcox Co.*, 186 N. Y. 451, 79 N.

E. 726. In *Walsh v. Martin*, 69 Mich. 29, 37 N. W. 40, it was held that an indorsement on the lease giving to the lessee the "privilege of occupying" the premises, with additional ground, for another term, and giving the lessor a right to the improvements erected by the lessee, a right not given by the original lease, was a "new leasing, and not an extension of the old lease," and consequently was not subject to a provision of the latter prohibiting an assignment.

¹⁶³ *Hill v. Beatty*, 61 Cal. 292. In *Rutgers v. Hunter*, 6 Johns. Ch. (N. Y.) 214, it is said by Chancellor Kent: "It would be absurd to suppose that an agreement to renew a lease did necessarily imply a lease, not only of the same term and rent, but also with all the covenants in the other, and which are the accidental and not the essential parts of a lease. In the first lease, there was a covenant on the part of the lessee to build a good brick dwelling house within two years. This was a covenant that had no necessary and could not have any reasonable connection with the renewal of the lease; and the same observation will apply to the covenant on the part of the lessor to pay, at the expiration of the lease, the value of such house, and of other buildings and improvements to be made, built and erected on the lot, or to renew the lease." So in *Pierce v. Grice*, 92 Va. 763, 24 S. E. 392, it seems to be decided that an option in the lessor to pay for buildings or to renew is not to be in-

It has been decided that where one, to whom a leasehold in part of the premises had been assigned, thereafter created an easement in favor of the assignee of the other part, the easement continued upon the granting of renewal leases to such assignees.¹⁶⁴ A renewal of a lease upon the same "terms" was held to give the lessors the same option to terminate upon six months' notice as was given by the original lease,¹⁶⁵ and a contract to renew "on the same terms and conditions" has been regarded as entitling the lessor to demand, as a condition of renewal, a surety for rent equal to the one furnished on the original leasing.¹⁶⁶

Covenants in the renewal lease are, it has been said, to be construed as if the renewal constituted the inception of the relation of landlord and tenant between the parties.¹⁶⁷

In the case of extension under an option in the lessee, as in that of a renewal under a covenant, the stipulations named in the original term continue into the extended period.¹⁶⁸ But in one case, where the provision for extension was oral, it was stated to be a question for the jury whether certain terms of the lease were to be applied to the extended period.¹⁶⁹

serted in the renewal lease. But it was decided that, where a lease provided that a holding over by the lessee for thirty days should be construed as a renewal of the lease on the same terms and conditions for another twelve months, such holding over involved an extension of the lessor's covenant to make certain repairs. *Harthill v. Cook's Ex'r*, 19 Ky. Law Rep. 1524, 43 S. W. 705. And see *In re Coatsworth*, 160 N. Y. 114, 54 N. E. 665, ante, note 161.

¹⁶⁴ *Newhoff v. Mayo*, 48 N. J. Eq. 619, 23 Atl. 265, 27 Am. St. Rep. 455.

¹⁶⁵ *Quidort v. Bullitt*, 60 N. J. Law. 119, 36 Atl. 881. And to the same effect, see *DeFriest v. Bradley*, 192 Mass. 346, 78 N. E. 467, where it was held that an oral agreement for an extension, not giving such an option, was merged in a subsequent written extension.

¹⁶⁶ *Piper v. Levy*, 114 La. 544, 38 So. 448.

¹⁶⁷ *Phelps v. City of New York*, 61 Hun, 521, 16 N. Y. Supp. 321.

¹⁶⁸ *Betts v. June*, 51 N. Y. 274. As to the construction of a provision for notice to terminate, as applying to the extended term as well as to the original term, see *McGregor v. Rawle*, 57 Pa. 184; *Wilcox v. Montour Iron & Steel Co.*, 147 Pa. 540, 23 Atl. 840; *Ashurst v. Eastern Pennsylvania Phonograph Co.*, 166 Pa. 357, 31 Atl. 116.

¹⁶⁹ *Powers v. Cope*, 93 Ga. 248, 18 S. E. 815. In *Wood v. Edison Elec. Illuminating Co.*, 184 Mass. 523, 69 N. E. 364, 100 Am. St. Rep. 573, it was regarded as a question for the jury in the particular case whether an extension of the lease agreed upon by the parties during the term was intended as an exercise of an

§ 228. Appraisement to ascertain rent.

It is not infrequently the case that the parties, in agreeing for the renewal or extension of the lease, provide that the amount of rent to be paid during the term of such renewal or extension shall be fixed by a person or persons named, or to be named, the provision usually stipulating that the rent shall be a certain percentage upon the value of the property as determined by such person or persons.¹⁷⁰

It has been held that when the lease provided that a renewal should be granted at such "increased" rent as might be awarded by arbitrators, the arbitrators were bound to award an increased rent, but that a nominal increase was sufficient.¹⁷¹ The value of the land, for the purpose of fixing the rent by arbitration, is, it has been decided, its value exclusive of the buildings which may have been erected by the tenant under the lease.¹⁷²

In case one of the parties refuses to carry out such an agreement, by joining in the naming of appraisers for this purpose, he waives his right to the renewal, it has been decided, at the option of the other party.¹⁷³ But the landlord's delay in this regard has been held not to affect his right to collect rent for the whole of the new term on the basis of the new valuation, this having been finally made.¹⁷⁴ For such a breach of his contract, either party is liable in damages in an action at law.¹⁷⁵

The question whether equity will decree specific performance of such an agreement to renew or extend the lease, at a rent to be determined by third persons, is one of some difficulty. That it will not do so has occasionally been asserted, on the ground,

option to extend contained in the lease, so as to make applicable a provision in such option as to payment of taxes. *Van Brocklin v. Town of Brantford*, 20 U. C. Q. B. 347.

¹⁷⁰ As to the ascertainment of the value in the case of adjoining parcels leased by separate demises by the same lessor to the same lessee, see *Livingston v. Sage*, 95 N. Y. 289, 47 Am. Rep. 41.

¹⁷¹ In *re Geddes*, 3 Ont. Law Rep. 75.

¹⁷² In *re Allen*, 27 Ont. App. 536;

¹⁷³ *Wells v. DeLeyer*, 1 Daly (N. Y.) 39.

¹⁷⁴ *Hegan Mantel Co. v. Cook's Adm'r*, 22 Ky. Law Rep. 427, 57 S. W. 929.

¹⁷⁵ *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303; *Greason v. Keteltas*, 17 N. Y. 491; *Hopkins v. Gilman*, 22 Wis. 476. See *Tscheider v. Bidle*, 4 Dill. 58, Fed. Cas. No. 14,210.

it is said, that to do so would involve the specific performance of an agreement to submit to arbitration, a thing which equity will always refuse.¹⁷⁶ It is very questionable, however, whether such an agreement for appraisement by third persons is properly to be considered one for arbitration,¹⁷⁷ the purpose of the nomination of such persons not being the settlement, by a *quasi* judicial inquiry, of a controversy which has already arisen, as is an ordinary arbitration, but rather the prevention of any future controversy from arising,¹⁷⁸ and the more substantial objection to the award of specific performance in such a case is that the contract is incomplete so long as the amount of rent is undetermined, relief of that character not being granted in the case of an incomplete contract.¹⁷⁹ On this theory it has been decided in England that specific performance will not be decreed of a contract for the sale of land at a valuation to be determined by third persons.¹⁸⁰ But a different rule has been applied there,¹⁸¹ and in at least one state,¹⁸² when such a provision for the ascertainment of the price can be regarded as subsidiary or nonessential, or the contract for the purpose of which the valuation is to be made is merely incidental to another contract, the contract being then in effect treated as one for a sale at a fair price, to be ascertained by the court if the provision for valuation by appraisers is not carried out. It is perhaps upon the theory that the provision for the determination of the rent upon a renewal can be thus regarded as of a nonessential or subsidiary character,¹⁸³ that it has

¹⁷⁶ *Greason v. Keteltas*, 17 N. Y. Pomeroy, Spec. Perform. § 151.

¹⁷⁷ 491; *Hopkins v. Gilman*, 22 Wis. 476. ¹⁸² *Town of Bristol v. Bristol & See Tscheider v. Biddle*, 4 Dill. 58, Warren Waterworks, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740.

¹⁷⁷ See 3 *Cyclopedia of Law & Proc.* 583.

¹⁷⁸ See *In re Carns-Wilson*, 18 Q. 429; *Coles v. Peck*, 96 Ind. 333, 49 B. Div. 7; *Redman, Arbitrations* (3d Am. Rep. 161; *Springer v. Borden*, 154 Ill. 668, 39 N. E. 603. In *Gourlay v. Somerset*, 19 Ves. Jr. 429, where there was a contract to give a lease with such conditions as A should think proper, it was held that the approval of A was not essential, and the court left the question of the conditions of the lease to the master.

¹⁷⁹ *Fry, Spec. Perform. c. 3*; *Pomeroy, Spec. Perform. § 149 et seq.*

¹⁸⁰ *Milnes v. Gery*, 14 Ves. Jr. 400; *Darbey v. Whitaker*, 4 Drew. 134; *Fry, Spec. Perform. § 355 et seq.*

¹⁸¹ *Hall v. Warren*, 9 Ves. Jr. 605; *Richardson v. Smith*, L. R. 5 Ch. 648; *Fry, Spec. Perform. §§ 364-367*;

been decided that if either the lessor or lessee refuses to name an appraiser,¹⁸⁴ or they cannot agree upon one,¹⁸⁵ or the one agreed upon cannot act,¹⁸⁶ equity will decree specific performance, the rent being fixed by a master or otherwise under the direction of the court. And one decision, to the effect that equity will itself fix the rent if the arbitrators disagree, is explicitly based on such theory.¹⁸⁷

The fact that the lessee has made improvements upon the premises on the strength of a stipulation for renewal or extension at a rent to be fixed by appraisement has, in one or two cases, been regarded as a reason for the grant of relief in equity in favor of the lessee.¹⁸⁸ In one case it was decided that, while specific performance could not be granted in such case, equity had jurisdiction, on the ground of fraud, account, and prevention of a multiplicity of suits, of a bill by the lessor alleging that the lessee had refused to name impartial appraisers, and had so occupied the premises for several years without paying rent, and that the agreement also provided for an appraisement of the improvements, the lessor having the option of taking them at that valuation or of granting a renewal lease at the rent to be fixed by the appraisers.¹⁸⁹

There is a decision to the effect that the tenant may, until the appraisement is made, consider himself tenant from year to year at the original rent, and that if delay in the appraisement is caused by the lessor, he may recover rent, until the new lease is tendered, at the rate fixed in the previous lease, and thereafter at the rate fixed by the appraisement.¹⁹⁰

¹⁸⁴ *Kelso v. Kelly*, 1 Daly (N. Y.) 419; *Graham v. James*, 30 N. Y. 419; *Weir v. Barker*, 104 App. Div. 112, 93 N. Y. Supp. 732.

Super. Ct. (7 Rob.) 468; *Johnson v. Conger*, 14 Abb. Pr. (N. Y.) 195; ¹⁸⁷ *Kaufman v. Liggett*, 209 Pa. 87, 58 Atl. 129, 67 L. R. A. 353, 103 Am. St. Rep. 988.

Strohmaier v. Zeppenfeld, 3 Mo. App. 429. See *Tscheider v. Biddle*, 4 Dill. 58, Fed. Cas. No. 14,210. ¹⁸⁸ See *Tscheider v. Biddle*, 4 Dill. 58, Fed. Cas. No. 14,210; *Kaufman v. Liggett*, 209 Pa. 87, 58 Atl. 129, 67 L. R. A. 353, 103 Am. St. Rep. 988.

¹⁸⁵ *Piggot v. Mason*, 1 Paige (N. Y.) 412; *Springer v. Borden*, 154 Ill. 668, 39 N. E. 603. ¹⁸⁹ *Biddle v. Ramsey*, 52 Mo. 159.

¹⁸⁶ *Viany v. Ferran*, 5 Abb. Pr. (N. S.) 119, 54 Barb. (N. Y.) 529. And ¹⁹⁰ *Ryder v. Jenny*, 25 N. Y. Super. Ct. (2 Rob.) 56.

so when one of the appraisers died.

§ 229. Qualified right to renewal or extension.

Occasionally the provision for a renewal or extension is qualified by a provision extending its operation in a particular contingency, or making it operative in a particular contingency only.^{190a}

A provision that the lessee should be entitled to a renewal or extension in case the lessor did not sell the premises¹⁹¹ was held to be inapplicable when the lessor made a valid executory agreement of sale, entitling the vendee to a conveyance.¹⁹² Elsewhere it was held that such a provision referred to an open and notorious sale, and a sale and conveyance to the lessor's wife, of which the lessee had no notice, did not deprive him of the right to the crops sown by him after the end of the original term.¹⁹³ It was decided in one state that where the lease allowed a renewal unless the "lessors" shall sell said premises, the right to a renewal was not defeated by the sale by one lessor of his interest in the premises.¹⁹⁴ But it has elsewhere been decided that a conveyance to the lessor's son, by way of advancement, is a "disposing of" the premises within the meaning of a covenant by the lessor that if the lessee did not elect to exercise his option to purchase he might have a renewal, unless the lessor should "dispose of" the premises, and this even though the purpose of the conveyance was to avoid a renewal.¹⁹⁵

A provision that the lessor shall grant a renewal unless the lessor wishes the land for building purposes justifies a grantee of the reversion in declining to renew if he desires to so use the

^{190a} The extension may, it appears, be dependent on the lessee's compliance with some condition, such as giving security for rent. See *McFadden v. McCann*, 25 Iowa, 252. ¹⁹¹ *See Swank v. St. Paul City R. Co.*, 61 Minn. 423, 63 N. W. 1088; *Pfanner v. Sturmer*, 40 How. Pr. (N. Y.) 401. Where the lease gave "the privilege of two years in addition unless the lessor shall sell," in which case the privilege "shall be null and void," it was held that the privilege became void in case of a sale either before the commencement of such two years or while they were running. *Knowles v. Hull*, 97 Mass. 206.

¹⁹² *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560.

¹⁹³ *Starkey v. Horton*, 65 Mich. 96, 31 N. W. 626.

¹⁹⁴ *Ewing v. Miles*, 12 Tex. Civ. App. 19, 33 S. W. 235.

¹⁹⁵ *Elston v. Schilling*, 42 N. Y. 79.

land,¹⁹⁶ but he cannot legally avoid a renewal in such case by leasing to another who contracts to build.¹⁹⁷

Where the lease provided that if the lessor should, during certain months, "decide, by notice given to the lessee in writing," not to rebuild, then the lessee might elect to renew the lease, the lessee's right of renewal was held not to depend upon the giving of notice by the lessor, but upon the fact that he made the decision, the provision for notice being purely for the lessee's benefit.¹⁹⁸

Not infrequently there is a provision in the alternative, requiring the lessor either to renew or to pay for the lessee's buildings.¹⁹⁹

It has been decided, upon the construction of a particular lease, that a covenant to renew the lease was inapplicable when a part of the premises had been surrendered during the first term.²⁰⁰ Elsewhere it was decided that when a part of the leased premises had been condemned for public use before the time for exercising the option as to renewal, the lessor need tender a lease for so much only of the premises as remained in his possession and under his control.²⁰¹

§ 230. Persons to whom stipulations available.

A covenant by the lessor for renewal is one which runs with the land, and the assignee of the leasehold is entitled to the benefit thereof.²⁰² And the fact that the assignment is in terms

¹⁹⁶ *Leppla v. Mackey*, 31 Minn. 75, N. E. 23, 2 L. R. A. 549.

16 N. W. 470.

¹⁹⁷ *Broadway & S. A. R. Co. v. Metzger*, 27 Abb. N. C. (N. Y.) 160 (provision for extension).

¹⁹⁸ *Seaver v. Thompson*, 189 Ill. 158, 59 N. E. 553.

¹⁹⁹ See post, § 271 a.

²⁰⁰ *Barge v. Schiek*, 57 Minn. 155, 58 N. W. 874. The dissenting opinion of Canty, J., is based chiefly upon the ground that the words of the lease ("with the privilege to the lessee of another term") did not provide for a renewal but merely gave the lessee an option of extension.

²⁰¹ *Leiter v. Pike*, 127 Ill. 287, 20

²⁰² *Buckland v. Papillon*, L. R. 1

Eq. 477; *Crosbie v. Tooke*, 1 Mylne & K. 431; *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560; *Fitzgerald v. Jones*, 96 Ky. 296, 28 S. W. 963; *Connor v. Withers*, 20 Ky. Law Rep. 1326, 49 S. W. 309; *McClintock v. Joyner*, 77 Miss. 678, 27 So. 837, 78 Am. St. Rep. 541; *Blackmore v. Beardman*, 28 Mo. 420; *Kolasky v. Michels*, 129 N. Y. 635, 24 N. E. 278; *Piegot v. Mason*, 1 Paige (N. Y.) 412; *Barclay v. Steamship Co.*, 6 Phila. (Pa.) 558; *Barbee v. Greenberg*, 144 N. C. 430, 57 S. E. 125. A demand for the renew-

only for the residue of the existing term is immaterial in this respect.²⁰³ So, no doubt, the assignee of the leasehold is entitled to the benefit of an option for extension, as distinguished from one for renewal,²⁰⁴ unless the assignment is so expressed as to operate only on the original term. But though, it seems, in the case of such an option to extend, since there is an existing lease for the additional term,²⁰⁵ the assignment may be of the original term only, the assignor retaining the additional term, a different rule has occasionally been applied in the case of a covenant for renewal, this being regarded as inseparable from the original term.²⁰⁶

A lessee who has assigned is not liable for rent under a renewal lease made to his assignee,²⁰⁷ though he is liable, even after assignment, if the renewal lease was made to him,²⁰⁸ as is a lessee who exercises his privilege of extension and afterwards assigns.²⁰⁹

Upon the bankruptcy of the lessee, the benefit of the renewal clause passes to the trustee in bankruptcy.²¹⁰ Upon the death of the lessee, the right of renewal passes, along with the leasehold, to his personal representative.²¹¹

al is properly made by the assignee. *Warner v. Cochrane*, 63 C. C. A. 207, 128 Fed. 553.

²⁰³ *Downing v. Jones*, 11 Daly (N. Y.) 245; *Phelps v. Erhardt*, 24 N. Y. St. Rep. 380, 5 N. Y. Supp. 540.

²⁰⁴ See *Wilkinson v. Pettit*, 47 Barb. (N. Y.) 230. In *Fisher v. Slattery*, 75 Cal. 325, 17 Pac. 235, there are, perhaps, expressions to the effect that one who takes an assignment, without the lessor's assent, in violation of a covenant in the lease, is not entitled to the benefit of an option for an extension. But since a breach of such a covenant does not, by the weight of authority, render the assignment invalid (ante, § 152 j [2]), it is not apparent why it should affect the assignee's right to enjoy the full term, which, as appears above, is already existent for the full extended period, though liable to be cut off by the lessee at the end of the

first term named. The opinion is obscure. *Emery v. Hill*, 67 N. H. 330, 39 Atl. 266, is also to the effect that one to whom the leasehold is assigned in violation of a covenant is not entitled to the benefit of an option to extend.

²⁰⁵ See ante, § 218.

²⁰⁶ *Blackmore v. Boardman*, 28 Mo. 420; *Winton's Appeal*, 111 Pa. 387, 5 Atl. 240 ("privilege of refusal of subsequent lease"). But in *Owen v. Williams*, Amb. 734, the right of renewal is regarded as susceptible of sale.

²⁰⁷ *James v. Pope*, 19 N. Y. 324.

²⁰⁸ *Thompson's Estate*, 205 Pa. 555, 55 Atl. 539.

²⁰⁹ *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584, 64 N. E. 504.

²¹⁰ *Olden v. Sassman*, 67 N. J. Eq. 239, 57 Atl. 1075.

²¹¹ *Hyde v. Skinner*, 2 P. Wms. 196.

If the leasehold in different parts of the leased premises is assigned to different persons, they may join, it has been decided, in demanding performance of a covenant for renewal.²¹²

If the leasehold belongs to two or more, one of them cannot exercise the right of election on behalf of all,²¹³ and it has been decided that he cannot have the renewal lease made to himself alone, even though he has received an assignment of his colessee's interest, if there is a covenant against assignment and a provision that the renewal shall be subject to the same covenants, these being regarded as indicating an intention that the covenants in the renewal lease should be joint and several on the part of both lessees.²¹⁴ In the case of a lease to a partnership, one partner cannot demand that a renewal lease be made to him after the withdrawal of the other partners from the business.²¹⁵ A surviving partner may, however, demand a renewal on behalf of the partnership estate.²¹⁶

§ 231. Persons against whom stipulations available.

A covenant by the lessor for renewal is binding on the grantee of the reversion, as being a covenant running with the land,²¹⁷ though he is entitled to the benefit of any qualification in the covenant, as when he is not to renew if he desires to use the land for other purposes.²¹⁸ Likewise, the tenant may assert his option of an extension, as distinguished from that of renewal, against the grantee of the reversion as well as against the lessor.²¹⁹ The grantee is, by reason of the lessee's possession, charged with notice of the lease and of the covenant for renewal

²¹² *Cook v. Jones*, 96 Ky. 283, 28 S. W. 960.

²¹⁶ *Betts v. June*, 51 N. Y. 274.

²¹³ *Howell v. Behler*, 41 W. Va. 610, 24 S. E. 646. See *Tweedie v. P. E. Olson Hardware & Furniture Co.*, 96 Minn. 238, 104 N. W. 1089; *Id.*, 98 Minn. 11, 107 N. W. 310.

²¹⁷ *Richardson v. Sydenham*, 2

Vern. 447; *Simpson v. Clayton*, 4 Bing. N. C. 758; *Leiter v. Pike*, 127 Ill. 287, 20 N. E. 23, 2 L. R. A. 549; *Bratt v. Woolston*, 74 Md. 609, 7 Atl. 563; *Leominster Gaslight Co. v. Hillery*, 197 Mass. 267, 83 N. E. 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361.

²¹⁵ *Buchanan v. Whitman*, 151 N. Y. 253, 45 N. E. 556; *Id.*, 76 Hun. 67, 27 N. Y. Supp. 604; *James v. Pope*, 19 N. Y. 324.

²¹⁸ *Leppla v. Mackey*, 31 Minn. 75, 16 N. W. 470.

²¹⁹ *Callan v. McDaniel*, 72 Ala. 96.

contained in the instrument,²²⁰ as he is by a reference to the lease in the conveyance to him.²²¹

A covenant for renewal, made by one who has himself merely a limited interest in the land, such as a life estate, does not bind the land beyond that interest, and runs with the land only to the extent of that interest. Consequently, it cannot be enforced after the termination of such limited interest, even as against an assignee of such interest who acquires the reversion or remainder.²²²

§ 232. Covenant by sublessor to renew.

A sublessor who has covenanted with his own lessee to use his utmost endeavors to procure a renewal of his own lease is bound, it has been held, to pay any reasonable sum which may be required for such renewal.²²³ And he is not relieved from his obligation to fulfill his covenant with his lessee to renew by the fact that, in taking a new lease himself, he has been compelled to pay an increased rent, or to submit to more onerous conditions, nor is he thereby justified in charging an increased rent, or imposing upon the sublessee burdens greater than those imposed by his original lease.²²⁴ "The only way by which the obligation of such a covenant (to renew for such further term as his own leasehold estate may be renewed or extended) can be escaped is by the covenantor's abandonment of the estate, without a direct or indirect renewal of his own tenancy."²²⁵ It has been decided

²²⁰ *Cunningham v. Pattee*, 99 Mass. 248. See *Shelburne v. Biddulph*, 6 Brown Parl. Cas. 363.

²²¹ *A. G. Corre Hotel Co. v. Wells-Fargo Co.*, 63 C. C. A. 23, 128 Fed. 587.

²²² *Brereton v. Tuohey*, 8 Ir. C. L. 190; *Postlethwaite v. Lewthwaite*, 2 Johns. & H. 237; *Miller v. Trafford* [1901] 1 Ch. 54.

²²³ *Simpson v. Clayton*, 4 Bing. N. C. 758.

²²⁴ *Revell v. Hussey*, 2 Ball. & B. 280; *Evans v. Walshe*, 2 Schoales & L. 519; *Thomas v. Burne*, 1 Dru. & Walsh 657; *Hackett v. McNamara*,

Lloyd & G. t. Plunk, 283; *John Polhemus Print. Co. v. Wynkoop*, 30 App. Div. 524, 52 N. Y. Supp. 420.

²²⁵ *Cunningham v. Pattee*, 99 Mass. 248, per Foster, J. As to the effect of a provision in a sublease to the effect that any rights or privileges in regard to renewal granted by the original lessor to the sublessor should enure to the benefit of the sublessee, as entitling the sublessee to a renewal, see *Robinson v. Beard*, 140 N. Y. 107, 35 N. E. 441. As to the effect of a provision for a *pro rata* increase of rent to be paid by the subtenant in case an increase

that, where a sublessee for a year, under one having a lease for a year, was given the right of renewal for four years, provided his lessor obtained an "extension" of his own lease, the sublessee was entitled to a renewal when his lessor obtained a new lease for ten years.²²⁶

§ 233. Breach of covenant to renew—Remedies.

In case of a breach by the landlord of the covenant to renew, the lessor may recover damages therefor.²²⁷ The amount of recovery has been stated to be the difference between the rental value of the premises and the rent which would have been paid under the renewal,²²⁸ and he may also, it seems, recover the value of improvements made by him.²²⁹ Generally speaking, it seems, the measure of damages for breach of a contract to make a renewal lease would be the same as that for breach of a contract to make an original lease.²³⁰ If the lessee retains possession during the whole term for which renewal was to be made, he cannot, it has been decided, recover for the landlord's refusal to execute a renewal lease.²³¹

has to be paid by the sublessor, see *44 Mo. 25, 100 Am. Dec. 252; Tracy Hennessy v. Kenney, 20 Misc. 405, v. Albany Exch. Co., 7 N. Y. (3 46 N. Y. Supp. 249. Seld.) 472, 57 Am. Dec. 538.*

²²⁶ *Hansauer v. Dahlman, 18 App. Div. 475, 45 N. Y. Supp. 1088; Id., 163 N. Y. 567, 57 N. E. 1111.* The opinion assumes that a "renewal" is strictly another lease for the same term, while a lease for a different term is not a "renewal" but is a "new" lease. Such a distinction has, however, apparently, no foundation in principle or authority. A renewal lease is a new lease, by which the tenancy is renewed, and the fact that the lease is for the same term as the former lease, or for a different one, does not change its character as being both a renewal lease and a new lease.

²²⁷ *McClintock v. Joyner, 77 Miss. 678, 27 So. 837, 78 Am. St. Rep. 541; Garnhart v. Finney, 40 Mo. 449, 93 Am. Dec. 303; Arnot v. Alexander,*

44 Mo. 25, 100 Am. Dec. 252; Tracy Hennessy v. Kenney, 20 Misc. 405, v. Albany Exch. Co., 7 N. Y. (3 Seld.) 472, 57 Am. Dec. 538.

²²⁸ *Walcott v. McNew (Tex. Civ. App.) 62 S. W. 815; Belding Bros. & Co. v. Blum, 88 N. Y. Supp. 178; Neiderstein v. Cusick, 110 N. Y. Supp. 287. And see McClowry v. Croghan's Adm'r, 31 Pa. 22.*

²²⁹ *Garnhart v. Finney, 40 Mo. 449, 93 Am. Dec. 303. But Van Brocklin v. Town of Brantford, 20 U. C. Q. B. 347, is apparently contra.*

²³⁰ See ante, § 67 a.

²³¹ *Hegan Mantel Co. v. Cook's Adm'r, 22 Ky. Law Rep. 427, 57 S. W. 929.* The decision, however, seems to be partly based on the theory that the lessee had a perfect right to possession without the execution of a new lease, in effect that the covenant operated as a provision for extension.

There is a decision that where the lessor agreed that the lessee should "have the farm from year to year as long as the farm is to be let," a dispossession of the lessee at the end of the year, for the purpose of leasing to another, authorized a recovery of damages in covenant as for breach of such agreement.²³² Regarding this, however, as a stipulation for an extension, which it appears to have been, it would seem that such a dispossession of the tenant, entitled to continue in possession, should be regarded as an eviction, and should, therefore, be ground for recovery only in an action of tort for the eviction, or in action on the covenant for quiet enjoyment. The lessee has, in such case, a vested leasehold interest for the period of the extension as well as for the original term, and the provision for extension does not, like a covenant for renewal, give the lessee a right *in personam* against the lessor.²³³

In England, and also in a number of states in this country, it is customary for courts of equity specifically to enforce a covenant to renew the lease.²³⁴ In case, however, a covenant so phrased is to be treated as merely equivalent to an option in the lessee for an extension,²³⁵ since the lessee's title for the extended term is complete even at law without further act on the lessor's part, it does not seem that there is any ground for specific performance. In some cases equity may issue an injunction to restrain proceedings at law brought by the lessor in defiance of the equitable right of the lessee to a renewal.²³⁶

Not infrequently, as heretofore indicated,^{237,238} equity will give relief under circumstances precluding the assertion of the right of renewal at law, as when the lessee fails to promptly demand

²³² Walley v. Radcliff, 11 Wend. Scribner, 98 Wis. 104, 73 N. W. 776. (N. Y.) 22, 25 Am. Dec. 594. Every person who has or claims an

²³³ See ante, § 216. interest in the reversion may be

²³⁴ See Tscheider v. Biddle, 4 Dill. compelled to join in the renewal. 58, Fed. Cas. No. 14,210; Monihon Bratt v. Woolston, 74 Md. 609, 7 v. Wakelin, 6 Ariz. 225, 56 Pac. 735; Atl. 563.

Worthington v. Lee, 61 Md. 530; ²³⁵ See ante, note 4.

Ryder v. Robinson, 109 Mass. 67; ²³⁶ Tscheider v. Biddle, 4 Dill. 58, Arnot v. Alexander, 44 Mo. 25, 100 Fed. Cas. No. 14,210; Graham v. Am. Dec. 252; Johnson v. Conger, James, 30 N. Y. Super. Ct. (7 Rob.) 14 Abb. Pr. (N. Y.) 195; New York 468.

Life Ins. Co. v. St. George's Church, ^{237, 238} See ante, at notes 112-121. 12 Abb. N. C. (N. Y.) 50; Kollock v.

renewal, owing to accident or excusable negligence, the standard for determining such negligence differing, apparently, in different jurisdictions. But equity will refuse specific performance if the delay in demanding a renewal is not of an excusable character,²³⁹ or, usually at least, if the right to renew is contingent on the performance of covenants by the lessee, and he is guilty of a breach of such covenants.²⁴⁰ And it has been regarded as ground for refusing specific performance of the covenant for renewal that the tenant applying therefor is insolvent,²⁴¹ the same doctrine applying in such case as in the case of an application for specific performance of any contract to make a lease.²⁴² And so equity has refused relief when the covenant was inequitable,²⁴³ and when the lessee had been guilty of fraud in connection therewith.²⁴⁴ Specific performance has likewise been refused when the rights of the landlord in the land had been denied and contested by litigation on the part of the tenant, who had refused to pay rent for twelve years.²⁴⁵ But in the same jurisdiction it was decided that the fact that the leasehold had been conveyed as if a fee, with a recital that the rent reserved had "become lapsed and barred by limitations," was not a defense to an application for specific performance.²⁴⁶ That the lessee took the lease in his own name as agent for another has been held to be no defense to a suit for specific performance of the covenant to renew, he having been guilty of no fraud or misrepresentation in this regard, and the lessor having no personal objection to the principal, and knowing what sort of business was to be conducted on the premises.²⁴⁷

The question whether specific performance of a covenant to renew will be enforced when the rent is to be ascertained by appraisers or arbitrators has been before referred to.²⁴⁸

²³⁹ See ante, at note 113.

²⁴⁰ See ante, § 225.

²⁴¹ Price v. Assheton, 1 Younge & C. Exch. 441; Crosbie v. Tooke, 1 Mylne & K. 431. See Buckland v. Hall, 8 Ves. Jr. 92.

²⁴² See ante, § 67 b, at notes 142, 143.

²⁴³ Redshaw v. Bedford Level, 1 Eden, 346.

²⁴⁴ Pendred v. Griffith, 1 Brown Parl. Cas. 314.

²⁴⁵ Myers v. Silljacks, 58 Md. 319, 42 Am. Rep. 332.

²⁴⁶ Worthington v. Lee, 61 Md. 530.

²⁴⁷ Daniels v. Straw, 53 Fed. 327.

²⁴⁸ See ante, at notes 176-189.

§ 234. Trusts arising from renewal.

It is a well established rule in the courts of equity that, if a trustee or other person in a fiduciary position obtains the renewal of a lease in his own name, he will, even though free from fraud, hold it in trust for the persons interested in the original term,²⁴⁹ this being an application of the general rule that if a person in a fiduciary or *quasi* fiduciary position gains some personal advantage by availing himself of such position, the advantage so gained must be held by him for the benefit of his *cestui que trust*.²⁵⁰

The applicability of the rule is not affected, it has been held, by the fact that the lease had not customarily been renewed,²⁵¹ or that the new lease was for lives instead of for a term, as was the former lease,²⁵² or was for a different term or at a different rent,²⁵³ or comprised land not included in the former lease.²⁵⁴ But if the renewal includes other land as well as that included in the old lease, the trust will not attach to such other land.²⁵⁵

It has been held that the rule is applicable even though the landlord had refused to make a renewal lease directly to the *cestui que trust*.²⁵⁶ And so the fact that the cotrustees had refused to concur in a renewal for the *cestui que trust's* benefit has been regarded as immaterial.²⁵⁷ It has been held, however, in one jurisdiction, that no such relief would be given in favor of a corporation lessee as against one of its directors who had obtained a renewal after the landlord had positively refused to

²⁴⁹ See *Keech v. Sandford*, Cas. temp. King, 61; *Dixon v. Dixon*, 9 Ch. Div. 587; *Mill v. Hill*, 3 H. L. Cas. 828; *In re Morgan*, 18 Ch. Div. 93; *Phyfe v. Wardwell*, 5 Paige (N. Y.) 268, 28 Am. Dec. 430; *Mitchell v. Reed*, 61 N. Y. 123, 19 Am. Rep. 252; *Grumley v. Webb*, 44 Mo. 446, 100 Am. Dec. 304.

²⁵⁰ See *Lewin, Trusts* (10th Ed.) 192; 2 *White & Tudor's Leading Cases in Equity* (7th Ed.) p. 694. notes to *Keech v. Sandford*.

²⁵¹ *Kittick v. Flexney*, 4 Brown Ch. 161; *Featherstonhaugh v. Fenwick*, 17 Ves. Jr. 298; *Mulvany v. Dillon*, 1 Ball & B. 409.

²⁵² *Eyre v. Dolphin*, 2 Ball & B. 298.

²⁵³ *Mulvany v. Dillon*, 1 Ball & B. 409; *James v. Dean*, 11 Ves. Jr. 383, 15 Ves. Jr. 236.

²⁵⁴ *Giddings v. Giddings*, 3 Russ. 241.

²⁵⁵ *Giddings v. Giddings*, 3 Russ. 241; *Acheson v. Fair*, 3 Dru. & War. 512; *O'Brien v. Egan*, 5 L. R. Ir. 633.

²⁵⁶ *Keech v. Sandford*, Cas. temp. King, 61; *Ex parte James*, 8 Ves. Jr. 337, 345; *Featherstonhaugh v. Fenwick*, 17 Ves. Jr. 298.

²⁵⁷ *Blewett v. Millett*, 7 Brown Parl. Cas. 367.

make another lease to the corporation, the renewal lease expressly prohibiting any assignment by the person to whom it was made.²⁵⁸ And elsewhere, the fact that the landlord had refused to renew to the former lessees has been considered in determining whether one having a mere partial interest in the old lease acted in good faith in taking a renewal to himself.²⁵⁹

The rule has been applied as against an executor,²⁶⁰ an administrator,²⁶¹ and even an executor *de son tort*,²⁶² and he will be required to hold the leasehold in trust for the estate of the decedent. So a guardian, taking a renewal in his own name of a lease belonging to his ward, will hold the renewal lease in trust for the latter.²⁶³ And a person acting as agent for one interested in a lease cannot procure a renewal for his own benefit.²⁶⁴

In the case of a lease to the members of a partnership firm, one member of the firm cannot ordinarily²⁶⁵ obtain a renewal for himself, but will hold the renewal lease in trust for the others,²⁶⁶ and the fact that the lessor has refused to renew to the members of the firm has been regarded as immaterial,²⁶⁷ as has the fact that the renewal lease to the one partner provides expressly that it shall not be assigned.²⁶⁸ The partner taking the renewal cannot exclude the operation of the rule by notifying the other persons interested of his intention to do so,²⁶⁹ though occasionally

²⁵⁸ Crittenden & Cowles Co. v. Cowles, 66 App. Div. 95, 72 N. Y. Supp. 701. See post, at note 279.

²⁵⁹ In re Biss [1903] 2 Ch. 40.

²⁶⁰ Holt v. Holt, 1 Ch. Cas. 190; Killick v. Flexney, 4 Brown Ch. 160; Lewin, Trusts (10th Ed.) p. 192.

²⁶¹ Kelly v. Kelly, 8 Ir. Eq. 403.

²⁶² Mulvany v. Dillon, 1 Ball & B. 409; Griffin v. Griffin, 1 Schoales & L. 352.

²⁶³ Mulhallen v. Marum, 3 Dru. & War. 317; Milner v. Harewood, 18 Ves. Jr. 259, 274.

²⁶⁴ Griffin v. Griffin, 1 Schoales & L. 352; Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541.

²⁶⁵ See Clegg v. Edmondson, 8 De Gex. M. & G. 787; In re Biss [1903] 2 Ch. 40, 62.

²⁶⁶ Alder v. Fouracre, 3 Swanst.

489; Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298; Clegg v. Fishwick, 1 Macn. & G. 294; Sneed v. Deal, 53

Ark. 152, 13 S. W. 703, 7 L. R. A. 551; Mitchell v. Reed, 61 N. Y. 123,

19 Am. Rep. 252; Struthers v. Pearce, 51 N. Y. 357; Cushing v.

Danforth, 76 Me. 114; Johnson's Appeal, 115 Pa. 129, 8 Atl. 36, 2 Am.

St. Rep. 539.

²⁶⁷ Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298; Lacy v. Hall, 37 Pa.

360, 78 Am. Dec. 429.

²⁶⁸ Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252.

²⁶⁹ Clegg v. Edmondson, 8 De Gex, M. & G. 787; Fitzgibbon v. Scanlan, 1 Dow, 269.

emphasis is placed on the fact that the renewal is obtained secretly.²⁷⁰ The same rule has been applied as against a surviving partner taking a renewal, and he will hold this for the benefit of the partnership estate.²⁷¹ It has been said, however, in this regard, that the rule "has been to some extent departed from where the trade is one of a speculative character, and requiring great outlay with uncertain returns. There, if the surviving partner renews the lease in his own sole name, and carries on the business with his own capital and in his own name, the court will not in general assist the representative of the deceased partner unless he comes forward promptly, and is ready to contribute a due proportion of money for the purpose of the business. It would be unjust to permit the executor of the deceased partner to lie by and remain passive while the survivor is incurring all the risk of loss, and only to claim to participate after the affairs have turned out to be prosperous."²⁷² The rule has been held to apply against a partner in a firm which has been dissolved otherwise than by the death of a member.²⁷³ The application of the rule is not excluded by the fact that the renewal lease obtained by the partner is not to commence until after the termination of the partnership by the terms of the firm articles.²⁷⁴

One who has but a partial interest, measured by duration, as, for instance, one to whom the leasehold has been bequeathed or assigned for life with remainder over, cannot, it has been held, procure a renewal exclusively for his own benefit, but will be regarded as a trustee for those entitled in remainder.²⁷⁵

If a mortgagee of the leasehold obtains a renewal of the lease, he will, it has been decided, hold it for the mortgagor's benefit,²⁷⁶

²⁷⁰ See *Mitchell v. Reed*, 61 N. Y. 96 N. Y. 651; *Johnson's Appeal*, 115 123, 19 Am. Rep. 252; *Chittenden v. Pa.* 129, 8 Atl. 36. 2 Am. St. Rep. 539; *Witbeck*, 50 Mich. 401, 15 N. W. 526; *Clegg v. Edmondson*, 8 De Gex, M. Featherstonhaugh v. Fenwick, 17 & G. 787.
Ves. Jr. 298, 311.

²⁷¹ *Clegg v. Fishwick*, 1 Macn. & 19 Am. Rep. 252.
G. 294.

²⁷² *Clements v. Hall*, 2 De Gex & 15 Ves. Jr. 236; *Rawe v. Chichester*, J. 173, 186, per Cranworth. L. C. Amb. 715. 1 Brown Ch. 198 n; *Lewin, See Chittenden v. Witbeck*, 50 Mich. 401, 15 N. W. 526. *Trusts* (11th Ed.) 197; 2 *White & Tudor's Leading Cas. in Eq.* p. 705, notes to *Keech v. Sandford*.

²⁷³ *Speiss v. Rosswogg*, 48 N. Y. Super. Ct. (16 Jones & S.) 135, *affd.* ²⁷⁶ *Rushworth's Case*, *Freem. Ch.*

though a different view has been taken when the renewal was procured by a mortgagee who was not in possession, without any fraud on his part, and after notice to the mortgagor, the renewal not being regarded, under such circumstances, as procured by him by reason of his position as mortgagee.²⁷⁷

If the mortgagor of a leasehold interest acquires a renewal of the lease, the new lease will, it has been held, be subject to the mortgage.²⁷⁸

A director of a corporation, procuring for himself the renewal of a lease held by the corporation, is, it has been held, subject to the rule above referred to.²⁷⁹

It has been recently decided in England, after a full consideration of the matter, that the mere circumstance that a person is partially interested in an old lease does not preclude him from obtaining a new lease of the same premises for his own benefit, the landlord having refused to renew to the old lessees.²⁸⁰

A sublessee does not stand in a fiduciary relation as regards the sublessor, and he may obtain a renewal in his own name from the principal lessor, without reference to any claims upon the part of the sublessor.²⁸¹

The lessee is, it has been held, under no fiduciary relation as regards his assignee, so as to be compelled to hold a renewal lease procured by him in trust for the latter, merely because he represented to him, while negotiating for the sale and assignment of the leasehold, that it was customary for the landlord to renew

13; *Rakestraw v. Brewer*, 2 P. Wms. 510; *Fosbrooke v. Balguy*, 1 Mylne

& K. 226; *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 30; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48.

²⁷⁷ *Nesbitt v. Tredennick*, 1 Ball & B. 29.

²⁷⁸ *Seabourne v. Powel*, 2 Vern. 11; *Leigh v. Burnett*, 29 Ch. Div. 231; *Wunderlich v. Reiss*, 31 Hun (N. Y.) 1; *Hausauer v. Dahlman*, 18 App. Div. 475, 45 N. Y. Supp. 1088; *Id.*, 163 N. Y. 567, 57 N. E. 1111.

²⁷⁹ *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224; *McCourt v. Singers-Bigger* (C. C. A.) 145 Fed. 103.

See *Jacksonville Cigar Co. v. Dozier*, 53 Fla. 1059, 43 So. 523.

²⁸⁰ *In re Biss* [1903] 2 Ch. 40, distinguishing *Palmer v. Young*, 1 Vern. 276, *Ex parte Grace*, 1 Bos. & P. 376.

²⁸¹ *Maunsell v. O'Brien*, 1 Jones, 176. See *John Polhemus Print. Co. v. Wynkoop*, 30 App. Div. 524, 52 N. Y. Supp. 420. A covenant by a sublessee with his lessor not to negotiate with any other person for a renewal before a certain time was held not to be broken by a promise to negotiate at a future time. *Smith v. Coe*, 55 N. Y. 678.

such leases,²⁸² though a different view was taken when the assignor expressly contracted with his assignee that he would give him all the advantages of being the tenant of the lessor as regards a renewal.²⁸³ A purchaser of the leasehold interest owes no obligation in this respect to his vendor, and cannot be compelled to transfer a renewal lease procured by him to the latter as security for the price to be paid by him for the assignment.²⁸⁴ But where a lessee contracted to sell his interest in the premises for the purpose of enabling the vendee to obtain a renewal, without prejudice to the rights of an existing sublessee, and the vendee in consequence obtained a new lease in his own name, such new lease, it was held, was to be considered as merely a renewal of the old lease, and the original lessee was entitled to specific performance of the vendee's contract to pay the purchase money, and to indemnity against the sublessee's claim for damages for eviction by the vendee.²⁸⁵

²⁸² *McDonald v. Fiss*, 54 App. Div. 489, 67 N. Y. Supp. 34.

²⁸³ *Bennett v. Vansyckel*, 11 N. Y. Super. Ct. (4 Duer) 462.

In *H. Koehler & Co. v. Kennedy*, 65 App. Div. 611, 72 N. Y. Supp. 595, it was decided that where the lessee assigned the leasehold as security, with an agreement also to as-

sign any renewal, the lessee could not avoid the effect of such agreement by having the renewal taken in the name of his wife.

²⁸⁴ *Hibbard v. Ramsdell*, 118 N. Y. 38, 22 N. E. 1123, 16 Am. St. Rep. 740.

²⁸⁵ *Phyfe v. Wardell*, 5 Paige (N. Y.) 263, 28 Am. Dec. 430.

CHAPTER XXIII.

FIXTURES.

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§ 235. General considerations.

The questions to be considered in connection with the law of fixtures, as between landlord and tenant, involve almost exclusively the right of the tenant to remove from the premises articles or erections placed by him thereon.

The first question which arises in any particular case is whether the article or erection in question is of such a character, or has been annexed to the land in such manner, or under such circumstances, that it is to be regarded as part of the land. If there is nothing to show that the article or erection has become part of the land, it remains a chattel, which the tenant obviously has the right to remove. If the article or erection has become part of the land, the question then arises whether the tenant may nevertheless remove it as being within an exceptional right of removal given to a tenant for a limited period. There are, it is true, decisions by most respectable courts which tend to blend these questions, which, in other words, regard the assertion of a right of removal in the tenant as necessarily equivalent to an assertion that the article retains its chattel character,¹ but we will, for the present, assume that the two questions are distinct, and will discuss the subject accordingly.

In determining the first question, whether the article or erection has become a part of the realty, that is, whether it is a "fixture," using the term as descriptive of an article which, because affixed to the land or brought into physical connection therewith, has lost its original chattel character, for some purposes at least,²

¹ See post, § 241.

² Such is the sense in which the word will be used in the present chapter. It has also been frequently used as signifying an article which, though annexed to the land, is removable by the person who made the annexation. See Ewell, Fix-

tures, 1 et seq.; Bronson, Fixtures, c. 1; 13 Am. & Eng. Enc. Law (2d Ed.) 597. A "fixture" has also been defined (Brown, Fixtures, §§ 1-3) as a thing "associated with or more or less incidental to the occupation of lands and houses, or either thereof, and with regard to which the

the considerations which govern as between landlord and tenant are approximately the same, it is conceived, as when no relation of tenancy exists between the owner of the land and the person who made the annexation. Consequently, it is proper to state briefly these general considerations, with reference to which the courts ordinarily undertake to determine the question whether an erection on the land, or article affixed to, or placed on, the land, is to be regarded as "a part of the realty," as it is frequently expressed.³

§ 236. Physical attachment.

Not infrequently the courts have asserted the view that a thing cannot be a fixture if merely placed on the land, and not actually attached to the land, or to some structure which is itself so attached to the land as, in a legal sense, to form a part thereof.⁴ In other cases, however, an article of a heavy and permanent character has been regarded as constituting a fixture, though merely laid upon the land and kept in place by the force of gravity.⁵

question most frequently arising is that of their removability by the person claiming to remove them," thus apparently making the question whether a dispute is likely to arise as to the right of removal the test of a fixture.

³The subject of fixtures has recently been treated at length in Bronson, *Fixtures* (St. Paul, 1904), and Ewell, *Fixtures* (2d Ed. Chicago, 1905). An article on the subject by the present writer is to be found in 13 *Am. & Eng. Enc. Law* (2d Ed.) 593.

⁴*Horn v. Baker*, 9 *East*, 215; *Wansbrough v. Maton*, 4 *Adol. & E.* 884; *Walker v. Sherman*, 20 *Wend.* (N. Y.) 636; *Hoyle v. Plattsburgh & M. R. Co.*, 54 *N. Y.* 314, 13 *Am. Rep.* 595; *Brown v. Lillie*, 6 *Nev.* 244; *Williamson v. New Jersey Southern R. Co.*, 29 *N. J. Eq.* 311;

Teaff v. Hewitt, 1 *Ohio St.* 511, 59 *Am. Dec.* 634; *Hill v. Wentworth*, 28 *Vt.* 429. See authorities cited in Ewell, *Fixtures* (2d Ed.) 18; 13 *Am. & Eng. Enc. Law* (2d Ed.) 600.

⁵*Stockwell v. Campbell*, 39 *Conn.* 362, 12 *Am. Rep.* 393; *Blethen v. Towle*, 40 *Me.* 310; *Snedeker v. War-ring*, 12 *N. Y.* (2 *Kern.*) 170; *Doscher v. Blackiston*, 7 *Or.* 143; *Holland v. Hodgson*, L. R. 7 *C. P.* 334; *Monti v. Barnes* [1901] 1 *K. B.* 205. So buildings merely resting on a wooden foundation have been regarded as fixtures (*Landon v. Platt*, 34 *Conn.* 517; *Ogden v. Stock*, 34 *Ill.* 522, 85 *Am. Dec.* 332; *Madigan v. McCarthy*, 108 *Mass.* 376, 11 *Am. Rep.* 371), as have fences resting on the surface of the ground (*Glidden v. Bennett*, 43 *N. H.* 306; *Wentz v. Fincher*, 34 *N. C.* (12 *Ired. Law*) 297, 55 *Am. Dec.* 416; *Kimball v.*

Occasionally a thing, not at the time actually annexed to or in place on the land, has been regarded as part of the land as constituting an essential part of or accessory to a thing which is annexed. A part of a machine, temporarily removed, either for the purpose of repairs or safe keeping, or in order to facilitate a particular use of the machine, has been considered to come within this principle,⁶ though it may perhaps, in most cases, be as well regarded as having become part of the realty by reason of actual annexation, and as not having ceased to be so because temporarily severed.⁷ Keys, doors, and windows, have been regarded as part of the realty on the same theory,⁸⁻¹⁰ though they also might ordinarily be regarded as actually annexed.

In some cases the courts have considered the mode of physical attachment as decisive that the article attached is a part of the land,¹¹ but the tendency is to consider this as in itself but a slight indication that the article is a fixture, provided it is susceptible of removal without injury to the land, or to the structure constituting a part of the land to which it is attached.¹²

Adams, 52 Wis. 554, 9 N. W. 170, 38 Am. Rep. 756). See 13 Am. & Eng. Enc. Law, 603. In Pennsylvania the requirement of actual physical attachment has been positively repudiated. *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490; *Christian v. Dripps*, 28 Pa. 271, 278; *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452; *Wick v. Bredin*, 189 Pa. 83, 42 Atl. 17; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209.

⁶ *Ex parte Ashbury*, 4 Ch. App. 630; *Sheffield & South Yorkshire Permanent Bldg. Soc. v. Harrison*, 15 Q. B. Div. 258; *Bain v. Brand*, 1 App. Cas. 762; *Fisher v. Dixon*, 12 Clark & F. 312; *Dudley v. Hurst*, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235.

⁷ See 13 Am. & Eng. Enc. Law, 615; *Ewell*, Fixtures, 62; *Bronson*, Fixtures, §§ 18 c (5), 24.

⁸⁻¹⁰ *Liford's Case*, 11 Coke, 50 b; *State v. Elliot*, 11 N. H. 540; *Hill v. Wentworth*, 28 Vt. 436.

¹¹ *Wiltshire v. Cottrell*, 1 El. & Bl. 674; *Bliss v. Whitney*, 91 Mass. (9 Allen) 114, 85 Am. Dec. 745; *Degraffenreid v. Scruggs*, 23 Tenn. (4 Humph.) 451, 40 Am. Dec. 658; *Clark v. Hill*, 117 N. C. 11, 23 S. E. 91, 53 Am. St. Rep. 514. See *Amos & Ferard*, Fixtures (3d Ed.) 3 et seq.

¹² *State Sav. Bank v. Kercheval*, 65 Mo. 687, 27 Am. Rep. 310; *McRea v. Central Nat. Bank*, 66 N. Y. 495; *Farrar v. Stackpole*, 6 Me. (6 Greenl.) 154, 19 Am. Dec. 201; *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490; *Winslow v. Merchants' Ins. Co.*, 45 Mass. (4 Metc.) 314, 38 Am. Dec. 368; *Manwaring v. Jenison*, 61 Mich. 117, 27

The fact, however, that a chattel is so attached to a structure that its removal would leave an unfinished gap in the structure has been regarded as strong evidence that the chattel is a part of the land.¹³

§ 237. Character of article.

A consideration on which the cases usually lay great stress, as determining the character of the article as a fixture *vel non*, is its character, as related to the uses to which the land has been appropriated, it being regarded as a fixture only in case there is a correspondence between its character, and consequently its prospective use, and the use to which the land is devoted. This idea of correspondence between the use of the article and that of the land, as showing the annexor's intention, is presented in the cases under various names, as when it is stated that the article annexed must be "adapted" or "appropriated" to the use to which the land is appropriated. The same idea is apparently involved in the frequent statement that the object and purpose of the annexation, as being for the "improvement" or "better enjoyment" of the land, is the important consideration, this referring to the purpose as indicated by the character of the article and the use made of the land.¹⁴

§ 238. Intention of the annexor.

In determining the question whether an article is a fixture, the modern decisions usually lay great emphasis on the question of the "intention" with which the annexation was made, and indeed

N. W. 829; Despatch Line v. Bellamy 260, note b; Holland v. Hodgson, L. Mfg. Co., 12 N. H. 205, 37 Am. Dec. R. 7 C. P. 323; State Sav. Bank v. 203; Thomas v. Davis, 76 Mo. 72, 43 Kercheval, 65 Mo. 686, 27 Am. Rep. Am. Rep. 756. See 13 Am. & Eng. 316; Green v. Phillips, 26 Grat. Enc. Law (2d Ed.) 607.

¹³ Ward v. Kilpatrick, 85 N. Y. v. Farmers' Nat. Bank, 148 Ill. 163, 413, 39 Am. Rep. 674; Teaff v. Hew- 35 N. E. 802, 39 Am. St. Rep. 166; itt, 1 Ohio St. 534, 59 Am. Dec. 634; Atchison, T. & S. F. R. Co. v. Mor- Ottumwa Woolen Mill Co. v. Hawley, gan, 42 Kan. 23, 21 Pac. 809, 4 L. 44 Iowa, 57, 24 Am. Rep. 719; Horne R. A. 284, 16 Am. St. Rep. 471; Teaff v. Smith, 105 N. C. 322, 11 S. E. 373, v. Hewitt, 1 Ohio St. 511, 59 Am. 18 Am. St. Rep. 902.

¹⁴ See Lawton v. Salmon, 1 H. Bl. Co. No. 1, 81 Ala. 482, 1 So. 643, 60

quite frequently make this the sole criterion, referring to the mode of annexation and the character of the article merely as evidence upon this question of intention.¹⁵ Unfortunately, the courts are not entirely clear, nor are they consistent, in their statements as to the nature of this intention, and the facts from which it is to be inferred. In a leading case,¹⁶ which is frequently quoted and referred to in connection with the law of fixtures, it is said that the intention is to be inferred "from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made."¹⁷ And so it is said in other cases that the secret intention of the person making the annexation is immaterial, the intention which controls being that inferable from his acts.¹⁸

Am. Rep. 171; *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *Stillman v. Flenniken*, 58 Iowa, 450, 10 N. W. 842, 43 Am. Rep. 120; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; 13 Am. & Eng. Enc. Law, 609.

¹⁵ See *Holland v. Hodgson*, L. R. 7 C. P. 328; *Leigh v. Taylor* [1902]

App. Cas. 157, *affr.* In re *DeFalbo* [1901] 1 Ch. 523; *State Sav. Bank v. Kercheval*, 65 Mo. 683, 27 Am. Rep. 310; *Ozark v. Adams*, 73 Ark. 227, 83 S. W. 920; *Snedeker v. Warring*, 12 N. Y. (2 Kern.) 170; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; *Potter v. Cromwell*, 40 N. Y. 293, 100 Am. Dec. 485; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Hutchins v. Masterson*, 46 Tex. 551, 20 Am. Rep. 286; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Wick v. Bredin*, 189 Pa. 83, 42 Atl. 17; *Langston v. State*, 96 Ala. 44, 11 So. 334; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 22 Pac. 134, 13 Am. St. Rep. 147; *Read-*

field Tel. & T. Co. v. Cyr, 95 Me. 287, 49 Atl. 1047; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 106; *Feder v. Van Winkle*, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628; *Baringer v. Evenson*, 127 Wis. 36, 106 N. W. 801.

¹⁶ *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634, per Bartley, C. J.

¹⁷ To the same effect, see *Capon v. Peckham*, 35 Conn. 88; *Thomson v. Smith*, 111 Iowa, 718, 83 N. W. 789, 50 L. R. A. 780, 82 Am. St. Rep. 541; *Readfield Tel. & T. Co. v. Cyr*, 95 Me. 287, 49 Atl. 1047; *Schaper v. Bibb*, 71 Md. 145, 17 Atl. 935; *Thomas v. Davis*, 76 Mo. 72, 43 Am. Rep. 756; *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332.

¹⁸ *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; *Crum v. Hill*, 40 Iowa, 506; *Snedeker v. Warring*, 12 N. Y. (2 Kern.) 170; *Cosgrove v. Troesch*, 62 App. Div. 123, 70 N. Y. Supp. 764; *Catasauqua Bank v. North*, 160 Pa. 303, 28 Atl. 694; *Alberson v. Elk Creek*

Most of the cases which thus lay stress upon the intention of the person making the annexation, as determining whether the article annexed becomes part of the land, are cases in which such person was, at the time of the annexation, the owner of the land, as well as of the article annexed.¹⁹ In such a case, the absence of any conflicting interests at the time of the annexation renders his intention an appropriate consideration in this connection, when the question subsequently arises, for instance, between his heir and personal representatives, or between one to whom he conveys the land, absolutely or by way of mortgage, and one claiming the article as a chattel. But it seems that if, at the time of the annexation, the person annexing has no right in the land, his intention, however clearly expressed by word or act, that the article shall not become a part of the land, should have no effect in divesting the rightful owner of the land of the right to the chattel which he otherwise would have.²⁰ And the cases

Min. Co., 39 Or. 552, 65 Pac. 978; *Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 Pac. 736.

¹⁹ See, e. g., *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29, 24 Pac. 920, 22 Am. St. Rep. 373; *Seedhouse v. Broward*, 34 Fla. 509, 16 So. 425; *Thomson v. Smith*, 111 Iowa, 718, 83 N. W. 789, 50 L. R. A. 780, 82 Am. St. Rep. 541; *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Erdman v. Moore*, 58 N. J. Law, 445, 33 Atl. 958; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305, 58 Atl. 409; *McFarlane v. Foley*, 27 Ind. App. 484, 60 N. E. 357; *Kendall v. Hathaway*, 67 Vt. 122, 30 Atl. 859.

²⁰ That the intention of the annexor is in such case immaterial, see *Treadway v. Sharon*, 7 Nev. 37; *Miles v. McNaughton*, 111 Mich. 350, 69 N. W. 481; *Henderson v. Ownby*, 56 Tex. 647, 42 Am. Rep. 691 (semble). In *Huebschmann v. McHenry*, 29 Wis. 655, it is said, per Dixon, C. J.: "It would be strange if it were

to be held that the mere trespasser entering without any title and erecting buildings or other improvements, having in all other respects the character of fixtures, could show that they were not by showing that his intention was at some future day to remove them. This would be a new way of defeating the rights of the owner of the soil to fixtures and improvements thus annexed, and which, by the common law as it now exists and always has, confessedly belong to him." But in *Curtis v. Leasia*, 78 Mich. 480, 44 N. W. 500, it was held that such intention was relevant to show that a fence mistakenly placed on adjoining soil did not become the property of the adjoining owner. And in *Wake v. Hall*, 8 App. Cas. 204, where it was held that one who had a right by custom to mine on another's land could remove mining machinery placed by him thereon, Lord Blackburn refers to his intention as an important factor in the case.

seem in effect to support this view, though not in terms so stating, it being held that if a trespasser makes erections upon another's land, the erection becomes a part thereof,²¹ although it may be assumed that in such case there is no intention to make the article a part of the other person's land. And so where the person making the annexation has an estate in the land of limited duration only, it would seem that, if the articles are such, and are so annexed, that they would ordinarily become a part of the land, the fact that the tenant of the limited estate, whether one for life or years, proclaims, at the time of the annexation, that he intends to retain the right to the articles annexed, should not affect the rights of the owner of the remainder or reversion, and there are a few cases in which this view is asserted.²² There are, however, it must be conceded, a greater number of cases in which the right of the tenant of a limited estate to remove articles annexed by him is based in terms on the theory of an intention on his part not to make them a part of the realty.²³ It seems questionable, however, whether these cases can be regarded as

²¹ See cases cited in Ewell, Fixtures, c. 2; 13 Am. & Eng. Enc. Law, 620.

²² West Coast Lumber Co. v. Apfield, 86 Cal. 335, 24 Pac. 993; Wright v. Du Bignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669; McLain Inv. Co. v. Cunningham, 113 Mo. App. 519, 87 S. W. 605. The Georgia case cited quotes from Ewell, Fixtures, 58, that "in order to give effect to the intention of a party not to make an erection a permanent accession to the realty, the person making the improvement must have the right to determine whether or not the erection shall become a part of the realty; and if, as between himself and the owner of the soil, he has no right to erect the same as property separate and distinct from the freehold, an intention so to do, no matter how clearly manifested, is of no avail." This statement is itself taken from Ogden v. Stock, 34 Ill. 522, 35 Am. Dec. 332, where it was

held that the fact that one in possession of land under a contract of purchase intended, when making improvements, to remove them, did not affect the vendor's right thereto on the purchaser's default. And to this effect, see Crum v. Hill, 40 Iowa, 506.

²³ Linahan v. Barr, 41 Conn. 471; Hewitt v. General Elec. Co., 164 Ill. 420, 45 N. E. 725; Baker v. McClurg, 198 Ill. 28, 64 N. E. 701, 92 Am. St. Rep. 261; Id., 96 Ill. App. 165, 59 L. R. A. 131; Conde v. Lee, 55 App. Div. 401, 67 N. Y. Supp. 157; Roth v. Collins, 109 Iowa, 501, 98 N. W. 543; McMath v. Levy, 74 Miss. 450, 21 So. 9, 523; Hayford v. Wentworth, 97 Me. 347, 54 Atl. 940; Holmes v. Standard Pub. Co. (N. J. Eq.) 55 Atl. 1107; Seeger v. Pettit, 77 Pa. 437, 18 Am. Rep. 452; Wing v. Gray, 36 Vt. 261; Menger v. Ward (Tex. Civ. App.) 28 S. W. 821; Wall v. Hinds, 70 Mass. (4 Gray) 256, 271, 64 Am. Dec. 64; Morey v. Hoyt, 62 Conn.

authorizing the view that the mere mental intention of the tenant, when making the annexation, subsequently to remove articles annexed, even though expressly declared to the landlord at the time, will preserve the personal character of such articles, or render them removable by him, unless their nature and mode of annexation are themselves such as to preserve their physical character, or unless they come within one of the excepted classes of fixtures which, as is hereafter stated, the tenant has the right to remove.

The question of the intention of the person making the annexation is to be distinguished from that of the intention, so called, of both the interested parties, as evidenced by agreement between them. Any such agreement is, as we shall see presently, conclusive in its effects.²⁴ The courts not infrequently use the word "intention" in this sense, sometimes apparently without sufficiently recognizing the distinction referred to.²⁵

§ 239. Specific articles as fixtures.

The principles above summarized are, it seems, as before stated, to be applied in determining whether an article has become part of the land, when the question arises between landlord and tenant, as in other cases, and the occasional assertion that, as between landlord and tenant, the claim of the latter that particular articles are personal chattels is to be specially favored may probably be considered as merely equivalent to a statement that, as explained in the next section, the tenant may, as against his land-

542, 557, 26 Atl. 127, 19 L. R. A. 611; 28, 64 N. E. 701, 59 L. R. A. 131, 92 Ryder v. Faxon, 171 Mass. 206, 50 Am. St. Rep. 261; Munroe v. Armstrong, 179 Mass. 165, 60 N. E. 475; N. E. 631, 68 Am. St. Rep. 417.

²⁴ See post, §§ 243, 244.

²⁵ See e. g., Wood v. Holly Mfg. Co., 100 Ala. 326, 13 So. 948, 21 L. R. A. 787, 46 Am. St. Rep. 56; West Coast Lumber Co. v. Apfield, 86 Cal. 335, 24 Pac. 993; Linahan v. Barr, 41 Conn. 471; Horn v. Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 9 L. R. A. 376, 21 Am. St. Rep. 231; Eaves v. Estes, 10 Kan. 314, 15 Am. Rep. 345; Baker v. McClurg, 193 Ill. 28, 64 N. E. 701, 59 L. R. A. 131, 92 Am. St. Rep. 261; Lansing Iron & Engine Works v. Wilbur, 111 Mich. 413, 69 N. W. 667; Schellenberg v. Detroit Heating & Lighting Co., 130 Mich. 439, 90 N. W. 47, 57 L. R. A. 632, 97 Am. St. Rep. 489; Potter v. Cromwell, 40 N. Y. 227, 100 Am. Dec. 485; Brownell v. Fuller, 60 Neb. 558, 83 N. W. 669; Adams v. Tully, 164 Ind. 292, 73 N. E. 595.

lord, remove certain classes of articles which would not be removable as between persons standing in another relation.

A chattel placed by the tenant on the land, if not so annexed, or if not of such character, as to become part of the land, is removable by the tenant.²⁶

Various decisions as to whether a particular article annexed by a tenant to the land was to be considered as still retaining its personal character, or whether it had become a part of the realty, are referred to in the note below.²⁷

²⁶ *Wansbrough v. Maton*, 4 Adol. & E. 884; *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611; *Carlín v. Ritter*, 68 Md. 478, 13 Atl. 370, 16 Atl. 301, 6 Am. St. Rep. 467; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Kimball v. Grand Lodge*, 131 Mass. 59; *Bartlett v. Haviland*, 92 Mich. 552, 52 N. W. 1008; *Shapira v. Barney*, 30 Minn. 59, 14 N. W. 270; *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452; *Crerar v. Daniels*, 109 Ill. App. 654; *Fullington v. Goodwin*, 57 Vt. 641.

²⁷ A building has been quite frequently decided, in the particular case, to be a part of the realty, in view of the mode of annexation or character of the building and the purpose of its construction. *Talbot v. Whipple*, 96 Mass. (14 Allen) 177; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *Precht v. Howard*, 187 N. Y. 136, 79 N. E. 847; *Linahan v. Barr*, 41 Conn. 471; *Holmes v. Standard Pub. Co.* (N. J. Eq.) 55 Atl. 1107; *Schlemmer v. North*, 32 Mo. 206; *Marks v. Ryan*, 63 Cal. 107; *Fletcher v. Kelly*, 88 Iowa 475, 55 N. W. 474, 21 L. R. A. 347; *Fortescue v. Bowler*, 55 N. J. Eq. 741, 38 Atl. 445; *Carver v. Gough*, 153 Pa. 225, 25 Atl. 1124; *Beckwith v. Boyce*, 9 Mo. 560 (sheds for making brick). But that a particular building erected by the tenant was

personal property, see *O'Donnell v. Hitchcock*, 118 Mass. 401; *Nigro v. Hatch*, 2 Ariz. 144, 11 Pac. 177; *Robinson v. Wright*, 9 D. C. (2 Mac Arthur) 54; *Lanphere v. Lowe*, 3 Neb. 131; *Carlín v. Ritter*, 68 Md. 478, 13 Atl. 370, 16 Atl. 301, 6 Am. St. Rep. 467; *Beckwith v. Boyce*, 9 Mo. 560.

Windows placed in a dwelling house have been stated to be fixtures. *State v. Elliot*, 11 N. H. 540. But see *State v. Whitener*, 93 N. C. 590.

Bar in saloon and large oyster counter annexed by tenant have been held to be fixtures. *Guthrie v. Jones*, 108 Mass. 191, 11 Am. Rep. 335. So a bar, bar fixtures, and bowling alley. *O'Brien v. Kusterer*, 27 Mich. 289. And platform scales, set into the earth in front of a building and connected with a room in it, were held a fixture. *Bliss v. Whitney*, 91 Mass. (9 Allen) 114, 85 Am. Dec. 745. A partition placed by the tenant in a room, running half way to the ceiling and nailed to blocks let through the plastering, has been regarded as a fixture. *McAuliffe v. Mann*, 37 Mich. 539.

Boilers and steam engines annexed by tenant have been held part of realty. *Donnewald v. Turner Real Estate Co.*, 44 Mo. App. 350; *Merritt v. Judd*, 14 Cal. 59; *Dobschuetz v. Holliday*, 82 Ill. 371. So

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a. Trade fixtures. Since the strict application of the rule that things annexed to the land, although at the time of annexa-

a heating plant consisting of a boiler set in brick and cement and screwed to pipes running through building. *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 73 N. W. 159, 248. But that a portable engine and a saw-mill, though in some degree attached to the soil, were personalty, see *Hughes v. Edisto Cypress Shingle Co.*, 51 S. C. 1, 28 S. E. 2, and that view was taken of a boiler cemented to brick work merely to keep it in place (*Cooper v. Johnson*, 143 Mass. 108, 9 N. E. 33), and of a steam heating plant (*semble*) *Insurance Co. v. Buckstaff*, 3 Neb. Unoff. 632, 92 N. W. 755. And see *Kelsey v. Durkee*, 33 Barb. (N. Y.) 410; *Barker v. Brick Co.*, 4 Ohio Dec. 270. Engines and boilers have usually been regarded as part of the realty when the question has arisen as between persons standing in other relations. See 13 Am. & Eng. Enc. Law (2d Ed.) p. 663.

A cotton gin has been held to be a fixture (*Hughes v. Edisto Cypress Shingle Co.*, 51 S. C. 1, 28 S. E. 2), as has a "calender," a machine weighing six tons and extending into second story of building, firmly fastened and difficult of removal. *Talbot v. Whipple*, 96 Mass. (14 Allen) 177. Machinery attached to building by the tenant with bolts and screws was also held to be a part of the realty, under statute making all things permanently attached fixtures (*McNally v. Connolly*, 70 Cal. 3, 11 Pac. 320), and a fire frame fixed in the fire place was so regarded. *Gaffield v. Hapgood*, 34 Mass. (17 Pick.) 192, 28 Am. Dec. 290.

The following articles have been regarded as personalty: Chairs in a theatre secured in place by screws (*Metropolitan Concert Co. v. Sperry*, 9 N. Y. St. Rep. 342); "gas fixtures" (*Lawrence v. Kemp*, 8 N. Y. Super. Ct. [1 Duer] 363; *Wolff v. Sampson*, 123 Ga. 400, 51 S. E. 335 [*semble*]; *Guthrie v. Jones*, 108 Mass. 191, 11 Am. Rep. 335; *Jarechi v. Philharmonic Soc.*, 79 Pa. 403, 21 Am. Rep. 78); apparatus for generating gas (*Hays v. Doane*, 11 N. J. Eq. [3 Stockt.] 84); posts and boards lying on premises, not intended to be used for erections thereon, and also hoop poles placed in the ground by the tenant (*Wing v. Gray*, 36 Vt. 261); machinery of a movable character, though attached to the building (*Bartlett v. Haviland*, 92 Mich. 552, 52 N. W. 1008. And see *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146); planking laid on dock and stringer to which it is attached (*Crerar v. Daniels*, 109 Ill. App. 654); plants and loam in pots (*Young v. Chandler*, 102 Me. 251, 66 Atl. 539); stools in a store on which to sit (*Lawrence v. Kemp*, 8 N. Y. Super. Ct. [1 Duer] 363); glass case, stand of drawers and mirror, nailed by tenant of restaurant to the walls (*Guthrie v. Jones*, 108 Mass. 191, 11 Am. Rep. 335. And see *Kimball v. Grand Lodge of Masons*, 131 Mass. 59); still for making whiskey (*Terry v. Robins*, 13 Miss. [5 Smedes & M.] 291. But see *Moore v. Smith*, 24 Ill. 512; *Pillow v. Love*, 6 Tenn. [5 Hayw.] 109).

tion belonging to a person other than the owner of the land, become a part of the land, would operate to give to the landlord all articles annexed by the tenant for the better enjoyment of the premises, and so tend to prevent the making of improvements by him, and the most beneficial utilization of the premises, the rule has been subjected to considerable relaxations in the tenant's favor, and certain classes of articles, although of such character and so affixed that, as between persons in other relations, they would be treated as permanent annexations, are ordinarily removable by him.

There are occasional statements to be found to the effect that all annexations made by the tenant for the better enjoyment of the premises are removable by him,²⁸ but these are not in accord with the weight of authority, which is, substantially, that the tenant's rights of removal are restricted to (1) trade fixtures; (2) domestic and ornamental fixtures; and, by some decisions, (3) agricultural fixtures. These various classes of fixtures and the tenant's rights in reference thereto will be considered in the above order.

The exceptional right of the tenant to remove fixtures annexed for the purpose of trade was, in a quite early case, stated to exist "in favor of trade and to encourage industry,"²⁹ and that seems

²⁸ So it has been asserted that the tenant may remove "erections made for the more beneficial enjoyment of the premises" (*Bircher v. Parker*, 40 Mo. 118); fixtures annexed by the tenant "for his convenience and comfort" (*State v. White-ner*, 93 N. C. 590); erections made by tenant "in furtherance of purpose for which the premises were leased" (*Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *Hayward v. School Dist. No. 9*, 139 Mich. 539, 102 N. W. 999); articles annexed by him for purposes of trade, "or some other immediate or temporary uses" (*Bliss v. Whitney*, 91 Mass. [9 Allen] 114, 85 Am. Dec. 745); anything affixed by the tenant (*Ross v. Campbell*, 9 Colo. App. 38, 47 Pac. 465); buildings erected by him "for the better enjoyment of the leasehold" (*Hedderich v. Smith*, 103 Ind. 203, 2 N. E. 315, 53 Am. Rep. 509). And see to the same general effect, *Asheville Woodworking Co. v. Southwick*, 119 N. C. 611, 26 S. E. 253; *Shafter Estate Co. v. Alvord*, 2 Cal. App. 602, 84 Pac. 279; and *Dubois v. Kelly*, 10 Barb. (N. Y.) 500, criticised in *Ombony v. Jones*, 19 N. Y. 234. In *Winner v. Williams*, 82 Miss. 669, 35 So. 308, it is said that there is an exceptional right of removal in favor of "tenants, trades and manufactures," thereby asserting a right of removal in a tenant without reference to whether the annexation is for any particular purpose.

²⁹ *Poole's Case*, 1 Salk. 368, per *Holt, C. J.*

the logical ground on which to base it. Occasionally it is said to be based on the presumption of an intention on the part of the tenant subsequently to remove the article,³⁰ but there appears no more reason for such a presumption when the annexation is for purposes of trade than when it is for any other purpose. As before remarked, it is a reasonable presumption that in every case of an annexation by a tenant having an estate of limited duration he intends, if possible, to remove the article annexed upon the termination of his interest, but such an intention should not, it seems, affect the rights of the remainderman or reversioner.³¹ Occasionally, moreover, the court seems to have regarded the question whether a particular article is a trade fixture, for the purposes of the rule, as dependent on whether the tenant intended it to be a trade fixture.³² But whether an article is a trade fixture is, it is conceived, in no way a question whether it was intended so to be, there usually, indeed, being no intention in this regard, but it is rather a question whether, so far as appears from the nature of the article, and the mode in which the premises were utilized, it was annexed for the purpose of aiding in the conduct of a trade.

The determination of the question whether a particular article or structure comes within the rule, as being evidently annexed by the tenant to aid in the carrying on of his trade or business, seems to involve but little difficulty. There have, however, been numerous adjudications upon the subject, and engines and boilers,³³ industrial machinery, and apparatus of various kinds,³⁴

³⁰ *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Watts-Campbell Co. v. Yuengling*, 51 Hun, 302, 3 N. Y. Supp. 869. In *Menger v. Ward* (Tex. Civ. App.) 28 S. W. 821, an intention on the part of the tenant that the articles should be permanently a part of the realty was held to preclude their removal as trade fixtures.

³¹ See ante, at note 22.

³² *Linahan v. Barr*, 41 Conn. 471; *Royce v. Latshaw*, 15 Colo. App. 420, 62 Pac. 627; *Baker v. McClurg*, 198 Ill. 28, 64 N. E. 701, 59 L. R. A. 131, 92 Am. St. Rep. 261; *Roth v. Col-*

lins, 109 Iowa, 501, 98 N. W. 543; *Brownell v. Fuller*, 60 Neb. 558, 83 N. W. 669; *Ward v. Earl*, 86 Ill. App. 635; *Straight v. Mahoney*, 16 Pa. Super. Ct. 155 (semble); *Carver v. Gough*, 153 Pa. 225, 25 Atl. 1124 (semble).

³³ *Bergh v. Herring-Hall-Marvin Safe Co.*, 69 C. C. A. 212, 136 Fed. 368; *Dobschuetz v. Holliday*, 82 Ill. 371; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Smith v. Whitney*, 147 Mass. 479, 18 N. E. 229; *Conrad v. Saginaw Min. Co.*, 54 Mich. 249, 20 N. W. 39, 52 Am. Rep.

appliances annexed by the proprietor of a place of public entertainment or amusement,³⁵ buildings,³⁶ or parts of a building,³⁷

- 817; *Andrews v. Day Button Co.*, 132 N. Y. 348, 30 N. E. 831; *Hayes v. New York Gold Min. Co.*, 2 Colo. 273; *Hewitt v. Stearn Engine Co.*, 65 Ill. App. 153; *Davis v. Moss*, 38 Pa. 346; *Winner v. Williams*, 82 Miss. 669, 35 So. 308. But see *Menger v. Ward* (Tex. Civ. App.) 28 S. W. 821.
- ³⁴ *Cider mill. Holmes v. Tremper*, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238. *Cotton gin. McMath v. Levy*, 74 Miss. 450, 21 So. 9, 523. *Distilling apparatus. Moore v. Smith*, 24 Ill. 512; *Pillow v. Love*, 6 Tenn. (5 Hayw.) 109; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Burk v. Baxter*, 3 Mo. 207. *Ovens in a bakery. Baker v. McClurg*, 96 Ill. App. 165; *Id.*, 198 Ill. 28, 64 N. E. 701, 59 L. R. A. 131, 92 Am. St. Rep. 261. *Compare Collamore v. Gillis*, 149 Mass. 578, 22 N. E. 46, 5 L. R. A. 150, 14 Am. St. Rep. 460. *Hydraulic press. Finney v. Watkins*, 13 Mo. 291. *Electric lighting machinery. Brown v. Reno Elec. Light & Power Co.*, 55 Fed. 229; *Havens v. West Side Elec. Light Co.*, 17 N. Y. Supp. 580. *Mining machinery and appliances. Updegraff v. Lesem*, 14 Colo. App. 297, 62 Pac. 342; *Dobschuetz v. Holliday*, 82 Ill. 371; *Merritt v. Judd*, 14 Cal. 59; *Couch v. Welsh*, 24 Utah, 36, 66 Pac. 600. *Sawmill. Kile v. Ciebnner*, 114 Pa. 381, 7 Atl. 154. *Platform scales. Bliss v. Whitney*, 91 Mass. (9 Allen) 114, 85 Am. Dec. 745; *Allen v. Kennedy*, 40 Ind. 142. See *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452. *Heating apparatus in greenhouse. Royce v. Latchaw*, 15 Colo. App. 420, 62 Pac. 627. *Shafting, belts and pulleys. Brown v. Reno Elec. Light & Power Co.*, 55 Fed. 229; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Hey v. Bruner*, 61 Pa. 87. *Oil or gas well casings and other appliances. Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95. *Gang edger in sawmill. Stokoe v. Upton*, 40 Mich. 581, 29 Am. Rep. 560. *Railroad rails. Northern Cent. R. Co. v. Canton Co.*, 30 Md. 347.
- ³⁵ *Bar counters and shelving. Guthrie v. Jones*, 108 Mass. 191, 11 Am. Rep. 335; *Bush v. Havird*, 12 Idaho, 352, 86 Pac. 529; *Berger v. Hoerner*, 36 Ill. App. 360; *Cubbins v. Ayres*, 72 Tenn. (4 Lea) 329; *Webber v. Franklin Brew. Co.*, 123 App. Div. 465, 108 N. Y. Supp. 251. And see *Asheville Wood Working Co. v. Southwick*, 119 N. C. 611, 26 S. E. 253. But *O'Brien v. Kusterer*, 27 Mich. 289, is to the effect that a bar counter is not removable. *Oyster counter. Guthrie v. Jones*, 108 Mass. 191, 11 Am. Rep. 335. "Club house" erected in beer garden. *Hedderich v. Smith*, 103 Ind. 203, 2 N. E. 315, 53 Am. Rep. 509. *Cisterns, sinks, water and gas pipes in hotel or boarding house. Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64. *Ball room erected by lessee of inn. Ombony v. Jones*, 19 N. Y. 234. *Bowling alley. Hanrahan v. O'Reilly*, 102 Mass. 201. "Scenic railway." *L. A. Thompson Scenic R. Co. v. Young*, 90 Md. 278, 44 Atl. 1024, 47 L. R. A. 127. *Hotel attachments, including bake house, oven, fountain, awning, furnace, washtubs, grates, office counter, shelving and counter in cigar store and bar attached to hotel, shelving in store room, and certain inside shutters and doors. Carlin v. Ritter*, 68 Md. 478, 13 Atl. 370, 16 Atl. 301, 6

and even plants grown by a nurseryman,³⁸ have all been regarded as trade fixtures in particular cases, and as, therefore, removable. Generally, it seems, an article so annexed as to be part of the realty is a trade fixture if the purpose of the annexation was to aid in the conduct of a calling exercised for the purpose of pecuniary profit, provided this calling is not exclusively agricultural in its nature, and the fact that the article has also the qualities of a domestic or agricultural fixture is immaterial in this respect.³⁹ Buildings erected by the tenant merely for the purpose

Am. St. Rep. 467. Partitions and stalls in saloon. *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93. Water closet and urinal attached to saloon. *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93.

³⁶ Repair shop built by railway company. *Union Terminal Co. v. Wilmar & S. F. R. Co.*, 116 Iowa, 392, 90 N. W. 92. Greenhouse erected by florist. *Royce v. Latshaw*, 15 Colo. App. 420, 62 Pac. 627; *Free v. Stuart*, 39 Neb. 220, 57 N. W. 991. Engine and machinery house. *Smith v. Whitney*, 147 Mass. 479, 18 N. E. 229; *Brown v. Reno Elec. Light & Power Co.*, 55 Fed. 229; *White's Appeal*, 10 Pa. 252. Ice house erected by dealer in ice. *Antoni v. Belknap*, 102 Mass. 193. Dwellings intended to be merely accessory to mining operations. *Conrad v. Saginaw Min. Co.*, 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817; *Couch v. Welsh*, 24 Utah, 36, 66 Pac. 600. Building erected for use both as dwelling and for carrying on trade. *Van Ness v. Pacard*, 27 U. S. (2 Pet.) 137, 7 Law. Ed. 374. Depot building erected by railway company. *Western North Carolina R. Co. v. Deal*, 90 N. C. 110; *Carr v. Georgia R. Co.*, 74 Ga. 74. Frame office building in lumber yard. *Security Loan & Trust Co. v. Williamette Steam Mills*

Lumbering Mfg. Co., 99 Cal. 636, 34 Pac. 321. But see *Burkhardt v. Hopple*, 6 Ohio Dec. 127, to effect that a building erected for an office, but used also for other purposes, was not removable. Building erected for use of saloon. *Lewis v. Ocean Nav. Pier Co.*, 125 N. Y. 341, 26 N. E. 301. Building erected for livery stable. *Firth v. Rowe*, 53 N. J. Eq. 520, 32 Atl. 1064. In *West Shore R. Co. v. Werner* (N. J. Err. & App.) 68 Atl. 225, it is in effect stated that the tenant cannot remove a building erected by him for hotel purposes, as constituting a trade fixture.

³⁷ Counting room of wood erected in store. *Brown v. Wallis*, 115 Mass. 156.

³⁸ *Penton v. Robart*, 2 East, 90; *Lee v. Risdon*, 7 Taunt. 191; *Brooks v. Galster*, 51 Barb. (N. Y.) 196; *Miller v. Baker*, 42 Mass. (1 Metc.) 27; *Whitmarsh v. Walker*, 42 Mass. (1 Metc.) 315; *Duffus v. Bangs*, 122 N. Y. 423, 25 N. E. 980. See *Maples v. Millon*, 31 Conn. 598; *Fox v. Brissac*, 15 Cal. 223; *Wintermute v. Light*, 46 Barb. (N. Y.) 278.

³⁹ See *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64; *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238 (Cider mill); *Van Ness v. Pacard*, 27 U. S. (2 Pet.) 137, 7 Law. Ed. 374.

of leasing them have, however, been regarded as not within the designation of trade fixtures.⁴⁰

In several states there is a statutory provision in confirmation of the right to remove trade fixtures, it being provided that the tenant "may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises."⁴¹ Such a statute has been held not to authorize the removal of a four story building erected by a tenant to be used for stores and as a lodging and boarding house.⁴² A statute of one state,⁴³ providing that a tenant, during the term or a continuation thereof, or while he is in possession under the landlord, may remove fixtures erected by him, has been construed, in view of a previous decision on which it is based, to give a right to remove trade fixtures only.⁴⁴

It is generally recognized that the tenant cannot remove a fixture, even though affixed for purposes of trade, if the removal will result in injury to the premises.⁴⁵ The injury must, how-

⁴⁰ Cannon v. Hare, 1 Tenn. Ch. 22. v. Jones, 19 N. Y. 234; Cohen v.

⁴¹ California Civ. Code, § 1019; Wittemann, 100 App. Div. 338, 91 N. Y. Supp. 493; Cubbins v. Ayres, 72 Idaho Civ. Code, § 2385; Montana Rev. Codes 1907, § 4578; North Dakota Rev. Codes 1905, § 3492; South Dakota Rev. Civ. Code, § 899.

⁴² West Coast Lumber Co. v. Apfield, 86 Cal. 335, 24 Pac. 993.

⁴³ Georgia Code 1895, § 3120.

⁴⁴ Wright v. Du Bignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669.

⁴⁵ Davis v. Jones, 2 Barn. & Ald. 165; Friedlander v. Ryder, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700.

In Michigan the question of the right to remove articles as trade fixtures is determined, it seems, not so much by whether the removal will injure the building, as by whether they have been so built into the building as to become a part of it. O'Brien v. Kusterer, 27 Mich. 494; Felcher v. McMillan, 103 Mich. 494, 61 N. W. 791. This view seems to

ever, be substantial, since, as has been remarked, "a screw or nail can scarcely be drawn without attrition."⁴⁶ In determining whether the removal involves injury to the premises, their condition at the time of the removal is to be compared with their condition at the time of the annexation, and the removal is not allowable if, to make the annexation, the premises were altered or cut away, and the removal of the fixture would leave the premises in a maimed or unfinished condition.⁴⁷ And if the tenant has substituted a new fixture for one on the premises at the time of taking possession, and this latter has been injured or permanently removed, he cannot assert any right to remove the substituted article, since the effect would be to leave the premises in worse condition than when he took the lease.⁴⁸

By some decisions the tenant cannot remove a trade fixture if the removal will result in the destruction of the fixture, or its reduction to a mere mass of crude materials,⁴⁹ though the fact

be an outgrowth of the view that a removable fixture is necessarily personal property. See post, § 241.

⁴⁶ *Martin v. Roe*, 7 El. & Bl. 237. See *Foley v. Addenbrooke*, 13 Mees. & W. 174; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Powell v. McAshan*, 28 Mo. 70; *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93; *Arms v. Hill*, 10 Mo. App. 108.

⁴⁷ *Whiting v. Brastow*, 21 Mass. (4 Pick.) 310; *Chase v. New York Insulated Wire Co.*, 57 Ill. App. 205; *Holmes v. Standard Pub. Co.* (N. J. Eq.) 55 Atl. 1107; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700.

⁴⁸ *Hay v. Tillyer* (N. J. Eq.) 14 Atl. 18; *Ashby v. Ashby*, 59 N. J. Eq. 536, 46 Atl. 528; *Dougherty v. Spencer*, 23 Ill. App. 357; *Bovet v. Holzgraff*, 5 Tex. Civ. App. 141, 23 S. W. 1014; *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 73 N. W. 159, 248. See *Felcher v. McMillan*, 103 Mich. 494, 61 N. W. 791. But in *Ross v. Campbell*, 9 Colo. App. 38, 47 Pac. 465, it is in effect held that

he may remove the substituted articles on restoring the premises to the same condition as they were in at the time of the lease. And see *Beers v. St. John*, 16 Conn. 322. In *Andrews v. Day Button Co.*, 132 N. Y. 348, 30 N. E. 831, the tenant was allowed to remove an engine which he had substituted for one on the premises, but there the old engine remained on the premises, available to the landlord. *Roth v. Collins*, 109 Iowa, 501, 80 N. W. 543, seems to involve a view contrary to that stated in the text. There it was held that where the lessee wrongfully removed fixtures belonging to the lessor and substituted fixtures belonging to himself, these latter were removable as trade fixtures, and the lessor could not enjoin their removal by one to whom the lessee had sold them, though he could proceed by action against the lessee for the removal of the fixtures originally on the premises.

⁴⁹ *Whitehead v. Bennett*, 27 Law J. Ch. 474, approved by Lord Chan-

that the removal can be effected only by taking the article to pieces will not, it has been said, prevent the removal.⁵⁰ By some courts, the fact that the removal will destroy the fixture seems not to be regarded as an obstacle to the removal,⁵¹ and it is perhaps difficult to perceive why the landlord should be given the fixture merely because the tenant cannot remove it in its existing form.

b. **Domestic and ornamental fixtures.** The tenant has, from a quite early day, been allowed to remove what are known as domestic and ornamental fixtures, these being articles annexed by the tenant of a dwelling in order to render it more comfortable and attractive as a dwelling. This exception in favor of the tenant is said to be based on "the public policy and convenience, which permit the tenant to make the most profitable and comfortable use of the premises demised, that can be obtained consistently with the rights of the owner of the freehold."⁵² It has also been said that the tenant's right to remove such fixtures is grounded on the fact that they were put there by the tenant merely for his temporary domestic use while he occupied the premises.⁵³

cellor Selborne in *Wake v. Hall*, 7 Q. B. Div. 295. *Collamore v. Gillis*, 149 Mass. 578, 22 N. E. 46, 5 L. R. A. 150, 14 Am. St. Rep. 460.

⁵⁰ *Collamore v. Gillis*, 149 Mass. 578, 22 N. E. 46, 5 L. R. A. 150, 14 Am. St. Rep. 460; *Whitehead v. Bennett*, 27 Law J. Ch. 474.

⁵¹ It is so decided in *Baker v. McClurg*, 198 Ill. 28, 64 N. E. 701, 59 L. R. A. 131, 92 Am. St. Rep. 261. And in several cases, brick or stone structures which, in their nature are insusceptible of removal without disintegration, have been regarded as removable, no reference being made to the rule referred to. See *Van Ness v. Pacard*, 27 U. S. (2 Pet.) 137, 7 Law. Ed. 374; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Moore v. Wood*, 12 Abb. Pr. (N. Y.) 393; *Carr v. Georgia R. Co.*, 74 Ga. 73, 81; *Brown*

v. Reno Elec. Light & Power Co., 55 Fed. 229; *White's Appeal*, 10 Pa. 252; *Couch v. Welsh*, 24 Utah, 36, 66 Pac. 600 (semble); *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655; *Gordon v. Miller*, 28 Ind. App. 612, 63 N. E. 774. In *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 142 U. S. 396, 35 Law. Ed. 1055, it is said, per *Brown, J.*, that "it is difficult to conceive that any fixture, however solid, permanent and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term."

⁵² *Gaffield v. Hapgood*, 34 Mass. (17 Pick.) 192, 28 Am. Dec. 290, per *Putnam, J.*

⁵³ *Gibson v. Hammersmith & City R. Co.*, 2 Drew. & S. 603, 609. See *Seeger v. Pettit*, 77 Pa. 440, 18 Am. Rep. 452.

Articles which have thus been regarded as removable because affixed for purposes of ornament include hangings and tapestry,⁵⁴ pier glasses,⁵⁵ ornamental chimney pieces,⁵⁶ wooden cornices,⁵⁷ and even, it is said, wainscoting affixed to the walls by screws.⁵⁸ And of articles annexed for purposes of domestic convenience which have been regarded as removable by the tenant may be enumerated bells and bell wires,⁵⁹ chandeliers,⁶⁰ cisterns and sinks, though fastened by nails or set into the floor,⁶¹ a fireframe fixed in the fireplace,⁶² pipes for gas or water, removable without injury to the building,⁶³ pumps,⁶⁴ stoves, grates, ranges and furnaces,⁶⁵ and water closet appliances.⁶⁶ In no case does it appear to have been decided that a building erected by the tenant for residence purposes is removable as a domestic fixture, and it would seem that it is not so removable.⁶⁷

⁵⁴ Beck v. Rebow, 1 P. Wms. 94; 504, 52 S. E. 619, 3 L. R. A. (N. S.) Leigh v. Taylor [1902] App. Cas. 157, 69.
afg. In re De Falbe [1901] 1 Ch. 523.

⁵⁵ Beck v. Rebow, 1 P. Wms. 94.

⁵⁶ Elwes v. Maw, 3 East, 53; Leach v. Thomas, 7 Car. & P. 327; Bishop v. Elliott, 11 Exch. 113.

⁵⁷ Avery v. Cheslyn, 3 Adol. & E. 75.

⁵⁸ See Lawton v. Lawton, 3 Atk. 15; Ex parte Quincy, 1 Atk. 477; Elwes v. Maw, 3 East, 53; Lee v. Riedon, 7 Taunt. 191; Buckland v. Butterfield, 2 Brod. & B. 54. But wainscoting might be affixed in such a way, no doubt, as not to be removable. See Co. Litt. 53 a. and the discussion in Amos v. Ferard, Fixtures (3d Ed.) 119.

Glass put in the windows by the tenant cannot be removed by him. Co. Litt. 53 a. "So I apprehend it would be if the tenant should shingle the house, or put another story upon it." Putnam, J., in Gaffield v. Hapgood, 34 Mass. (17 Pick.) 192, 28 Am. Dec. 190.

⁵⁹ This appears to be recognized in Lyde v. Russell, 1 Barn. & Adol. 294; Pugh v. Arton, L. R. 8 Eq. 629.

⁶⁰ Raymond v. Strickland, 124 Ga.

⁶¹ Wall v. Hinds, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64.

⁶² Gaffield v. Hapgood, 34 Mass. (17 Pick.) 192, 28 Am. Dec. 290.

⁶³ Wall v. Hinds, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64; Jenkins v. Gething, 2 Johns. & H. 520. In Hays v. Doane, 11 N. J. Eq. (3 Stockt.) 84, it was held that the tenant could remove a gasometer and apparatus for generating gas.

⁶⁴ Grymes v. Boweren, 6 Bing. 437; McCracken v. Hall, 7 Ind. 30.

⁶⁵ Roffey v. Henderson, 17 Q. B. 575. See Stockwell v. Marks, 17 Me. 455, 35 Am. Dec. 266.

⁶⁶ Hayford v. Wentworth, 97 Me. 347, 54 Atl. 940. It does not clearly appear, however, whether the appliance in question was regarded as removable because not a fixture, or because in the nature of a domestic fixture. It was in fact used in connection with an office, and it was asserted that the principle that domestic fixtures are removable applied to such a case.

⁶⁷ See Reed v. Kirk, 12 Rich. Law (S. C.) 54; Van Ness v. Pacard, 27

The right to remove domestic and ornamental fixtures is no doubt subject to the limitation which prevails as regards trade fixtures, that the removal shall not cause substantial damage to the realty.⁶⁸ And likewise, in jurisdictions where the rule obtains that a trade fixture is not removable if its removal involves its disintegration,⁶⁹ a like rule would apply in the case of a domestic or ornamental fixture.⁷⁰

There is some authority for recognizing, in the case of an article of a domestic or ornamental character, the existence of a limitation upon the right of removal which does not apparently exist in the case of trade fixtures, that is, when it has been so affixed as to become permanently incorporated with the land or structure to which it is attached. On such a theory it has been held that a conservatory or a greenhouse is not removable as a domestic or ornamental fixture.⁷¹ A like view has been taken of gutters placed on the roof of the dwelling and a servants' room added to the house,⁷² and it has been decided that a stairway is not removable as a domestic fixture.⁷³ Nor are, it seems, flowers, bushes or shrubs planted by the tenant for ornamental purposes,⁷⁴ or for the purpose of enjoying the fruits thereof,⁷⁵ removable by him. It is perhaps with reference to the same principle that it has been said that the privilege of the tenant in removing fixtures of this char-

U. S. (2 Pet.) 137. Compare *Schlemmer v. North*, 32 Mo. 206.

⁶⁸ *Grymes v. Boweren*, 6 Bing. 437; *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64; *Hanrahan v. O'Reilly*, 102 Mass. 201. See *Stockwell v. Marks*, 17 Me. 455, 35 Am. Dec. 266; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700. The question of such injury is for the jury. *Avery v. Cheslyn*, 3 Adol. & E. 75.

⁶⁹ See ante, at note 49.

⁷⁰ *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64; *Hanrahan v. O'Reilly*, 102 Mass. 201, are to this effect.

⁷¹ *Buckland v. Butterfield*, 2 Brod.

& B. 54; *Jenkins v. Gething*, 2 Johns. & H. 520.

⁷² *Wright v. Du Bignon*, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669, quoting at length a passage from a text book, which does not, however, appear to be entirely supported by the cases cited therein, several of which involved actions on account of the removal by the tenant of articles which formed a part of the premises at the time of the lease.

⁷³ *Bovet v. Holzgraft*, 5 Tex. Civ. App. 141, 23 S. W. 1014.

⁷⁴ *Empson v. Soden*, 4 Barn. & Adol. 655.

⁷⁵ *Jenkins v. Gething*, 2 Johns. & H. 525; *Wyndham v. Way*, 4 Taunt. 316, per Heath, J.

acter must be regarded as more limited in character than that which he has as regards trade fixtures.⁷⁶

c. **Agricultural fixtures.** It was decided in England, in a case frequently referred to,⁷⁷ that the principle on which a tenant is allowed to remove fixtures annexed by him for purposes of trade cannot be extended so as to allow him to remove fixtures annexed for agricultural purposes. There are, however, in this country, quite a number of *dicta* adverse to this decision.⁷⁸ There is, moreover, at least one case in which an article annexed for the purpose of putting the agricultural products of the soil in form or condition for the market has been regarded as removable as a trade fixture,⁷⁹ and plants cultivated for purposes of sale are, as before stated, removable on this ground.⁸⁰ As has been well said,⁸¹ the principle on which the right to remove trade fixtures is based, that is, the policy of encouraging tenants to make useful additions to their premises, and to avail themselves of modern improvements in arts and manufactures, would seem to be quite as applicable in the case of appliances and erections which may be useful for the conduct of agriculture. Furthermore, in view of

⁷⁶ See *Amos v. Ferard*, Fixtures, 126; *Bronson*, Fixtures, § 34; *Ewell*, Fixtures, 185.

⁷⁷ *Elwes v. Maw*, 3 East, 38.

⁷⁸ *Van Ness v. Pacard*, 27 U. S. (2 Pet.) 137; *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742; *Davis' Adm'r v. Eastham*, 81 Ky. 116; *Perkins v. Swank*, 43 Miss. 349; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Wing v. Gray*, 36 Vt. 261. See *Carver v. Gough*, 153 Pa. 225, 25 Atl. 1124.

In *Stevens v. Burnham*, 62 Neb. 672, 87 N. W. 546, the court, in referring to a barn, said that there was no evidence that it was "intended to be a mere agricultural fixture." As before remarked in connection with trade fixtures (ante, § 240 a), the question whether an article belongs to one of the classes of fixtures which are by law removable would seem to be a question of the character of the article rather than of

the intention of the annexor, however material the question of intention may be in determining whether the article is a fixture *vel non*.

⁷⁹ *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238 (Cider press). In *McMath v. Levy*, 74 Miss. 450, 21 So. 9, 523, it was held that a cotton gin on a plantation was removable in view of the recognized exceptions "in favor of trade, manufactures and, as in the case before us, tenants." In *Wintermute v. Light*, 46 Barb. (N. Y.) 278, "wine plants," that is, plants from the roots of which a wine is extracted, were held removable by the tenant. Presumably, however, these are to be regarded as "emblems" (*fructus industriales*). See post, § 249.

⁸⁰ See ante, at note 38.

⁸¹ See *Amos & Ferard*, Fixtures (3d Ed.) appendix (e), p. 424.

the wide scope given to the privilege of removing trade fixtures, as including, apparently, annexations made in the course of any gainful occupation, including that of appropriating the mineral profits of the earth, the exclusion of the right of removal in the case of annexations made in the course of agricultural operations seems arbitrary and illogical.

§ 241. Removable fixtures as realty or personalty.

It being conceded that trade fixtures, domestic or ornamental fixtures, and, in some jurisdictions, perhaps, agricultural fixtures, are removable by the tenant who has annexed them, the question arises whether such articles are, before they are removed, to be regarded as part of the realty or as personalty. In this regard the cases are not in unison. Quite frequently the courts have spoken of such fixtures as being personalty, apparently considering that this necessarily follows from the fact that they are removable, and without discussion of the question.⁸² By other decisions, what appears to the writer a much sounder view has been adopted, to the effect that articles removable as belonging to one of these classes are nevertheless a part of the land until removed, the right to remove them existing in the tenant's favor apart from, and independently of, his unquestioned right to remove any articles which, though on the land, have not become a part thereof for any purpose, that is, which are mere personal chattels.⁸³

⁸² *State v. Bonham*, 18 Ind. 231; *73 Pa. 302*; *Kile v. Giebner*, 114 Pa. 381, 7 Atl. 154; *Wright v. McDonnell*, 88 Tex. 140, 30 S. W. 907. Articles which the tenant has a right to remove, as having been affixed for purposes of trade, have occasionally been held not to be subject to a mechanic's lien as a part of the land. *Koenig v. Mueller*, 39 Mo. 165; *Church v. Griffith*, 9 Pa. 117. Compare *Ombony v. Jones*, 19 N. Y. 234. This is, however, primarily a question of the construction of the mechanic's lien law of the particular state.

⁸³ *Meux v. Jacobs*, L. R. 7 H. L. 481, 490; *Bain v. Brand*, 1 App. Cas.

Robinson v. Wright, 9 D. C. (2 McArthur) 54; *Finney v. Watkins*, 13 Mo. 291; *Bircher v. Parker*, 43 Mo. 443; *Bartlett v. Haviland*, 92 Mich. 552, 52 N. W. 1008; *Perkins v. Swank*, 43 Miss. 349; *Lanphere v. Lowe*, 3 Neb. 131; *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; *Cook v. Transportation Co.*, 1 Denio (N. Y.) 91; *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23, 32 Am. Rep. 259; *Western North Carolina R. Co. v. Deal*, 90 N. C. 110; *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655; *Lemar v. Miles*, 4 Watts (Pa.) 330; *Heffner v. Lewis*,

The question whether fixtures which are removable by a tenant are to be regarded as a part of the land or as merely personal property is an important one. If they are part of the land, they are not the subject of an action of trover, replevin or detinue,⁸⁴ while the contrary is true if they are regarded as personalty.⁸⁵ If regarded as personalty, the articles annexed may be transferred or mortgaged as such by the tenant,⁸⁶ while if regarded as a part of the land, they cannot, in one state at least, be so disposed of,⁸⁷ though in some states, it appears, they may nevertheless be sold or mortgaged as chattels, the sale or mortgage being regarded as effecting a "severance," and *ipso facto* converting them into chattels.⁸⁸ It has been well said that the "facility with which fixtures, although essentially part of the real estate, may be made subject to the right of removal, to meet special exigencies, is one of their most valuable incidents, and must necessarily be sacrificed by any view of the law which assumes that they are personal property for all purposes, because certain persons are entitled to act as if such was their character."⁸⁹ Furthermore, the view that removable fixtures are chattels seems incompatible with the prevailing opinion that the tenant loses his right to remove the fixtures if he relinquishes possession of the land without having done so,⁹⁰ since

762, 772, 777; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Climie v. Wood*, L. R. 4 Exch. 328; *Freeman v. Dawson*, 110 U. S. 270, 28 Law. Ed. 143; *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939; *Guthrie v. Jones*, 108 Mass. 191; *Treadway v. Sharon*, 7 Nev. 37; *Hereford v. Pusch* (Ariz.) 68 Pac. 547.

⁸⁴ *Mackintosh v. Trotter*, 3 Mees. & W. 184; *Raffey v. Henderson*, 17 Q. B. 575; *Davis v. Jones*, 2 Barn & Ald. 165; *Guthrie v. Jones*, 108 Mass. 191 (trover); *Brown v. Wallis*, 115 Mass. 156 (replevin); *Pemberton v. King*, 13 N. C. (2 Dev. Law) 376 (detinue). In *Shapira v. Barney*, 30 Minn. 59, 14 N. W. 270, the article annexed was regarded as the subject of conversion, but there it was removable by agreement.

⁸⁵ *Finney v. Watkins*, 13 Mo. 291; *Rosenau v. Syring*, 25 Or. 386, 35 Pac. 844; *Watts v. Lehman*, 107 Pa. 106; *Vilas v. Mason*, 25 Wis. 310. See post, § 248.

⁸⁶ See *Lanphere v. Lowe*, 3 Neb. 131.

⁸⁷ *Bliss v. Whitney*, 91 Mass. (9 Allen) 114, 85 Am. Dec. 745. See *Richardson v. Copeland*, 72 Mass. (6 Gray) 536, 66 Am. Dec. 424.

⁸⁸ See *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899, and cases referred to 13 Am. & Eng. Enc. Law, 617.

⁸⁹ *Smith's Leading Cases* (8th Am. Ed.), notes to *Elwes v. Mawe*, at p. 230.

⁹⁰ See post, at notes 109-115.

there is no principle of law by which the owner of chattels loses title thereto merely because he leaves his chattels lying on the land of another person.⁹¹ Nor does such view seem to harmonize with the decisions that the tenant loses the right of removal by taking a new lease,⁹² since these are based on the theory that the fixtures pass under the new lease, which they cannot well do, if not a part of the land.

In jurisdictions where removable fixtures are regarded as part of the land, a transfer of the land by the lessor will pass title to the fixtures, unless they are expressly excepted therefrom,⁹³ and a transfer by the lessee of his interest in the land and will also pass a like interest in the fixtures, together with his right of removal.⁹⁴ Regarding removable fixtures as personal property, on the other hand, there seems some difficulty in construing a conveyance of the land, whether by the lessor or by the lessee, as including the fixtures. There are many decisions to the effect that articles, though attached to the land, if not of such character or so attached as to be part thereof, do not pass by a conveyance of the land,⁹⁵ and this would seem to apply to fixtures annexed and removable by a tenant for life or years, if regarded as retaining their personal character and so not a part of the land.^{95a}

The view that a removable fixture is part of the land has been

⁹¹ See *Broadbudd v. Smith*, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; *Davis v. Emery*, 61 Me. 140, 14 Am. Rep. 553; *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Corey v. Bishop*, 48 N. H. 146, and cases cited post, note 113.

⁹² See post, § 242 g.

⁹³ *Davis v. Buffum*, 51 Me. 160; *Bliss v. Whitney*, 91 Mass. (9 Allen) 114, 85 Am. Dec. 745; *Walsh v. Schler*, 20 Mo. App. 374.

⁹⁴ *Southport & West Lancashire Banking Co. v. Thomson*, 37 Ch. Div. 64; *Meux v. Jacobs*, L. R. 7 H. L. 481; *Boyd v. Shorrocks*, L. R. 5 Eq. 72; *In re Calvert* [1898] 2 Ir. 501; *Ex parte Astbury*, L. R. 4 Ch. 630; *First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. 955; *San Francisco*

Breweries v. Schurtz, 104 Cal. 420, 38 Pac. 92.

⁹⁵ See cases cited 13 Am. & Eng. Enc. Law (2d Ed.) p. 664, notes 1, 2, 3 *ad fin.*; p. 665, note 2; p. 667, note 6 *ad fin.*

^{95a} But in *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23, 32 Am. Rep. 259, while it was stated that machinery annexed by the lessee was personal property, such machinery was regarded as passing on a sale of the land under foreclosure of a mortgage thereon. And see *Bircher v. Parker*, 43 Mo. 443; *Smyth v. Stoddard*, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314, where it is held that a conveyance of the land by the lessor constitutes a conversion of the removable fixtures, thus at the

applied in connection with the appropriation of land for railroad purposes, it being decided that the fixture was part of the land for which the railroad company must pay, and not a chattel which it could demand to have removed,⁹⁶ and so it has been decided that a mortgage by the lessee of all the personalty on the premises did not cover trade fixtures or fixtures removable by agreement.⁹⁷

In jurisdictions where fixtures are regarded as personalty, they are obviously subject to levy under execution as such,⁹⁸ and even in jurisdictions where they are not so regarded, they have been held to be subject to execution in favor of the tenant's creditors so long as the tenant's right of removal endures, that is, the execution creditor is entitled to exercise his debtor's right of removal.⁹⁹

Even in jurisdictions where removable fixtures are regarded as part of the realty, an oral transfer of them has been decided not to be invalid under the Statute of Frauds as being of an interest in the land, the transfer being apparently regarded as of the right to remove the fixtures rather than of the fixtures themselves;¹⁰⁰ while a sale to a person taking or having an interest in the land, such as an incoming tenant or the landlord, is regarded as in the nature of an abandonment or waiver of the right of removal.¹⁰¹

same time regarding them as a part of the land for the purpose of a conveyance, and yet personal property for the purpose of supporting an action for conversion.

⁹⁶ *Gibson v. Hammersmith & City R. Co.*, 2 Drew. & S. 603, 32 Law J. Ch. 337, where this view of the question is forcibly stated.

⁹⁷ *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939.

⁹⁸ *State v. Bonham*, 18 Ind. 231; *Havens v. West Side Elec. Light Co.*, 17 N. Y. Supp. 580; *Lemar v. Miles*, 4 Watts (Pa.) 330; *Heffner v. Lewis*, 73 Pa. 302; *Kile v. Giebner*, 114 Pa. 381, 7 Atl. 154; *Pillow v. Love*, 6 Tenn. (5 Hayw.) 109.

⁹⁹ *Poole's Case*, 1 Salk. 368; *Hallen v. Runder*, 1 Crompt. M. & R. 266; *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Freeman v. Dawson*, 110 U. S.

287; *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611. In *McNally v. Conolly*, 70 Cal. 3, 11 Pac. 320, it was held that certain machinery, removable by the tenant, was part of the realty so as to be subject to execution and sale "as real estate," on behalf of a creditor of the tenant. In *Pemberton v. King*, 13 N. C. (2 Dev. Law) 376, it was decided that, since a trade fixture is part of the realty, a constable had no power to sell it, nor could a sheriff sell it as personalty.

¹⁰⁰ *Lee v. Gaskell*, 1 Q. B. Div. 700; *Oswald v. Whitman*, 22 Nova Scotia, 13.

¹⁰¹ *Hallen v. Runder*, 1 Crompt. M. & R. 266; *South Baltimore Co. v. Muhlbaeh*, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507.

Nor are such fixtures goods or chattels within the seventeenth section of the statute.¹⁰²

§ 242. Loss of tenant's rights of removal.

a. **End of term or relinquishment of possession.** A question has frequently arisen as to the time at which the right to remove trade, ornamental, or agricultural fixtures, must be exercised, and it is difficult to extract a uniform rule from the decisions in this regard. In some decisions it is stated that the removal must be made during the term,¹⁰³ in some, that the right expires with the tenancy,¹⁰⁴ and in some, that it may be exercised a "reasonable time" after the expiration of the term.¹⁰⁵ It has occasionally been

¹⁰² *Lee v. Gaskell*, 1 Q. B. Div. 700; *v. Frick & Lindsay Co.*, 207 Pa. 597, Hallen v. Runder, 1 Comp. M. & R. 57 Atl. 60.
¹⁰³ *South Baltimore Co. v. Muhl-*
bach, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507.

¹⁰⁴ *Dudley v. Warde*, Amb. 113; *Lyde v. Russell*, 1 Barn. & Adol. 394; *Harrison v. Smith*, 19 Nova Scotia, 516 (semble); *Beckwith v. Boyce*, 9 Mo. 560; *Davis v. Buffum*, 51 Me. 160; *Bodwell Water Power Co. v. Old Town Elec. Co.*, 96 Me. 117, 51 Atl. 802; *Bliss v. Whitney*, 91 Mass. (9 Allen) 114, 85 Am. Dec. 745; *Wat-*
riss v. First Nat. Bank, 124 Mass. 571, 26 Am. Rep. 694; *Darrah v. Baird*, 101 Pa. 265; *Thomas v. Crout*, 68 Ky. (5 Bush) 37; *Stokoe v. Up-*
ton, 40 Mich. 581, 29 Am. Rep. 560; *Conner v. Coffin*, 22 N. H. 538; *Samp-*
son v. Camperdown Cotton Mills, 64 Fed. 939 (dictum); *Smith v. Moore*, 26 Ill. 392; *Dreiske v. Peo-*
ple's Lumber Co., 107 Ill. App. 285; *Stockwell v. Marks*, 17 Me. 455, 35 Am. Dec. 266; *Carlin v. Ritter*, 68 Md. 478, 13 Atl. 370, 16 Atl. 301, 6 Am. St. Rep. 467; *Bliss v. Whitney*, 91 Mass. (9 Allen) 114, 85 Am. Dec. 745; *Tate v. Blackburne*, 48 Miss. 1; *Overton v. Williston*, 31 Pa. 115; *Davis v. Moss*, 38 Pa. 346; *Donnelly*
v. Griffin v. Ransdell, 71 Ind. 440; *Walsh v. Siehler*, 20 Mo. App. 374; *Stevens v. Burnham*, 62 Neb. 672, 87 N. W. 546.
¹⁰⁵ *Cartland v. Hickman*, 56 W. Va. 75, 49 S. E. 14, 67 L. R. A. 694; *Shel-*
lar v. Shivers, 171 Pa. 569, 33 Atl. 95; *Berger v. Hoerner*, 36 Ill. App. 360; *Preston v. Briggs*, 16 Vt. 124. In *Burk v. Hollis*, 98 Mass. 55, it was held that an "unreasonable time" had elapsed when the tenant did not commence to remove a house built by him until six weeks after the expiration of the term. In *Beckwith v. Boyce*, 9 Mo. 560, it was held that sheds erected by the tenant, being fixtures, could not be removed by him four months after the end of the term. In *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95, it was held that the removal of oil well appliances was not within a reasonable time if delayed till four years after the expiration of the lease and five and a half years after cessation of operations, and this though the lease authorized removal "at any time." In *Berger v. Hoerner*, 36 Ill. App. 360, it is said to be a

stated that the tenant's right of removal continues "during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant,"¹⁰⁶ or during what may, for this purpose, "be considered as an excrescence on the term,"¹⁰⁷ or "during his rightful continuance in possession."¹⁰⁸ What is the exact meaning of some of these statements it is difficult to say, but a number of cases recognize the right of the tenant to remove the fixtures even after the term, provided he does so before he relinquishes possession of the land, it being said in some that he may make the removal before such relinquishment of possession,¹⁰⁹ and in others that he must do so.¹¹⁰

question for the jury, under proper instructions, whether the removal was within a reasonable time.

¹⁰⁶ *Weeton v. Woodcock*, 7 Mees. & W. 14; *Merritt v. Judd*, 14 Cal. 59; *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611; *Youngblood v. Eubank*, 68 Ga. 630; *Erickson v. Jones*, 37 Minn. 459, 35 N. W. 267; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173. See *Alexander v. Touhy*, 13 Kan. 64, where it is said that the removal must take place during such period as the tenant may lawfully and rightfully remain in possession.

In *Leader v. Homewood*, 5 C. B. (N. S.) 546, Willes, J., suggested that a right of removal existed so long as the tenant had no reason to suppose that his continuance in possession was objectionable to the landlord, and no longer, and this view was applied by Charles, J., in *Barff v. Probyn*, 73 Law T. (N. S.) 118.

¹⁰⁷ *Mackintosh v. Trotter*, 3 Mees. & W. 184; *Wright v. MacDonnell*, 88 Tex. 140, 30 S. W. 907.

¹⁰⁸ *Allen v. Kennedy*, 40 Ind. 142; *Hedderich v. Smith*, 103 Ind. 203, 2 N. E. 315, 53 Am. Rep. 509.

¹⁰⁹ *Brown v. Reno Elec. Light & Power Co.*, 55 Fed. 229; *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939; *Fenimore v. White*, 78 Neb. 520, 111 N. W. 204; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *State v. White-ner*, 93 N. C. 590; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173; *Lewis v. Ocean Nav. & Pier Co.*, 125 N. Y. 341, 26 N. E. 301; *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571, 26 Am. Rep. 694; *Talbot v. Cru-ger*, 151 N. Y. 117, 45 N. E. 364.

¹¹⁰ *Brown v. Reno Elec. Light & Power Co.*, 55 Fed. 229; *Mueller v. Chicago, M. & St. P. R. Co.*, 111 Wis. 300, 87 N. W. 239; *Bush v. Havird*, 12 Idaho, 352, 86 Pac. 529; *Bliss v. Whitney*, 91 Mass. (9 Allen) 114, 85 Am. Dec. 745; *Gaffield v. Hapgood*, 34 Mass. (17 Pick.) 192, 28 Am. Dec. 290; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 82, 9 L. R. A. 700; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554; *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362; *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *McIver v. Estabrook*, 134 Mass. 550; *Williams v. Lane*, 62 Mo. App. 66; *Fuller v. Brownell*, 48 Neb. 145, 67 N. W. 6; *Dingley v. Buffum*,

The decisions or *dicta* to the effect that a tenant holding over has the right of removal, and that he loses the right by giving up possession of the premises, are usually in terms based on the theory that by yielding possession he indicates an intention to abandon the fixtures, and that no presumption of such an intention arises so long as he continues his possession.¹¹¹ But, as has been well remarked, ¹¹² if his rights as to fixtures on the premises are to be determined by the presumption of his intention to abandon *vel non*, the same rule should apply to chattels on the land not so annexed as to become fixtures, and he would lose all right to them by relinquishing possession of the land, which he certainly does not do.¹¹³ This theory of a presumption of abandonment, however, seems the only possible one on which, in any jurisdiction in which removable fixtures are regarded as personalty,¹¹⁴ to support the

57 Me. 381; *Youngblood v. Eubank*, 68 Ga. 630; *Donnelly v. Thieben*, 9 Ill. App. (9 Bradw.) 495; *Sweet v. Myers*, 3 S. D. 324, 53 N. W. 187; *Kutter v. Smith*, 69 U. S. (2 Wall.) 491; *Cromie v. Hoover*, 40 Ind. 49; *Thomas v. Crout*, 68 Ky. (5 Bush) 27 (semble); *Dostal v. McCaddon*, 35 Iowa, 318; *Bliss v. Whitney*, 91 Mass. (9 Allen) 114, 85 Am. Dec. 745; *Josslyn v. McCabe*, 46 Wis. 591, 1 N. W. 174; *Keogh v. Daniell*, 12 Wis. 163; *Mueller v. Chicago, M. & St. P. R. Co.*, 111 Wis. 300, 87 N. W. 239.

¹¹¹ See *Youngblood v. Eubank*, 68 Ga. 630; *Cromie v. Hoover*, 40 Ind. 49; *Hedderich v. Smith*, 103 Ind. 203, 2 N. E. 315, 53 Am. Rep. 509; *Beckwith v. Boyce*, 9 Mo. 560; *Lewis v. Ocean Nav. & Pier Co.*, 125 N. Y. 341, 26 N. E. 301; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173.

¹¹² See per *Kindersley, V. C.*, in *Gibson v. Hammersmith & City R. Co.*, 2 Drew. & S. 603, 32 Law J. Ch. 337.

¹¹³ *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611; *Talbot v. Whipple*, 96 Mass. (14 Allen) 177; *Donnewald v. Turner Real Estate Co.*, 44 Mo. App. 350; *Western North Carolina R. Co. v. Deal*, 90 N. C. 110; *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Brooks v. Galster*, 51 Barb. (N. Y.) 196; *Lawrence v. Kemp*, 8 N. Y. Super. Ct. (1 Duer) 363; *Wansbrough v. Maton*, 4 Adol. & E. 884; *Davis v. Jones*, 2 Barn. & Ald. 165.

The Georgia Code 1895, § 3120, provides that "a tenant, during the term or a continuation thereof, or while he is in possession under the landlord, may remove fixtures erected by him. After the term and possession are ended, they are regarded as abandoned to the use of the landlord and become the latter's property."

That the landlord detaches the fixtures after the tenant has relinquished possession does not revest the title thereto in the tenant. *Stokoe v. Upton*, 40 Mich. 581, 29 Am. Rep. 560.

¹¹⁴ See ante, at note 82.

view that the right of removal is lost by the tenant's relinquishment of possession of the land.¹¹⁵ On the other hand, regarding the fixtures as constituting a part of the land, with a mere right of removal in the tenant,¹¹⁶ it is perhaps difficult to see why a tenant should be enabled, by wrongfully holding over, to extend the period for the removal of the fixtures, thus profiting by his own wrong. Such a case, it might seem, would be governed by a rule different from that which governs when he holds over rightfully, that is, by permission. In the latter case, it has been decided, the right of removal continues.¹¹⁷

b. **Tenancy of uncertain duration.** If the tenancy is of uncertain duration, such as a tenancy at will, or if it is subject to termination on a certain contingency, the tenant has a "reasonable time" after its termination within which to remove the fixtures, provided at least the termination is not the result of his own voluntary act,¹¹⁸ and provided further, it seems, he has not relinquished possession.¹¹⁹ It has been questioned whether this principle would apply to a tenancy at will, when by statute the tenant is entitled to a reasonable notice to terminate,¹²⁰ and there are cases somewhat adverse to its application in favor of a tenant under a lease made by a life tenant, when the leasehold is terminated by the death of the lessor.¹²¹

¹¹⁵ On the theory that removable fixtures are personalty, it has been held, in North Carolina, that the right of removal is not lost by the expiration of the term. *Pemberton v. King*, 13 N. C. (2 Dev. Law) 376; *Western North Carolina R. Co. v. Deal*, 90 N. C. 110. *Holmes v. Trämper*, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238, is to the same effect.

¹¹⁶ See ante, at note 83.

¹¹⁷ *Crandall Inv. Co. v. Ulyatt*, 40 Colo. 35, 90 Pac. 591; *Mason v. Fenn*, 13 Ill. 525; *Donnelly v. Frick & Lindsay Co.*, 207 Pa. 597, 57 Atl. 60; *Darrah v. Baird*, 101 Pa. 265; *Wright v. MacDonnell*, 88 Tex. 140, 30 S. W. 907; *Finney's Trustees v. City of St. Louis*, 39 Mo. 178; *Bircher v. Parker*, 40 Mo. 118, 43 Mo. 443. Compare post, at note 150.

¹¹⁸ *Cromie v. Hoover*, 40 Ind. 49; *Sullivan v. Carberry*, 67 Me. 531; *Northern Cent. R. Co. v. Canton Co.*, 30 Md. 347; *Doty v. Gorham*, 22 Mass. (5 Pick.) 487, 16 Am. Dec. 417; *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571, 26 Am. Rep. 694; *Talbot v. Whipple*, 96 Mass. (14 Allen) 177; *Antoni v. Belknap*, 102 Mass. 193; *Ombony v. Jones*, 19 N. Y. 234; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173; *Walsh v. Sichler*, 20 Mo. App. 374; *Hayward v. School Dist. No. 9*, 139 Mich. 539, 102 N. W. 999.

¹¹⁹ *State v. Elliot*, 11 N. H. 540.

¹²⁰ *Erickson v. Jones*, 37 Minn. 459, 35 N. W. 267.

¹²¹ In *White v. Arndt*, 1 Whart. (Pa.) 91, it is stated that fixtures erected by the lessee of a life tenant

c. **Surrender or merger of leasehold.** If the tenant surrenders his unexpired leasehold estate to the landlord, he thereby loses, it has been decided, the right to remove the fixtures.¹²² And a surrender by operation of law^{122a} is as effective for this purpose, it seems, as an express surrender.¹²³

When the title to the leasehold and to the reversion become united in one person, the leasehold interest is merged,¹²⁴ and ordinarily there is no room for further question as to the right to remove fixtures annexed by the lessee, since his interests and those of the lessor have become united. It may occur, however, that the tenant, before the merger, has transferred his removable fixtures to another, and the question would then arise whether such transferee could still assert the right of removal. Presumably he could do so.¹²⁵ For instance, a lessee, having transferred his fixtures to

must be removed before the term is ended by the lessor's death. There the right of removal was given by agreement, and this was held not binding on the remainderman. This case was followed in *Haffick v. Stober*, 11 Ohio St. 482, where the fixture was by agreement removable at the end of the term, and it was held not to be removable after the term was ended by the lessor's death. In *Jones v. Shufflin*, 45 W. Va. 729, 31 S. E. 975, 72 Am. St. Rep. 848, it was held that after the termination of a lease by the death of the lessor, who had a life estate merely, the lessee could not remove a fixture, as against the remainderman, since it must be removed during the term. No suggestion is made that the lessee had a reasonable time for removal. Such a view as is indicated in these cases places the lessee of a life tenant in a distinctly precarious position as regards articles annexed by him to the premises.

Appeal, 70 Pa. 395; *Shepard v. Spaulding*, 45 Mass. (4 Metc.) 416; *Talbot v. Whipple*, 96 Mass. (14 Allen) 177; *Friedlander v. Ryder*, 39 Neb. 783, 47 N. W. 83, 9 L. R. A. 700; *Free v. Stuart*, 39 Neb. 220, 57 N. W. 991.

An assignment by the lessee to the lessor to secure a debt deprives the lessee of the right of removal if the debt is not paid. *Breese v. Bange*, 2 E. D. Smith (N. Y.) 474.

^{122a} See ante, § 190.

¹²³ *Jungerman v. Bovee*, 19 Cal. 354; *Talbot v. Whipple*, 96 Mass. (14 Allen) 177. But see *Baker v. McClurg*, 198 Ill. 28, 64 N. E. 701, 59 L. R. A. 131, 92 Am. St. Rep. 261, to the effect that the making and acceptance of a new lease by one of two joint lessees, being intended merely to release the other, did not involve any loss of the right of removal. The case is not discussed, however, as involving any question of the effect of surrender. See post, note 143.

¹²⁴ See ante, § 12 g (2).

¹²⁵ In *Denham v. Sankey*, 38 Iowa, 269, it was held that when the les-

¹²² *London & Westminster Loan & Discount Co. v. Drake*, 6 C. B. (N. S.) 798; *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939; *Thropp's*

another, or, to speak more accurately perhaps, having transferred to another his right of removal,¹²⁶ could not debar such other of that right by taking a conveyance from the lessor. If the reversion is subject to a mortgage at the time of the merger, the fixtures, if regarded as part of the realty, become, it seems, subject to the mortgage, they being, after the merger, a part of the interest on which the mortgage was given.¹²⁷ But it may be shown, it appears, that a conveyance of the reversion to the lessee, though purporting to be absolute, was in reality intended as security only, and that consequently there was no merger preventing removal of the fixtures by such lessee or one claiming under him.¹²⁸

d. **Forfeiture of leasehold.** By the weight of authority, a tenant loses his right to remove fixtures if by any act or omission he has forfeited his interest under the lease,¹²⁹ provided there has

sor purchased the leasehold, though it was merged thereby, the rights of a prior mortgagee of a mill thereon which had always been treated as personalty were not affected by the merger. In such case, when the article is in effect personalty, by agreement, it cannot be affected by a merger, which reaches the lessee's interest in the land only.

¹²⁶ See ante, at note 100.

¹²⁷ In *Jones v. Detroit Chair Co.*, 38 Mich. 92, 31 Am. Rep. 314, it was decided that the fixtures annexed by the lessee became subject to a mortgage, previously given by the lessor, upon the lessee's purchase of the reversion "subject to the mortgage," the language of the mortgage covering annexations of that character. It does not clearly appear why the fact that the conveyance to the lessee was in terms subject to the mortgage should affect the question. And since a mortgage includes annexations to the land, though not specifically mentioned, it does not seem that the failure to so mention them should prevent the mortgage from operating upon them after the

merger. *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23, 32 Am. Rep. 259, is to the effect that such a merger of the lessee's interest in the lessor's interest does not subject the fixtures annexed by the lessee to a mortgage previously made by the lessor, on the ground that "the ownership of the chattels was separate and independent of the interest under the lease," that is, that they were not a part of the land. This accords with the New York view of the nature of removable fixtures.

¹²⁸ *Security Loan & Trust Co. v. Williamette Steam Mills Lumbering & Mfg. Co.*, 99 Cal. 636, 34 Pac. 321, 38 Am. St. Rep. 314. There it was held that the lessee could show that a conveyance to him from the lessor was as security merely, as against one to whom the property was subsequently conveyed by the lessor, after it had been reconveyed to him by the lessee.

¹²⁹ *Pugh v. Arton*, L. R. 8 Eq. 626, 38 Law J. Ch. 619; *Weeton v. Woodcock*, 7 Mees. & W. 14; *Minshall v. Lloyd*, 2 Mees. & W. 450; *Kutter v.*

been an enforcement by the landlord of the forfeiture,¹³⁰ whether by re-entry,¹³¹ a recovery in ejectment,¹³² a summary proceeding,¹³³ or otherwise. There are, however, a few decisions to the effect that the tenant has a reasonable time after the loss of possession by forfeiture in which to remove the fixtures.¹³⁴

e. **Eviction under title paramount.** In case the tenant is evicted by title paramount, he cannot, it seems, assert any claim to fixtures annexed by him, he being in no better position than any other person making annexations to another's land without any right so to do. One who is wrongfully in possession of another's land has no right to remove articles annexed by him, as against the rightful owner, and he cannot, it seems clear, by making a lease to another, enable this latter to annex and remove articles.

f. **Delay in removal caused or acquiesced in by landlord.** If the landlord prevents the tenant, by legal process or otherwise,

Smith, 69 U. S. (2 Wall.) 491 (semble); *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611; *Davis v. Moss*, 38 Pa. 346; *Whipley v. Dewey*, 8 Cal. 36; *Massachusetts Nat. Bank v. Shinn*, 18 App. Div. 276, 46 N. Y. Supp. 329; *West Shore R. Co. v. Wenner* (N. J. Err. & App.) 68 Atl. 225.

¹³⁰ *Bush v. Havird*, 12 Idaho, 352, 86 Pac. 529; *Paine v. Coffin*, 2 Cleve. L. Rep. (Ohio) 1, 4 Ohio Dec. 351; *Keogh v. Daniell*, 12 Wis. 163. In *Davis v. Moss*, 38 Pa. 346, it was held that the tenant could not remove his fixtures after he had committed an act of forfeiture, on the theory that in that state such act terminates the lease without any action on the part of the landlord.

¹³¹ *Weeton v. Woodcock*, 7 Mees. & W. 14; *Keogh v. Daniell*, 12 Wis. 163; *Little Falls Water Power Co. v. Hausdorf*, 127 Fed. 444.

¹³² *Minshall v. Lloyd*, 2 Mees. & W. 450.

¹³³ *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611; *Fried-*

lander v. Ryder, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700. In *Massachusetts Nat. Bank v. Shinn*, 18 App. Div. 276, 46 N. Y. Supp. 329, it was held that the right of removal must be asserted in a summary proceeding brought on account of nonpayment of rent or the right is lost.

¹³⁴ *Royce v. Latschaw*, 15 Colo. App. 420, 62 Pac. 627; *Updegraff v. Lesem*, 15 Colo. App. 297, 62 Pac. 342; *Gartland v. Hickman*, 56 W. Va. 75, 49 S. E. 14, 67 L. R. A. 694. See *Moore v. Wood*, 12 Abb. Pr. (N. Y.) 393; *Miller v. Hennessy*, 47 Misc. 403, 94 N. Y. Supp. 563. In *Mickle v. Douglas*, 75 Iowa, 78, 39 N. W. 198, it was held that the tenant had a reasonable time after the lessor's re-entry, under a forfeiture clause for nonpayment of rent, within which to remove fixtures, although the lease provided for a right of removal "at the termination of this lease, unless all right thereto has been forfeited by plaintiffs by a forfeiture of the lease."

from removing the fixtures, the time for removal is extended till after such obstruction is removed.¹³⁵ And if the landlord, by his conduct or language, induces the tenant to leave the fixtures on the premises for some particular purpose, as, for instance, that they may be sold for him by the landlord, his right of removal remains, though he has relinquished possession.¹³⁶

The landlord may expressly stipulate that the tenant shall have the right of removal after the end of the term or relinquishment of possession,¹³⁷ and the stipulation may be either oral or in writing.¹³⁸ Such a stipulation has been regarded as ineffective as against a mortgage by the landlord, made before the making of the stipulation but after the annexation,¹³⁹ and also as against an incoming tenant.¹⁴⁰

¹³⁵ *Ex parte Wemenway*, 2 Lowell, 496, Fed. Cas. No. 6,346 (attachment levied on fixtures); *Podlech v. Phelan*, 13 Utah, 333, 44 Pac. 838 (forcible prevention of removal). So when the landlord obtains an injunction against the removal, the tenant may remove after giving up possession within a reasonable time after the dissolution of the injunction. *Mason v. Fenn*, 13 Ill. 525; *Bircher v. Parker*, 40 Mo. 118; *Goodman v. Hannibal & St. J. R. Co.*, 45 Mo. 33, 100 Am. Dec. 336.

¹³⁶ *Thorn v. Sutherland*, 123 N. Y. 236, 25 N. E. 362; *Torrey v. Burnett*, 38 N. J. Law, 457, 20 Am. Rep. 421. So when the tenant was requested by the landlord not to remove the fixtures pending negotiations for a sale. *Young v. Consolidated Imp. Co.*, 23 Utah, 586, 65 Pac. 720; *Merriam v. Ridpath*, 16 Wash. 104, 47 Pac. 416, 38 L. R. A. 267.

¹³⁷ See *McCracken v. Hall*, 7 Ind. 30; *Free v. Stuart*, 39 Neb. 220, 57 N. W. 991. Such a stipulation was held not to be shown by the fact that the lessee asked the lessor if he could leave certain fixtures on the premises and the lessor replied that he was willing, since they might

help him to rent the store. *Josslyn v. McCabe*, 46 Wis. 591, 1 N. W. 174.

In *Bodwell Water Power Co. v. Old Town Elec. Co.*, 96 Me. 117, 51 Atl. 802, a clause providing that at the termination of the lease the landlord should buy the fixtures, or allow them to be removed, was held to allow their removal after the term if the landlord did not exercise the option of purchase. In *Duffus v. Bangs*, 122 N. Y. 423, 25 N. E. 980, it was held that if the landlord told a purchaser of the tenant's nursery stock, that he could remove the stock after the term, he was estopped to claim the stock on the ground that the term had come to an end. In *Stopper v. Kantner*, 29 Pa. Super. Ct. 48, it was decided that the landlord could not revoke such permission to the tenant at midnight of the last day of the term, even though he might possibly have done so previously.

¹³⁸ *McCracken v. Hall*, 7 Ind. 30; *Torrey v. Burnett*, 38 N. J. Law, 457, 20 Am. Rep. 421.

¹³⁹ *Thomas v. Jennings*, 75 Law T. (N. S.) 274.

¹⁴⁰ *Roffey v. Henderson*, 17 Q. B. 574. That is, the grant of a license

It has been asserted in one case that if the tenancy is "wrongfully terminated" by the landlord and the tenant is ousted, the latter has a reasonable time within which to remove the fixtures annexed by him.¹⁴¹ But it would seem that the landlord cannot thus, by his wrongful act, abbreviate the time within which the tenant may exercise the right of removal. An eviction by the landlord does not terminate the tenancy, and the tenant retains his right to possession,¹⁴² and consequently he has a perfect right to leave the fixtures till the expiration of the term of the lease.

g. Acceptance of new lease by tenant. The weight of authority is to the effect that, by the acceptance from the landlord of a new lease, containing no mention of fixtures annexed during the tenancy under the former lease, the tenant loses his right to remove such fixtures, the theory being that, the fixtures being a part of the land, the tenant, by an acceptance of the new lease, takes such an interest in the fixtures only as he does in the land, that is, a merely temporary interest.¹⁴³ Occasionally a decision to

to a lessee to remove the fixtures after his term was regarded as ineffective as against a subsequent lessee.

¹⁴¹ Eldridge v. Hoefer, 45 Or. 239, 77 Pac. 874. The authorities cited do not support the statement.

¹⁴² See ante, § 185 h.

¹⁴³ Merritt v. Judd, 14 Cal. 59; Marks v. Ryan, 63 Cal. 107; Sanitary Dist. of Chicago v. Cook, 169 Ill. 184, 48 N. E. 461, 39 L. R. A. 269, 61 Am. St. Rep. 161; Hedderich v. Smith, 103 Ind. 203, 2 N. E. 315, 55 Am. Rep. 509; Watriss v. Cambridge First Nat. Bank, 124 Mass. 571, 26 Am. Rep. 694; Carlin v. Ritter, 68 Md. 478, 13 Atl. 370, 16 Atl. 301, 6 Am. St. Rep. 467; Bauernschmidt Brew. Co. v. McColgan, 89 Md. 135, 42 Atl. 907; Williams v. Lane, 62 Mo. App. 66; Champ Spring Co. v. B. Roth Tool Co., 103 Mo. App. 103, 77 S. W. 344; Gerbert v. Sons of Abraham, 59 N. J. Law, 160, 35 Atl.

1121, 69 L. R. A. 764, 59 Am. St. Rep. 578; Leman v. Best, 30 Ill. App. 323; Davis v. Carsley Mfg. Co., 112 Ill. App. 112; Gauggel v. Ainley, 83 Ill. App. 582; Spencer v. Commercial Co., 30 Wash. 520, 71 Pac. 53; Sharp v. Milligan, 23 Beav. 419; Thresher v. East London Waterworks Co., 2 Barn. & C. 608; Ex parte Lloyd, 1 Mont. & A. 511. The case of Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173, to this effect, is somewhat questioned by Peckham, J., in Lewis v. Ocean Nav. & Pier Co., 125 N. Y. 341, 26 N. E. 301, but the rule is approved in Talbot v. Cruger, 151 N. Y. 117, 45 N. E. 364; Stephens v. Ely, 162 N. Y. 79, 56 N. E. 499; Precht v. Howard, 187 N. Y. 136, 79 N. E. 847; Nieland v. Mahnken, 89 App. Div. 463, 85 N. Y. Supp. 809.

In Baker v. McClurg, 198 Ill. 28, 64 N. E. 701, 59 L. R. A. 131, 92 Am. St. Rep. 261, it was decided that where the original lease was "can-

this effect lays some stress upon the fact that the new lease contains a covenant by the lessee to yield up the premises at the end of the term in as good condition as at the time of the lease,¹⁴⁴ but it does not seem that this can be material since, even in its absence, a tenant has no right to remove improvements covered by the lease to him.

This doctrine has been held to apply as against one to whom the right to remove the fixtures has been transferred by the tenant who annexed them, upon the taking of a new lease by such transferee,¹⁴⁵ and it has also been decided that such a transferee loses his right of removal if his transferor, while still in possession of the premises, takes a new lease.¹⁴⁶ The rule has even been applied as against a sublessee who, after making annexations, took a new lease from the original lessor.¹⁴⁷

Since this doctrine is based upon the theory that the new lease includes the fixtures, as constituting a part of the realty, it necessarily follows that it has no application to articles not so annexed, or not of such character, as to constitute fixtures.¹⁴⁸

ceded" during the term and a new lease made for the balance of the term, which was executed by but one of the two former lessees, and this was done merely to release the other from liability, there was not a new lease within the rule.

In *Cronkhite v. Imperial Bank of Canada*, 14 Ont. Law Rep. 270, it was held that a clause in the new lease, "provided that the lessee may remove his fixtures," preserved his right of removal as referring to fixtures already annexed by him. Compare *St. Louis v. Nelson*, 108 Mo. App. 210, 83 S. W. 271, where the right of removal given by the second lease was restricted to improvements erected "during said term."

¹⁴⁴ *Wadman v. Burke*, 147 Cal. 351, 81 Pac. 1012, 1 L. R. A. (N. S.) 1192; *Watriss v. Cambridge First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694. In *Sanitary Dist. of Chicago v. Cook*, 169 Ill. 184, 48 N. E. 461, 39

L. R. A. 369, 61 Am. St. Rep. 161, the presence of such a covenant is referred to, but the rule is recognized independently thereof. In *George Bauernschmidt Brew. Co. v. McColgan*, 89 Md. 135, 42 Atl. 907, there was such a covenant, but no particular effect was given thereto, and the same may be said of *Stephens v. Ely*, 162 N. Y. 79, 56 N. E. 499, where the right of removal was originally given by an agreement made subsequent to the original lease.

¹⁴⁵ *Talbot v. Cruger*, 151 N. Y. 117, 45 N. E. 364; *Van Vleck v. White*, 66 App. Div. 14, 72 N. Y. Supp. 1026.

¹⁴⁶ *Bauernschmidt Brew. Co. v. McColgan*, 89 Md. 135, 42 Atl. 907.

¹⁴⁷ *McIver v. Estabrook*, 134 Mass. 550.

¹⁴⁸ *Carlin v. Ritter*, 68 Md. 478, 13 Atl. 370, 16 Atl. 301, 6 Am. St. Rep. 467. *Smusch v. Kohn*, 22 Misc. 344, 49 N. Y. Supp. 176, seems also to be to this effect, as is perhaps *Bern-*

Furthermore, it would seem to be inapplicable in any jurisdiction where removable fixtures are regarded as personal property,¹⁴⁹ since, if personal property, they would not ordinarily be covered by a second lease, which is in terms of the land only.

There seems to be some inconsistency between this rule, as asserted, that a renewal lease puts an end to the right of removal, and the decisions, before referred to,¹⁵⁰ that a tenant holding over by permission does not lose his right of removal, since such permission is in effect a new lease, though only for a brief or indefinite space of time.¹⁵¹ The cases, however, undertake to distinguish in this regard between a holding under an extension of the original lease and under a new lease, without, it may be said, asserting any satisfactory ground of distinction.¹⁵² In one

heimer v. Adams, 70 App. Div. 114, 75 N. Y. Supp. 93, in which latter case it is said that the rule is "not applicable to trade fixtures, not distinctively realty, designed to retain their character as personal property and capable of removal without material injury to the freehold." If this means that trade fixtures are not within the general rule because they are not part of the land, it is not in accord with the decision of the New York court of appeals in Talbot v. Cruger, 151 N. Y. 117, 45 N. E. 364. If it means that there are two classes of trade fixtures, one of which constitutes personalty and the other a part of the land, it is not supported by authority. This case is affirmed without opinion in Bernheimer v. Adams, 175 N. Y. 472, 67 N. E. 1080, and is approved in Bergh v. Herring-Hall-Marvin Safe Co., 69 C. C. A. 212, 136 Fed. 368, 70 L. R. A. 756, where the court seems to construe its language as meaning that trade fixtures are not within the rule because they are personalty.

¹⁴⁹ See ante, at note 82.

¹⁵⁰ See ante, at note 117.

¹⁵¹ It is said in reference to this

rule, in Amos & Ferard, Fixtures (3d Ed.) p. 159, that in the case of the renewal of a lease, "there is in reality the grant of a new interest in the premises to the tenant, although upon the same conditions as those under which he formerly held. All, therefore, which formed part of the premises at the expiration of the first term must, unless excluded by the agreement of the parties, have passed to the landlord as part of the reversion out of which the new term is granted to the tenant. If the view here taken is correct, it seems to follow that the tenant's right of removing fixtures will be lost, although the further tenancy may arise merely from his holding over and paying rent after the expiration of his term; for he thereby becomes a tenant under a new tenancy from year to year." The principle is the same, it is conceived, if the owner's consent to the tenant's continued possession is indicated by word of mouth, without the acceptance of rent or the execution of any written instrument. He holds under a new tenancy, not under the old.

¹⁵² Compare ante, § 210.

case the question of the applicability of the rule is regarded as dependent on whether the right of continued possession is given orally or in writing,¹⁵³ while in others it is regarded as dependent on whether the continued possession is on the same terms as before, it being in such case regarded as under a mere extension of the old lease, while it is under a new lease if the terms are different.¹⁵⁴

In two or three jurisdictions the doctrine that the acceptance of a new lease, not referring to the fixtures, involves a loss of the right of removal, has been repudiated.¹⁵⁵ As before suggested, in so far as in either of these jurisdictions removable fixtures may be regarded as personalty, this view seems the only possible one, and the judicial statements to the effect that the right of removal is not lost by the new lease seem in fact to be based on the theory that the fixtures are the personal effects of

¹⁵³ *Ex parte Hemenway*, 2 Lowell, 496, Fed. Cas. No. 6,346.

¹⁵⁴ *Crandall Inv. Co. v. Ulyatt*, 40 Colo. 35, 90 Pac. 59; *Ross v. Campbell*, 9 Colo. App. 38, 47 Pac. 465; *Royce v. Latshaw*, 15 Colo. App. 420, 62 Pac. 627; *Hedderich v. Smith*, 103 Ind. 203, 2 N. E. 315, 53 Am. Rep. 509; *Watriss v. Cambridge First Nat. Bank*, 124 Mass. 571, 23 Am. Rep. 694; *Estabrook v. Hughes*, 8 Neb. 496; *Young v. Consolidated Imp. Co.*, 23 Utah, 586, 65 Pac. 720; *Lynn v. Waldron*, 38 Wash. 82, 80 Pac. 292.

Where there is a stipulation for extension in the original instrument of lease, the tenant holds under the original lease during the extended term as before (*ante*, § 218), and there can be no question of his losing his right of removal by availing himself of the right to extend. *Howe's Cave Ass'n v. Houck*, 66 Hun, 205, 21 N. Y. Supp. 40; *Id.*, 141 N. Y. 606, 36 N. E. 740.

¹⁵⁵ *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, contains an

elaborate opinion to this effect by Cooley, J. There, however, the right of removal existed by reason of an express stipulation, and this would seem to render the articles annexed personalty (*see post*, § 243 c). This case is apparently approved in *Radey v. McCurdy*, 209 Pa. 306, 58 Atl. 558, 67 L. R. A. 359, 103 Am. St. Rep. 1009, though there the continued possession was regarded as under an "extension" of the lease. It is also approved in *Wittenmeyer v. Board of Education*, 10 Ohio Cir. Ct. R. 119, and the same view was asserted in *Devlin v. Dougherty*, 27 How. Pr. (N. Y.) 455. In *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907, also, the court refers with approval to the case first cited, though the decision is in terms, it seems, based on a presumption that the new lease, in that case, being intended to be temporary only, until a new lease was drawn up, did not include the fixtures.

In Maryland the former rule has been changed by statute. Code Pub. Gen. Laws 1904, art. 53, § 27.

the tenant,¹⁵⁶ without, however, any apparent recognition of the fact that the doctrine criticized involves the view that the tenant does not own the fixtures but has a mere right of removal.¹⁵⁷ In one case it was decided that the doctrine did not apply, in view of evidence that the language of the new lease was not intended to cover the fixtures, supported by a presumption from the relation of the parties that this was not intended.¹⁵⁸ It seems that when the description in such lease is general in terms, evidence would always be admissible to show that it was not intended by the parties that the fixtures should be covered thereby.¹⁵⁹

It has been held that the reason of the doctrine above discussed applies in case the tenant takes a contract for the sale to him of the premises, and thereafter remains in possession thereunder, it being decided that he thereby loses the right of removal,¹⁶⁰ and the same effect has been given to a contract between the landlord and tenant, made after the institution of an ejectment suit by the former against the latter, by which the former agreed not to issue a writ of possession for a certain period.¹⁶¹

§ 243. Stipulations granting rights of removal.

a. **General considerations.** Not infrequently the parties, by stipulation in the instrument of lease, or distinct therefrom, undertake to determine the tenant's right to remove annexations to the land. We will first consider the case of stipulations granting rights of removal and then of stipulations restricting such rights.¹⁶²

¹⁵⁶ When the fixtures as originally annexed by the tenant can be regarded as personalty by reason of an express stipulation giving the right of removal (post, § 243 c), it seems clear that the renewal lease does not operate upon them so as to deprive the tenant of the right of removal. *McCarthy v. Trumacher*, 108 Iowa, 284, 78 N. W. 1104, 75 Am. St. Rep. 254. See *Hertzberger v. Witte*, 22 Tex. Civ. App. 320, 54 S. W. 921.

150, 33 Am. Rep. 362; *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907.

¹⁵⁸ *Second Nat. Bank v. O. E. Merrill Co.*, 69 Wis. 501, 34 N. W. 514. Compare *Baringer v. Evenson*, 127 Wis. 36, 106 N. W. 801.

¹⁵⁹ See 4 Wigmore, *Evidence*, § 2465; *Amos & Ferard, Fixtures* (3d Ed.) 160.

¹⁶⁰ *Merritt v. Judd*, 14 Cal. 59.

¹⁶¹ *Fitzherbert v. Shaw*, 1 H. Bl. 258; *Heap v. Barton*, 12 C. B. 274.

¹⁶² Occasionally the lease in terms transfers to the lessee fixtures then

¹⁵⁷ See *Kerr v. Kingsbury*, 39 Mich.

A stipulation giving rights of removal has been assumed to displace entirely the common-law rights of the tenant in this regard,¹⁶³ so that if the stipulation gives a right to remove only at a certain time or under certain conditions, the tenant cannot assert a right to remove the article as a trade, domestic, or agricultural fixture, without reference to such restriction.

A stipulation granting to the tenant a right to remove an article annexed to the land is not within the fourth or seventeenth sections of the Statute of Frauds, and so need not be in writing,¹⁶⁴ though evidence of an oral stipulation in this regard may be inadmissible in the particular case under the "parol evidence rule," as bearing on a matter otherwise provided for in the instrument of lease.¹⁶⁵ Such a stipulation may even be inferred from circumstances.¹⁶⁶

If there is a stipulation clearly giving the tenant the right to remove annexations of a certain character, the fact that the removal will result in injury to the premises is necessarily immaterial.¹⁶⁷

on the premises belonging to the landlord, giving him the right of removal. See *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. 634; *O'Brien v. Mueller*, 96 Md. 134, 53 Atl. 633; *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110, 65 Am. St. Rep. 47.

¹⁶³ See *Allen v. Gates*, 73 Vt. 222, 50 Atl. 1092; *Lake Superior Ship Canal R. & Iron Co. v. McCann*, 86 Mich. 106, 48 N. W. 692. In *In re New York*, 101 App. Div. 527, 92 N. Y. Supp. 8, there is a dictum that a provision authorizing removal does not enlarge the right of removal which the lessee would otherwise have had. This is not always so, as the right of removal apart from stipulation is subject to various restrictions.

¹⁶⁴ *Broadbuss v. Smith*, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; *McCracken v. Hall*, 7 Ind. 30; *Gray v. Oyler*, 65 Ky. (2 Bush) 256; *South Baltimore Co. v. Muhlbach*, 69 Md.

395, 16 Atl. 117, 1 L. R. A. 545; *Powell v. McAshan*, 28 Mo. 70; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496.

¹⁶⁵ See *Tait's Ex'r v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697.

A stipulation, outside the lease, that a building erected by the lessee shall belong to the lessor, is not inconsistent with a recital in the lease of the intended erection of the building, or with a covenant therein that the lessee shall deliver up the premises in as good condition as at the time of the lease. *Ryder v. Faxon*, 171 Mass. 206, 50 N. E. 631, 68 Am. St. Rep. 417.

¹⁶⁶ *Gray v. Oyler*, 65 Ky. (2 Bush) 256; *Howard v. Fessenden*, 96 Mass. (14 Allen) 124; *Morris v. French*, 106 Mass. 326; *Ryder v. Faxon*, 171 Mass. 206, 50 N. E. 631, 68 Am. St. Rep. 417.

¹⁶⁷ *Hunt v. Potter*, 47 Mich. 197, 10 N. W. 198. See *Broadbuss v. Smith*, 121 Ala. 335, 26 So. 34, 77 Am.

Occasionally the lease gives the tenant in terms the right to remove fixtures only upon the performance of some condition precedent on his part.¹⁶⁸ A provision that the lessee shall have the right of removal, "all covenants being complied with" on his part, has been regarded as rendering the performance of the covenants a condition precedent to the removal, so that a tender of performance on condition that the lessor would permit the removal was insufficient.¹⁶⁹ The fact, however, that the lease gave a right to remove improvements only "if the conditions of this lease are fully complied with" was held not to render them irremovable in equity because the rent, stipulated to be paid in advance, was thirteen days in arrears before a tender thereof was made.¹⁷⁰

b. **Articles annexed with landlord's assent.** Ordinarily, if one annexes an article to another's land by the license or permission of the landowner, an agreement that the annexor may

St. Rep. 61, apparently to this effect. In *Lake Superior Ship Canal R. & Iron Co. v. McCann*, 86 Mich. 106, 48 N. W. 692, it is said that if there is a stipulation allowing removal, the mode of annexation is immaterial. In *Powell v. McAshan*, 28 Mo. 70, it was decided by a majority of two judges to one that a contract authorizing the removal of all buildings, sheds, and other temporary houses and improvements, did not authorize the removal of erections so connected with buildings already on the premises that they could not be removed without materially injuring the latter. This, however, was on a construction of the particular contract.

¹⁶⁸ See *Snowden v. Memphis Park Ass'n*, 75 Tenn. (7 Lea) 225.

¹⁶⁹ *Clemens v. Murphy*, 40 Mo. 121. So when the landlord agreed that the tenant might remove his improvements, "provided the rents are paid which may be due on the lease at its expiration," the payment of the

rent, as well as the expiration of the lease, were regarded as conditions precedent to removal. *Mathinet v. Giddings*, 10 Ohio, 364.

¹⁷⁰ *Estabrook v. Hughes*, 8 Neb. 496. Where the lease gave the tenant the right of removal at the expiration of the term provided he had paid the taxes, the right to the buildings, it was decided, was not lost to him because the tenancy came to an end before the expiration of the term in a way presumably not in contemplation of the parties, as by condemnation proceedings, with taxes unpaid, and he was held to be entitled to the damages paid in the condemnation proceedings for the things annexed. *Muller v. Earle*, 35 N. Y. Super. Ct. (3 Jones & S.) 461. Covenants by the lessee to pay taxes, and by the lessor to permit the removal of improvements, have been regarded as independent, the lease not in terms making them otherwise. *Strohmeyer v. Zeppenfeld*, 28 Mo. App. 268.

remove the article will be inferred,¹⁷¹ and there are some cases to the effect that a like rule applies if the landlord gives permission to the tenant to make erections.¹⁷² The fact, however, that the tenant has an interest in the land during which he may enjoy the benefit of the annexation would seem to render the inference less imperative than when the annexor has no interest therein.¹⁷³ The landlord's mere failure to object cannot be regarded as constituting a grant of permission for the purpose of such a rule.

c. **Effect as rendering articles personalty.** There are two modes in which a stipulation giving the tenant a right of removal might be considered as taking effect, that is, either by regarding the article annexed as a part of the realty belonging to the landlord, and the stipulation as giving a license to the lessee to come upon the premises and remove it, or by regarding the stipulation as preserving the chattel character of the article and the tenant's title thereto. The latter theory is that which has usually been adopted,¹⁷⁴ and this coincides with the view

¹⁷¹ See cases cited 13 Am. & Eng. Enc. Law (2d Ed.) p. 625.

¹⁷² *Osgood v. Howard*, 6 Me. (6 Greenl.) 452, 20 Am. Dec. 322; *Doak v. Wiswell*, 38 Me. 569; *Duff v. Snider*, 54 Miss. 245; *Schapira v. Barney*, 30 Minn. 59, 14 N. W. 270 (semble); *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907.

¹⁷³ That the fact that the annexor has an interest in the land may exclude the inference of a right of removal from the landlord's consent to the annexation, see *Cooper v. Adams*, 60 Mass. (6 Cush.) 87; *Howard v. Fessenden*, 96 Mass. (14 Allen) 124; *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491; *Holmes v. Standard Pub. Co.* (N. J. Eq.) 55 Atl. 1107; 13 Am. & Eng. Enc. Law, 626. In *McIver v. Estabrook*, 134 Mass. 550, it is decided that the lessor's consent to the erection of a building does not involve an agreement that it is not to be a fixture.

¹⁷⁴ *Scarth v. Ontario Power & Flat Co.*, 24 Ont. 446; *Broadbuss v. Smith*, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; *Lake Superior Ship Canal R. & Iron Co. v. McCann*, 86 Mich. 106, 48 N. W. 692; *Brearley v. Cox*, 24 N. J. Law, 287; *Mott v. Palmer*, 1 N. Y. (1 Comst.) 564; *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811; *White's Appeal*, 10 Pa. 252; *Wick v. Bredin*, 189 Pa. 83, 42 Atl. 17; *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554; *Handford v. Jackson*, 150 Mass. 149, 22 N. E. 634; *Adams v. Goddard*, 48 Me. 212; *Hershberger v. Johnson*, 37 Or. 109, 60 Pac. 838; *Stout v. Stoppel*, 30 Minn. 56, 14 N. W. 268; *Hartwell v. Kelly*, 117 Mass. 235; *Booth v. Oliver*, 67 Mich. 664, 35 N. W. 793; *Mott v. Palmer*, 1 N. Y. (1 Comst.) 564; *Wick v. Bredin*, 189 Pa. 83, 42 Atl. 17; *Adams v. St. Louis & S. F. R. Co.*, 138 Mo. 242, 28 S. W. 496, 29 S. W. 836.

In *In re Welch*, 108 Fed. 367, it is

ordinarily taken in regard to an article annexed by one having no interest in the land.¹⁷⁵ There are a few cases, however, which appear to regard an article annexed, by the tenant, though removable by agreement, as constituting a part of the land.¹⁷⁶ It seems that if the chattel is so closely annexed to the land as to become an integral part thereof, an agreement allowing the tenant to remove it might take effect merely as a license, and so not preserve the chattel character.¹⁷⁷

held that if a building is removable by agreement, machinery placed in the building is personalty.

¹⁷⁵ See cases cited 13 Am. & Eng. Enc. Law (2d Ed.) 622; Ewell, Fixtures, c. 3.

¹⁷⁶ In *Prescott v. Wells*, 3 Nev. 82, there is a dictum to that effect; and in *Trask v. Little*, 182 Mass. 8, 64 N. E. 206, it is said of an article annexed, which the tenant was in terms given the right to remove, that "we think that the character of the platform was such that as soon as erected it became a part of the realty and not a mere movable chattel." No reference is made to the possible effect of the stipulation as making the article personalty.

In *Newhoff v. Mayo*, 48 N. J. Eq. 619, 23 Atl. 262, 27 Am. St. Rep. 455, it is held that, though a building erected by the tenant is removable by him by agreement, he has an interest therein amounting to a "chattel real." In *Griffin v. Marine Co.*, 52 Ill. 130, it is held that a mortgage by the lessee of his leasehold interest and of improvements made by him which are removable by agreement is a mortgage of a chattel real, and not governed by the law as to mortgages of chattels; and in *Stafford v. Adair*, 57 Vt. 63, a mortgage on a building annexed by the lessee under such an agreement was held to be a mortgage of a "chattel real."

These cases all seem to assume that the article annexed becomes part of the land, in spite of the agreement. The phrase "chattel real" is ordinarily used at the present day as descriptive of an estate in land less than freehold, and the propriety of its application to a chattel personal which has, by annexation, become part of the land, may perhaps be doubted.

In *First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. 955, it was held that a provision in the lease that buildings to be erected by the lessee should be personal property did not make the building a personal chattel, so as to exclude it from the operation of a mortgage on the leasehold.

¹⁷⁷ It is so stated in *Hershberger v. Johnson*, 37 Or. 109, 60 Pac. 838, and there are numerous dicta so restricting the effect of an agreement for removal when a chattel is annexed by one having no interest in the land. See *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Ford v. Cobb*, 20 N. Y. 344; *Fortman v. Goepper*, 14 Ohio St. 558; *Henkle v. Dillon*, 15 Or. 610, 17 Pac. 148; *Hershberger v. Johnson*, 37 Or. 109, 60 Pac. 838; *German Sav. & Loan Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267.

As removable fixtures, even though regarded as part of the land, are subject to execution in favor of the creditors of the tenant,¹⁷⁸ so *a fortiori* articles which are removable by agreement, being in theory personalty, are subject thereto.¹⁷⁹

Articles removable by the tenant by agreement are not, it has been decided, a part of the land, so as to become subject to a mechanic's lien in favor of a third person.¹⁸⁰ But the mechanics' lien statute may in effect provide otherwise.¹⁸¹

d. **Validity in favor of and as against third persons.** There appear to be no decisions as to whether the right to remove an article annexed, under an agreement for removal, may be exercised by the assignee of the leasehold. Regarding the article as personalty and not as a part of the land,¹⁸² a transfer of the leasehold interest in the land would seem to be insufficient in itself to transfer such article, in which case the title thereto and the consequent right of removal would remain in the original lessee.^{182a} An express transfer of the article by the lessee would no doubt be operative in favor of the transferee and give him the right of removal.

A stipulation for the right to remove articles annexed by the tenant may be asserted by him, it has been decided, against one claiming under a prior mortgage made by the landlord, provided the security of the mortgage is not affected by such removal,¹⁸³

¹⁷⁸ See ante, at note 99.

¹⁷⁹ *Broadbuss v. Smith*, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61, is to this effect.

¹⁸⁰ *White's Appeal*, 10 Pa. 252. And see *Richardson v. Koch*, 81 Mo. 264.

¹⁸¹ See *Richardson v. Koch*, 81 Mo. 264; *Hart v. Globe Iron Works*, 37 Ohio St. 75. In *Dobschuetz v. Holliday*, 82 Ill. 371, it was decided that articles annexed, though removable by agreement, were part of the land, so that the person furnishing them was entitled to a mechanic's lien. The court says that the agreement of the parties to treat the article as personalty could not change the character of the property so far as third parties were concerned. This

seems equivalent to saying that its character was not changed, but that the parties had the right merely to treat it for certain purposes as personal property.

¹⁸² See ante, at note 175.

^{182a} But in *Kribs v. Alford*, 120 N. Y. 519, 24 N. E. 811, it was assumed that articles annexed by the lessee but removable by agreement pass under an assignment of the lease, it being held, however, that the assignee, in the particular case, took subject to a prior mortgage of the articles, as he had notice thereof.

¹⁸³ *Broadbuss v. Smith*, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042.

and this was held to be the case even though the stipulation was not made till after foreclosure, if made during the period for redemption.¹⁸⁴ It has been held, however, that the tenant cannot assert such right as against a subsequent lessee of the premises, who took his lease without notice of the agreement.¹⁸⁵ And the stipulation, if by a life tenant lessor, is not enforceable by the lessee, after the life tenant's death, as against the remainderman.¹⁸⁶

e. **Loss of benefit of stipulation—Time for removal.** If articles removable by agreement are to be regarded as personalty, in accordance with the view usually expressed,¹⁸⁷ it would seem to follow that the rule applying to the removal of fixtures, that in the absence of agreement they must be removed during the term, or at least before the tenant relinquishes possession, can have no application, and that the tenant has the same time for removal as if the articles were in no way physically annexed to the land, that, in other words, the tenant, though guilty of a trespass on the land if he undertakes to remove the fixtures after he relinquishes possession, retains the title to them, as does any other person whose personal property is on another's land, until he loses his right to recover them by the running of the limitation period.¹⁸⁸ This position, however, logical as it may be, is not in accordance with all the decisions, it having been held, in at least one jurisdiction, that the same rule in this regard applies, whether the articles are removable because annexed for the purpose of trade, or because of a stipulation to that effect.¹⁸⁹ It was held in one case, indeed, that even though the lessee of a gas well was given the right to remove appliances "at

¹⁸⁴ *Pioneer Sav. & Loan Co. v. Fuller*, 57 Minn. 60, 58 N. W. 831.

¹⁸⁵ *Trask v. Little*, 182 Mass. 8, 64 N. E. 206.

¹⁸⁶ *White v. Arndt*, 1 Whart. (Pa.) 91; *Haflick v. Stober*, 11 Ohio St. 482.

¹⁸⁷ See ante, at note 174.

¹⁸⁸ It is so decided in *Broadbudd v. Smith*, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61. And see *Lake Superior Ship Canal & Iron Co. v. McCann*, 86 Mich. 106, 48 N. W. 692, and *Atkinson & Dixon*, 96 Mo. 588, 10 S.

W. 162, to the effect that a right of removal by agreement is not lost by the expiration of the term. *Knight v. Orchard*, 92 Mo. App. 466, is to the effect that it is not lost by forfeiture of the term.

¹⁸⁹ *Lewis v. Ocean Nav. & Pier Co.*, 125 N. Y. 341, 26 N. E. 301; *Talbot v. Cruger*, 151 N. Y. 117, 45 N. E. 364; *Massachusetts Nat. Bank v. Shinn*, 18 App. Div. 276, 46 N. Y. Supp. 329; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554 (dictum).

any time," he could not remove them four years after the expiration of the lease, and five years and six months after the completion of the well and the ascertainment of its unproductive character.¹⁹⁰ So it has been decided that, when the lease provided that the lessee's improvements should belong to him and might be removed during the last sixty days of the term, his right of removal was lost by his failure to remove within the time named.¹⁹¹

It has been decided that a clause authorizing removal "at the end of the term" enables the tenant to remove within a reasonable time after the end of the term,¹⁹² though on the other hand it has been said that such a clause does not authorize a removal after the term.¹⁹³ Such a provision has also been held to authorize removal before as well as at the end of the term,¹⁹⁴ but not after a re-entry by the landlord for breach of condition.¹⁹⁵

¹⁹⁰ *Shellar v. Shivers*, 171 Pa. 569, Tenn. Ch. 576. But see *Ex parte* 33 Atl. 95. In *Churchill v. More*, 4 Cal. App. 219, 88 Pac. 290, such words were held to allow of removal over a year after abandonment of the well. In *Gartland v. Hickman*, 56 W. Va. 75, 49 S. E. 14, 67 L. R. A. 694, it was held that a lessee expressly given the right of removal "at any time" could remove fixtures within a "reasonable time" after the end of the lease.

¹⁹¹ *Hughes v. Kershow*, 42 Colo. 210, 93 Pac. 1116, 15 L. R. A. (N. S.) 723. There it was said that, upon the failure to remove the improvements within the time named they became "a part of the real estate."

¹⁹² *Stansfield v. Borough of Portsmouth*, 4 C. B. (N. S.) 120; *Caper-ton v. Stege*, 91 Ky. 351, 15 S. W. 870, 16 S. W. 84; *Davidson v. Crump Mfg. Co.*, 99 Mich. 501, 58 N. W. 475; *Bodwell Water Power Co. v. Old Town Elec. Co.*, 96 Me. 117, 51 Atl. 802; *Smith v. Park*, 31 Minn. 70, 16 N. W. 490; *Kuhlmann v. Meier*, 7 Mo. App. 260; *Cheatham v. Plinke*, 1

Gould, 13 Q. B. Div. 454. The lessee has the right during such time of ingress and egress for the purpose of removal (*Davidson v. Crump Mfg. Co.*, 99 Mich. 501, 58 N. W. 475), but no greater right (*Caperton v. Stege*, 91 Ky. 351, 15 S. W. 870, 16 S. W. 84).

¹⁹³ *Darrah v. Baird*, 101 Pa. 265, 272.

¹⁹⁴ *Alexander v. Touhy*, 13 Kan. 64.

¹⁹⁵ *Whipley v. Dewey*, 8 Cal. 36. So the issue of a warrant in summary proceedings for nonpayment of rent has been regarded as terminating the right of removal under such a clause. *Van Vleck v. White*, 66 App. Div. 14, 72 N. Y. Supp. 1026. But a right of removal "at any time" was held to continue a reasonable time after enforcement of forfeiture for nonpayment of rent. *Gartland v. Hickman*, 56 W. Va. 75, 49 S. E. 14, 67 L. R. A. 694.

A vote of the directors of a lessee corporation to "sell out" was held not to be a "discontinuance" with-

Regarding articles annexed under a stipulation for removal as remaining personalty, and so as not a part of the land, a forfeiture of the leasehold interest in the land will not deprive the tenant of the right of removal,¹⁹⁶ unless there is an express stipulation that it shall have that effect, or unless such forfeiture brings the case within the terms of a stipulation as to the time of removal.

The rule, before referred to,¹⁹⁷ that the making of a new lease will destroy the tenant's right of removal, is of doubtful application, it would seem, when this right is based on an express stipulation, since viewing the article as retaining its character of personalty belonging to the tenant, it would seem not to be subject to the operation of the new lease,¹⁹⁸ and, moreover, the lessee's continuance in possession by the owner's permission would ordinarily be presumed to be on the same terms as the original holding, except in so far as there is an express provision to the contrary,¹⁹⁹ and consequently he would still have the benefit of the provision for removal.²⁰⁰ There are, however, decisions to the effect that, if the lease is renewed, the tenant

in a provision that the lessee should have a year after "discontinuing and abandoning said business" within which to remove buildings. *Waterman v. Clark*, 58 Vt. 601, 2 Atl. 578.

¹⁹⁶ *Ex parte Gould*, 13 Q. B. Div. 454; *Scarth v. Ontario Power & Flat Co.*, 24 Ont. 446.

¹⁹⁷ See ante, § 242 g.

¹⁹⁸ It is so decided in *McCarthy v. Trumacher*, 108 Iowa, 234, 78 N. W. 1104, 75 Am. St. Rep. 254, and *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907, and *Hertzberg v. Witte*, 22 Tex. Civ. App. 320, 54 S. W. 921, tend to support this view. In *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, the articles were removable by agreement, but the opinion of Cooley, J., lays no weight on this, and does not suggest the possibility that the rule in such case may be different from that applicable in the

case of fixtures removable because intended for trade purposes. In *O'Brien v. Mueller*, 96 Md. 134, 53 Atl. 663, it was held that where the landlord sold to the tenant the fixtures on the premises at the time of the lease, agreeing that the latter should have the right to remove them, a subsequent renewal of the lease did not affect this right of removal, the court apparently considering that they were not a part of the realty and that consequently the renewal could not affect the right of removal.

¹⁹⁹ See ante, § 210 c.

²⁰⁰ To this effect, apparently, are *Clarke v. Howland*, 85 N. Y. 204; *Neiswanger v. Squier*, 73 Mo. 192. So where the extension was expressly subject to the same terms and conditions. *Young v. Consolidated Imp. Co.*, 23 Utah, 586, 65 Pac. 720.

loses the benefit of a provision in the former lease authorizing the removal of fixtures.²⁰¹

As in the case when articles are removable because affixed for purposes of trade,²⁰² if the landlord prevents the removal at the end of the term, or induces the tenant, by act or word, not to remove them, this is to be considered in determining the time within which the removal may be made,²⁰³ conceding that there is any limitation in this regard.

§ 244. Stipulations restricting rights of removal.

a. **General considerations.** In discussing stipulations granting rights of removal, it was stated that such a stipulation ordinarily displaces the common-law rules as to the right of removal, so that the effect thereof may be to limit the right which the tenant would have in the absence of any stipulation. So regarded, a stipulation in terms granting rights of removal is not infrequently of such character that it might be also classed under the head of stipulations restricting such rights. In addition, however, to such stipulations, which in form undertake to grant rights of removal, though their actual effect may be to narrow such rights, clauses are quite frequently introduced which in terms deprive the tenant of the right to remove annexations made by him. Such a clause, it has been said, should be strictly construed.²⁰⁴

The mere fact that the lessee has covenanted to repair the premises or the buildings and erections thereon, or to yield them

²⁰¹ *Unz v. Price's Adm'r*, 22 Ky. Law Rep. 791, 58 S. W. 705; *Hayes v. Shultz*, 33 Misc. 137, 68 N. Y. Supp. 340; *Talbot v. Cruger*, 151 N. Y. 117, 45 N. E. 364; *Nieland v. Mahnken*, 89 App. Div. 463, 85 N. Y. Supp. 809. In *Stephens v. Ely*, 162 N. Y. 79, 56 N. E. 499, it was held that the right to take advantage of a stipulation for removal, entered into after the making of the first lease, was lost when the lessee took a renewal lease. The latter lease provided that the lessee should return the premises in good condition, and authorized the lessee to make alterations, he agreeing to restore the building to its "present" condition, but the decision seems to be independent of these provisions.

²⁰² See ante, § 242 f.

²⁰³ *Chalifoux v. Potter*, 113 Ala. 215, 21 So. 322; *Cheatham v. Plinke*, 1 Tenn. Ch. 576.

²⁰⁴ *Fox v. Lynch*, 71 N. J. Eq. 537, 64 Atl. 439. See, for the construction of language giving a right to remove improvements upon payment therefor as precluding removal without such payment, *Brown v. Ward*, 119 Iowa, 604, 93 N. W. 587.

up in repair at the end of the term, should not, it seems, preclude the tenant from removing fixtures which he is otherwise entitled to remove, and there are decisions to that effect.²⁰⁵ Such a covenant would appear to be ordinarily intended to assure the return of the premises in the condition in which they were at the time of the lease, rather than to secure to the landlord additions thereafter made by the tenant. The covenant may, however, in the particular case, be susceptible of a different construction.²⁰⁶ That the removal would involve an injury to the premises has been regarded as rendering applicable a covenant to deliver up the premises in as good condition as at the time of the lease, so as to preclude the removal.²⁰⁷

That the lessee is given an option to purchase the premises at a price named does not prevent the removal by the tenant of fixtures annexed by him which are ordinarily removable,²⁰⁸ though if the lessee actually agrees to purchase the premises, and subsequently annexes fixtures, he is, it seems, to be regarded as making the annexation in the capacity of purchaser and not of tenant, and has not the right of removal.²⁰⁹ And when the lease, while giving the lessee a right to purchase the premises at a certain price, provides that, should he fail to do so, the fixtures shall go to the lessor, the fact that the lessee agrees to purchase the premises does not entitle him to the fixtures if he makes default in payment of the price.²¹⁰

That the landlord is, by the terms of the lease, required either to grant an extension of the term or to take the fixtures at a valuation, and that he does grant the extension, does not, it has been decided, affect the right of the tenant to remove the trade fixtures at the end of the extended term.²¹¹ Nor does the fact

²⁰⁵ Such is the view asserted in *Thresher v. East London Waterworks Co.*, 2 Barn. & C. 608.

Brown v. Reno Elec. Light & Power Co., 55 Fed. 229; *Deeble v. McMullen*, 8 Ir. C. L. 355; *Mason v. Fenn*, 13

²⁰⁷ *Murray v. Moross*, 27 Mich. 203.

Ill. 525; *Fox v. Lynch*, 71 N. J. Eq. 537, 64 Atl. 439. In *Argles v. McMath*, 23 Ont. App. 44, it is so decided in reference to a statutory covenant to leave in repair "with all buildings, erections and fixtures."

²⁰⁸ *Brown v. Reno Elec. Light & Power Co.*, 55 Fed. 229; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146.

²⁰⁹ *Perkins v. Swank*, 43 Miss. 349.

²¹⁰ *Merritt v. Judd*, 14 Cal. 59.

²¹¹ *Howe's Cave Ass'n v. Houck*, 66 Hun, 205, 21 N. Y. Supp. 40; *Id.*, 141 F. 2d 233 et seq.; *N. Y.* 606, 36 N. E. 740.

that the lessor has agreed to purchase the tenant's fixtures have that effect, it seems, if he does not offer to comply with the agreement.²¹²

A provision that alterations and improvements should belong to the lessor "at his option" was held not to require a notice of the exercise of the option to be given at the time that the alterations and improvements were made, and a notice to that effect given four weeks before the end of the term was regarded as sufficient.²¹³

b. **Stipulations as to "fixtures."** Sometimes the lease stipulates that "fixtures,"²¹⁴ or fixtures of a certain character,²¹⁵ annexed by the tenant, shall go to the landlord at the expiration of the term. The scope of the word "fixtures," as used in such a stipulation, may be limited by the context. Thus, in a covenant by the lessee to deliver up to the lessor at the end of the term certain classes of articles named, "and other fixtures and articles in the nature of fixtures, which should, at any time during the said term, be fixed or fastened to the said demised premises, or be thereto belonging," the word was construed, by reference to the articles specifically named, not to include fixtures ordinarily removable by the tenant.²¹⁶ And in a stipulation that the tenant should not remove "any repairs, improvements, additions or fixtures," the word "fixtures" was held to apply only to permanent ameliorations such as were covered by the other words used, and not to include trade fixtures.²¹⁷ The word as used

²¹² *Pawtucket Inst. for Savings v. Almy*, 13 R. I. 68. Here it was held that trover could be brought after the term by a person claiming under the tenant, though the machinery was to go to the lessor at the end of the term, he paying to the lessee the value of any machinery added by the latter.

²¹³ *Isman v. Hanscom*, 217 Pa. 133, 66 Atl. 329.

²¹⁴ See e. g., *Watson v. Lane*, 11 Exch. 769.

²¹⁵ See *Porter v. Drew*, 5 C. P. Div. 143.

²¹⁶ *Bishop v. Elliott*, 11 Exch. 113.

On the authority of this case, it was held in *Sumner v. Bromilow*, 34 Law J. Q. B. 130, that a covenant by the lessee to deliver up at the end of the term all the "fixed materials" in or about the premises, save and except "the salt pans and other movable articles," bound him to leave on the premises only such fixtures as belonged to the landlord at the time of the lease, and not such articles as a tenant is ordinarily entitled to remove.

²¹⁷ *Cubbins v. Ayres*, 72 Tenn. (4 Lea) 329.

in such a covenant would not, ordinarily at least, include articles not actually annexed to the soil.²¹⁸

c. **Stipulations as to "improvements."** A clause giving to the lessor all "improvements" placed by the tenant on the premises has been regarded as including every addition, alteration, erection or annexation made by the lessee, "improvements" being said to be a more comprehensive word than "fixtures."²¹⁹ In England a provision that the tenant shall yield up in repair, at the end of the term, the premises, together with all improvements and erections, has been regarded as including, in the particular case, a greenhouse,²²⁰ a verandah,²²¹ and a plate glass front substituted for a shop window, though not fastened except by wedges.²²² But a covenant to yield up the land "with all buildings and erections thereon in good repair and condition," with

²¹⁸ *Ex parte Morrow*, 1 Lowell, 386, Fed. Cas. No. 9,850.

²¹⁹ *French v. City of New York*, 16 How. Pr. (N. Y.) 220, 29 Barb. 363. The court further says: "Where the parties say that all improvements which may be placed on the premises shall belong to the lessors, it is difficult to say what, if anything, would be excluded," and the covenant was held to cover a number of things in no way annexed. In *Lesser v. Weyner*, 21 Misc. 666, 47 N. Y. Supp. 1102, the language of this case was approved, and it was held that a stipulation that all "improvements" should be delivered up to the landlord rendered stalls and partitions, affixed in sheds already on the premises by screws and cleats, irremovable by the tenant.

Mining machinery was held to be included in a covenant, in a lease of mining land, that the landlord should have "improvements that may be put on the ground for working the lead" (*Merritt v. Judd*, 14 Cal. 59), and a covenant that the tenant would leave the premises at the end of the term in as good con-

dition "as they may be made by improvements" was held to preclude the removal of buildings erected by him (*Carver v. Gough*, 153 Pa. 225, 25 Atl. 1124). A boiler in a brewery was held to be within a clause providing that "any alterations and improvements" should belong to the landlord (*Agnew v. Whitney*, 10 Phila. [Pa.] 77, 30 Leg. Int. 312); and a floor put in a skating rink was also regarded as an "improvement" (*Harris v. Kelly* [Pa.] 13 Atl. 523). In *Isman v. Hanscom*, 217 Pa. 133, 66 Atl. 329, it was decided that a clause, in a lease for restaurant purposes, giving the lessor "all alterations, additions, and improvements," "except movable furniture," gave him dumb waiters, wall decorations, ovens, toilet rooms, electric light apparatus, and inlaid floors.

²²⁰ *West v. Blakeway*, 2 Man. & G. 729.

²²¹ *Fenry v. Brown*, 2 Starkie, 403 ("erections, buildings and improvements").

²²² *Haslett v. Burt*, 18 C. B. 893 (ditto).

a proviso that the lessees "shall be at liberty during their tenancy to remove all such improvements * * * as shall be capable of removal without injury to the land itself," was held to allow the removal of a brick building placed on stone foundations, these latter being left undisturbed.²²³ In another jurisdiction, however, the word was apparently regarded as equivalent to "fixtures," it being said that, in order to come within such a clause, the thing in question must have been actually annexed with an intention to make it a part of the realty.²²⁴ In one case it was regarded as not including trade fixtures, consisting of counters and the like in an hotel.²²⁵ The word may obviously be limited in scope by the other language of the instrument.²²⁶

d. "Erections" and "additions." It has been held that a covenant by the lessee to deliver up at the end of the term "all future erections or additions" to or upon the premises did not

²²³ London & South African Exploration Co. v. De Beers Consol. Mines [1895] App. Cas. 451. ²²⁴ Attached to the building. *Parker v. Wulstein*, 48 N. J. Eq. 94, 21 Atl. 623, 27 Am. St. Rep. 462.

In *Martyr v. Bradley*, 9 Bing. 24, it was held that a covenant to leave, at the end of the term, the water mill leased, "with all fixtures, fastenings and improvements, during the demise, fixed fastened or set up in or upon the premises," included new mill stones set up by the lessee during the term. ²²⁵ *Cubbins v. Ayres*, 72 Tenn. (4 Lea) 329. It was there held that a stipulation against the removal of any "repairs, improvements, additions or fixtures" did not apply to trade fixtures consisting of a bar room counter and shelving, office counter, and safe, all in a hotel on the leased premises.

²²⁶ *Ames v. Trenton Brew. Co.*, 56 N. J. Eq. 309, 38 Atl. 858; *Id.*, 57 N. J. Eq. 347, 45 Atl. 1090 (bar counter and beer pump in saloon not "improvements"). In this same state, however, it was held that a provision that "all improvements of the building" should belong to the lessor included shelves nailed to boards fastened to the wall and resting on counters not fastened to the wall or floor, a furnace with hot air flues extending to holes cut in the floor, and awnings over the windows, placed by the lessee on hooks already at- ²²⁶ In *Hey v. Bruner*, 61 Pa. 87, there was a covenant by the lessees "to make alterations, additions and improvements of a permanent character," according to certain specifications, to an amount named, and to introduce machinery necessary for their business, "the permanent additions and improvements to remain on the premises" and "to belong to the" landlord, and it was held that the machinery affixed by the tenant did not go to the landlord.

preclude the removal of trade fixtures, but was to be confined to new buildings erected, or old buildings added to, during the term.²²⁷ And a provision that any addition or alteration to a certain frame building on the premises should belong to the lessor was construed as not applying to a brick engine house, not connected with the building except by belts and shafting, transmitting power to machinery in the building.²²⁸ But it has also been decided that a covenant by the lessee to yield up, at the end of the term, all erections and buildings then erected or built or that might thereafter be erected or built, included buildings erected for purposes of trade.²²⁹

e. **"Alterations."** Occasionally the word "alterations" is found in a stipulation of this character, either by itself or in connection with "improvements," or other word of the same general character. A stipulation against the removal of alterations and improvements has been regarded as including a boiler annexed by the tenant of a brewery,²³⁰ and also wainscot, ceiling and floors placed in a saloon.²³¹

f. **Stipulated improvements by tenant.** A provision in the lease that the lessee shall make improvements of a certain character is ordinarily construed as precluding him from removing them at the end of the term, it being presumed that such a provision is intended to benefit the lessor, and no such benefit accruing to him if the improvements are removable.²³²

²²⁷ *Holbrook v. Chamberlin*, 116 Mass. 115, 17 Am. Rep. 146. This case was followed in *Liebe v. Nicolai*, 30 Or. 364, 48 Pac. 172. And see *Cubbins v. Ayres*, 72 Tenn. (4 Lea) 329, ante, note 225.

²²⁸ *Smith v. Whitney*, 147 Mass. 479, 18 N. E. 229.

²²⁹ *Naylor v. Collinge*, 1 Taunt. 19.

²³⁰ *Agnew v. Whitney*, 10 Phila. (Pa.) 77, 30 Leg. Int. 312.

²³¹ *Center v. Everard*, 19 Misc. 156, 43 N. Y. Supp. 416. See also, as to the construction of a particular stipulation, *Smith v. Whitney*, 147 Mass. 479, 18 N. E. 229.

In *Andrews v. Day Button Co.*, 132 N. Y. 348, 30 N. E. 831, it was held

that a provision that the lessee should not make alterations, without the lessor's consent, applying only to substantial alterations, did not affect the right of the tenant to remove as a trade fixture an engine substituted by him for an old engine on the premises at the time of the lease, the old engine and the building being left intact.

²³² *Deane v. Hutchinson*, 40 N. J. Eq. 83, 2 Atl. 292; *City of New York v. Hamilton Fire Ins. Co.*, 23 N. Y. Super. Ct. (10 Bosw.) 537; *City of New York v. Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231; *Boyd v. Douglass*, 72 Vt. 449, 48 Atl. 638, 52 L. R. A. 919; *Pierce v. Grice*, 92 Va.

g. Title to articles during term. Where it is stipulated that articles, or certain classes of articles, ordinarily removable by the tenant, shall belong to the landlord upon the expiration of the term, the latter, it seems, acquires a vested interest in such articles immediately on their annexation. So it has been held that he has an interest which he may transfer.²³³ The tenant cannot remove such articles before the expiration of the term,²³⁴ nor can he affect the landlord's rights by undertaking to transfer the fixtures to a third person.²³⁵ The removal of things annexed or erected under such a stipulation has occasionally been regarded as waste,²³⁶ but in one case it was said that for such a removal the remedy is by an action on the contract rather than by an action for waste.²³⁷ The leasee, it has been decided, is under no

763, 24 S. E. 392; *Tunis Lumber Co. v. R. G. Dennis Lumber Co.*, 97 Va. 682, 34 S. E. 613. In accordance with the above rule, apparently, is *Ozark v. Adams*, 73 Ark. 227, 83 S. W. 920, where it was held that one who procured a lease of land for ninety-one years at a nominal rent, on his undertaking to erect and operate a manufactory thereon, could not remove any erections or annexations made by him in carrying out the agreement. The decision is, however, in terms, on the theory that the circumstances and the length of the lease showed an intention on his part not to remove them. It was perhaps on this theory that it was held in *Gett v. McManus*, 47 Cal. 56, that a brick house erected by the tenant belonged to the landlord, the lease providing that the tenant should pay for all improvements and surrender the possession of the premises at the end of the term.

²³³ *Thrall v. Hill*, 110 Mass. 328.

²³⁴ *Loeser v. Liebmann*, 137 N. Y. 163, 33 N. E. 147, 20 L. R. A. 752. There it was said that changes and substitutions in good faith, in the ordinary course, were permissible.

²³⁵ *Podlech v. Phelan*, 13 Utah, 333, 44 Pac. 838. In *Forbes v. Williams*, 46 N. C. (1 Jones Law) 393, it was held that if the lessee, having agreed not to remove any buildings until the rent was paid, sold a building to a third person, and before the rent was paid such third person removed it, the latter was liable to the lessor in damages to the amount of the overdue rent, while the lessee might be held in damages for the breach of his covenant.

²³⁶ *Bass v. Metropolitan West Side El. R. Co.*, 27 C. C. A. 147, 82 Fed. 857, 39 L. R. A. 711, where an injunction was issued against waste by the tenant in removing part of a building erected by him under such a stipulation. In *Cook v. Champlain Transp. Co.*, 1 Denio (N. Y.) 91, it was held that the tenant could recover against a third party negligently injuring things so annexed by the tenant, since he, the tenant, would be liable to the landlord as for waste in not preventing such injuries by the third person. Ante, § 110.

²³⁷ *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64.

obligation in such a case to replace the fixtures, for the benefit of the landlord, if destroyed by fire.²³⁸ Though the tenant is precluded by his agreement from removing the fixture, he has an interest therein to the same extent as in the land itself, which is the subject of mortgage by him.²³⁹

If the lease merely gives the fixtures to the landlord upon the happening of a particular contingency,²⁴⁰ or merely a right to take them at a valuation named or to be named,²⁴¹ he acquires, it seems, no title thereto until the contingency happens or payment is made.

Occasionally the lease provides that the fixtures annexed by the tenant shall become the property of the landlord in case the tenant makes default in the payment of rent or otherwise. Such a stipulation will, it seems, in case it is conditioned on the non-payment of rent, be regarded in equity merely as creating in favor of the landlord a lien upon the fixtures for the amount of the rent.²⁴²

A clause providing that if the tenant makes default in certain respects the landlord shall have the right to re-enter, and to seize the fixtures annexed by him, has been regarded as negating any right in the tenant to remove the fixtures during the term.²⁴³

²³⁸ *Clemson v. Trammell*, 34 Ill. App. 414. *Mont. 100, 27 Pac. 408. Compare ante, note 212.*

²³⁹ *French v. Prescott*, 61 N. H. 27.

²⁴⁰ *Lemar v. Miles*, 4 Watts (Pa.) 330.

²⁴¹ *Seitzinger v. Marsden*, 2 Penny. (Pa.) 463. But it was held that, where the lease provided that a building to be erected by the lessee should remain on the land, the lessor paying the cost of the materials, and the lease also provided for a forfeiture of the term on a default in rent, the building became a part of the realty and could not, after a default, be levied upon as personalty belonging to the lessee, although the materials had not been paid for by the lessor, rent being due to an amount exceeding the value of the materials. *Switzer v. Allen*, 11

Reaney v. Crary, 8 Ill. App. (8 Bradw.) 329; *Lewis v. Ocean Nav. & Pier Co.*, 125 N. Y. 341, 26 N. E. 201. But at law, the landlord is entitled to take possession of the fixtures upon the tenant's default. *Stamps v. Cooley*, 91 N. C. 316.

That the lease contained a clause mortgaging all buildings to be erected by the lessee to secure the rent, and that, after the lease and the buildings erected by the lessee had been transferred by the lessee to a third person, the lessor renewed the mortgage, was held to estop the latter from claiming the buildings. *Platto v. Gettleman*, 85 Wis. 105, 55 N. W. 167.

²⁴³ *Dumergue v. Rumsey*, 2 Hurl. & C. 777.

§ 245. Custom affecting rights of removal.

The rights of a tenant under a lease as to the removal of articles and structures annexed by him may be controlled by a local custom in this regard.²⁴⁴ This can occur, however, only in the absence of an express agreement bearing on the subject.²⁴⁵

§ 246. Rights of removal as against person other than lessor.

a. **Purchaser subsequent to annexation.** The right to remove a trade fixture may be asserted as against a transferee of the reversion, taking with knowledge that the fixture was annexed by the tenant,²⁴⁶ and the tenant has likewise been regarded as entitled to assert a right of removal under a stipulation of the lease, as against such a subsequent purchaser, taking with notice of the stipulation.²⁴⁷ The cases to the above effect, in stating that the tenant has a right of removal as against a subsequent purchaser with notice of the tenant's rights, would seem to imply that he has no such right as against a purchaser without notice. In a few states it is apparently the law that where, by agreement, one has the right to remove articles annexed by him to another's land, he may exercise such right as against a purchaser of the land even though the latter is without notice of the agreement,²⁴⁸ and presumably, in those states, the right of a tenant under a lease to remove fixtures, as against a purchaser of the land, would be independent of the question of notice.²⁴⁹ But conceding that, as

²⁴⁴ *Van Ness v. Pacard*, 27 U. S. (2 Pet.) 137; *Merritt v. Judd*, 14 Cal. 59; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Weathersby v. Sleeper*, 42 Miss. 732, 2 Am. Rep. 649; *Thomas v. Davis*, 76 Mo. 72, 43 Am. Rep. 756; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Keogh v. Daniell*, 12 Wis. 163; *Davis v. Jones*, 2 Barn. & Ald. 165; *Culling v. Tuffnal*, *Bulter's Nisi Prius*, 34.

²⁴⁵ *Martyr v. Bradley*, 9 Bing. 24; *Boyd v. Shorrocks*, L. R. 5 Eq. 72; *Roxburghe v. Robertson*, 2 Bligh 156; notes to *Wiglesworth v. Dallison*, 1 Smith's Leading Cases (11th Ed.) 545.

²⁴⁶ *Davis v. Buffum*, 51 Me. 160; *Wing v. Gray*, 36 Vt. 261.

²⁴⁷ *First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. 955; *Adams v. Tully*, 164 Ind. 292, 73 N. E. 595; *Wilgus v. Gettings*, 21 Iowa, 177; *Jones v. Cooley*, 106 Iowa, 165, 76 N. W. 652; *Morris v. French*, 106 Mass. 326; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Hertzberg v. Witte*, 22 Tex. Civ. App. 320, 54 S. W. 921.

²⁴⁸ See cases referred to in *Bronson, Fixtures*, 158; 13 Am. & Eng. Enc. Law, 628, 629.

²⁴⁹ *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23, 32 Am. Rep. 259, is apparently to this effect. See the cases stated post, note 254. And see, also, *Hanrahan v. O'Reilly*, 102 Mass. 201, post, note 251.

has occasionally been expressly decided, a purchaser should not be affected by a right of removal in a tenant which is unknown to him,²⁵⁰ it seems that in almost every case the purchaser should be regarded as chargeable, by the fact of the latter's possession of the land, with notice of his rights in this regard as well as of the character and duration of the lease. That is, a purchaser of land in the possession of a tenant should be required to ascertain, by inquiry of the tenant or otherwise, whether the improvements thereon are subject to a right of removal in the tenant. Otherwise, the tenant's common-law right to remove trade or ornamental fixtures would be of a most precarious character, as being subject to annulment at any time, without his consent, by

²⁵⁰ To this effect is *Landon v. Platt*, 34 Conn. 517; *Dostal v. McCaddon*, 35 Iowa, 318; *Canadian Bank of Commerce v. Lewis*, 12 B. C. 398. In *Trask v. Little*, 182 Mass. 8, 64 N. E. 206, it was decided that a subsequent lessee, taking without notice of an oral agreement by the owner allowing a prior lessee to remove his fixtures, could maintain an injunction against removal under such agreement. In this case the first lessee had relinquished possession before the second lease was made, and so the latter could not have been charged with notice from possession, but the court does not refer to this. That the tenant loses the right of removal as against a purchaser without notice is apparently assumed in occasional decisions that a conveyance by the lessor, without excepting the fixtures, constitutes a conversion of the fixtures as against the tenant. See *Bircher v. Parker*, 43 Mo. 443; *Smyth v. Stoddard*, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314. That such a conveyance does not constitute a conversion is well stated in *Davis v. Buffum*, 51 Me. 160. *Walsh v. Sichler*, 20 Mo. App. 374, and to that effect are the cases in which it is assumed or decided that the right of removal may be exercised against the lessee's transferee. In *Smyth v. Stoddard*, 203 Ill. 424, 67 N. E. 980, supra, the lease provided that the lessee should have the right to remove erections at the end of the term or receive compensation therefor, and it was held that a sale of the land by the lessor without excepting the erections involved a conversion of the barn, entitling the lessee to recover the value thereof from the lessor. The same result might perhaps have been attained by regarding the sale as an election to pay compensation rather than to allow removal, making the lessor liable for the value. Adopting the theory that an article removable by agreement is personally (ante, at note 174), the sale of the land would seem not to transfer the erection, but to leave the title thereto unchanged.

In *Union Cent. Life Ins. Co. v. Tillery*, 152 Mo. 421, 54 S. W. 220, 75 Am. St. Rep. 480, it was held that, as against a purchaser under a deed of trust given by the landlord to secure a debt, an article annexed by the tenant subsequently to the making of such deed, under a stipulation allowing its removal, could not be removed, the purchaser having taken without notice of the agreement.

the making of a conveyance by the landlord to one without actual notice of the tenant's rights.²⁵¹

The tenant will no doubt lose his right of removal, as against the lessor's transferee, by reason of any lapse of time or other circumstances, which would have deprived him of the right had the reversion remained in the original lessor.²⁵²

b. **Person claiming under mortgage subsequent to annexation.** As against one to whom a mortgage of the reversion is made after the tenant's annexation of the article in question, the tenant has, it seems clear, the same right of removal as he would have against a subsequent purchaser, that is, he can remove the article, pro-

²⁵¹ This view is stated by Aldis, J., in *Wing v. Gray*, 36 Vt. 261, as follows: "His (the tenant's) possession was notice to the plaintiff (the purchaser) so as to put him on inquiry as to the right by which the defendant possessed and his relation to the grantor; and the plaintiff must be deemed to be affected with knowledge of the facts he would have ascertained upon inquiry, that is, that the defendant was a tenant having the right to carry on the farm for a year. This right he was not bound to put on the record, and his landlord by selling the land could not defeat any rights he had as tenant. The defendant was not bound to know of, or search the records for, a subsequent conveyance from his landlord to a third person, or to omit the exercise of any right granted by the lease because the landlord might thereafter sell the farm. A subsequent grantee would take the land subject to the rights of the tenant under the lease. The lease so far as it went was as operative as the subsequent deed, and being prior in time and accompanied by possession, all the tenant's rights as against the landlord continued as against his landlord's grantee."

The same view is adopted in *Royce v. Latshaw*, 15 Colo. App. 420, 62 Pac. 627 (see post, note 253), and to some extent, apparently, in *Dubois v. Kelly*, 10 Barb. (N. Y.) 496. In *Hanrahan v. O'Reilly*, 102 Mass. 201, the tenant was allowed to remove trade fixtures as against his landlord's transferee, and it was apparently regarded as immaterial that the transferee had no actual notice of the tenant's rights. The view that the tenant's possession is constructive notice of his rights as to fixtures is, however, perhaps, opposed to *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675, and the earlier Vermont case of *Powers v. Dennison*, 30 Vt. 752, holding that the possession of one who has built on another's land with an express agreement for the right of removal is not notice to a purchaser of the land in regard to his rights.

²⁵² *Bliss v. Whitney*, 91 Mass. (9 Allen) 114, 85 Am. Dec. 745. In *Davis v. Carsley Mfg. Co.*, 112 Ill. App. 112, it was held that one claiming under a contract of purchase from the lessor, though a conveyance had not been made to him, could restrain by injunction a removal by a tenant who had lost the right by taking a new lease.

vided the mortgagee took with notice, actual or constructive, of the tenant's rights in this regard.²⁵³ And he would, as against one claiming under a sale at foreclosure of the mortgage, have the same rights, no doubt, as against the mortgagee himself.²⁵⁴

c. **Person claiming under mortgage prior to annexation.** The question of the right of the tenant to remove a fixture, as against a mortgage made by the owner of the land prior to the annexation, may arise under two distinct states of fact, that is, the lease under which the tenant holds may have been made before, or it may have been made after, the mortgage. When the lease was made before the mortgage, it seems that the tenant's rights of removal, whether existing by reason of a stipulation to that effect, or by reason of the character of the article annexed, as being either a trade, ornamental, or agricultural fixture, cannot be affected by the fact that the landlord has chosen subsequently to make a mortgage on the land. One who takes a mortgage takes it subject to any outstanding lease of which he has actual or constructive notice,²⁵⁵ and so, it seems, he must take it subject to any existing stipulations for removal which appear in the lease itself, and also subject to the recognized right of a tenant to annex and remove at pleasure certain classes of articles.²⁵⁶

²⁵³ In *Royce v. Latshaw*, 15 Colo. App. 420, 62 Pac. 627, it is said that it is immaterial whether the mortgagee had notice that the article was a trade fixture, since he could not acquire any interest other than what the mortgagor had, and "besides, the very character of the structure, and of the business carried on there in, were sufficient to put him on inquiry."

²⁵⁴ *Bartlett v. Haviland*, 92 Mich. 552, 52 N. W. 1008, is apparently to this effect. In *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23, 32 Am. Rep. 259, it was held that, as against one purchasing at foreclosure of a mortgage by the landlord, made after the annexation, the tenant could assert his right of removal as if against the lessor. It is stated that, at the foreclosure sale, notice was given

of the tenant's rights, but no reference to the question of notice is made in the opinion. In New York, apparently, a subsequent purchaser or mortgagee of land takes subject to a right of removal by agreement in a third person, irrespective of notice (*Mott v. Palmer*, 1 N. Y. [1 Comst.] 564, 49 Am. Dec. 359; *Ford v. Cobb*, 20 N. Y. 344; *Godard v. Gould*, 14 Barb. [N. Y.] 662; *Kerby v. Clapp*, 15 App. Div. 37, 44 N. Y. Supp. 116), and the case referred to seems to accord with this view.

²⁵⁵ See ante, § 146 a, at notes 1-5.

²⁵⁶ In *Union Terminal Co. v. Wilmar & S. F. R. Co.*, 116 Iowa, 392, 90 N. W. 92, it was held that a receiver who rebuilt a trade fixture with the proceeds of insurance, upon its destruction by fire, could remove it as against one claiming un-

Otherwise a tenant, after taking a lease with the expectation of placing removable fixtures thereon, could be at any time deprived of the right so to do by the making of a mortgage by the lessor. The mortgagee should not, however, it seems, be affected by any stipulation as to removal made after the taking of his mortgage.

In case the lease was made after the mortgage, the question whether the tenant annexing an article should be allowed to remove it as against the mortgagee might, it seems, depend to some extent on the legal character of a mortgage in that jurisdiction. If the mortgage constitutes merely a lien, the mortgagor, retaining the legal title, has the right to make a lease, which is valid as against the mortgagee, in so far as it does not affect his security, and a tenant holding under the lease would have the same right to annex and remove fixtures as if no mortgage had been given, provided only that their removal does not render the premises less valuable as a security than they were at the date of the mortgage.²⁵⁷ But this view, that if the mortgage creates merely a lien the mortgagor's tenant has the right of removal, is not in accord with a number of decisions, rendered in states where such is the effect of a mortgage, that a mortgagor cannot remove articles annexed by himself,²⁵⁸ since, it would seem, the mortgagor's

der a mortgage subsequent to the lease.

²⁵⁷ In *Pioneer Sav. & Loan Co. v. Fuller*, 57 Minn. 60, 58 N. W. 831, it was held that the mortgagor might, during the year of redemption after foreclosure, agree with his lessee that an article to be affixed by the latter might be removed by him. The lease was subsequent to the mortgage, and indeed subsequent to the foreclosure sale, but the court makes no reference to this fact. In *Ferris v. Quimby*, 41 Mich. 202, 2 N. W. 9, the tenant's right to remove an article as against a subsequent mortgagee seems to be based on the theory that in that case the article did not become part of the realty. The decision in *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, 29 L. R. A. 446, to the effect that a mortgagor cannot authorize an-

other person to annex and remove fixtures as against a prior mortgagee of the land, would seem to be adverse to his right to enable a tenant to do so, although in that state a mortgagee has merely a lien. Compare *Sprague Nat. Bank v. Erie R. Co.*, 22 App. Div. 526, 48 N. Y. Supp. 85; *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93, to the effect that the mortgagor's tenant has the right of removal.

²⁵⁸ See e. g., *Seedhouse v. Broward*, 34 Fla. 509, 16 So. 425; *Cunningham v. Cureton*, 96 Ga. 489, 23 S. E. 420; *Bowen v. Wood*, 35 Ind. 268; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Mutual Ben. Life Ins. Co. v. Huntington*, 57 Kan. 744, 48 Pac. 19; *Dutro v. Kennedy*, 9 Mont. 101, 22 Pac. 763.

tenant can have no greater rights as to removal than the mortgagor.

Conceding that a tenant holding under a lease made by the mortgagor may, in jurisdictions where the mortgagee has a lien only, remove articles annexed by him so long as his right of possession continues, the question arises of the effect of a foreclosure of the mortgage upon this right of removal. Since a foreclosure sale vests the title to the premises in the purchaser as of the date of the mortgage, free from the operation of any conveyances made or incumbrances imposed by the mortgagor after that date,²⁵⁹ any rights by reason of a subsequent lease would seem immediately to become nonexistent as to him, and among such rights would be the tenant's right to remove fixtures. As regards the subsequent lessee, the purchaser at foreclosure acquires a paramount title, and the tenant has no more rights as against him than as against any other holder of a paramount title.²⁶⁰

In jurisdictions where the common-law conception of a mortgage as a conveyance of the legal title to the mortgagee is still retained, a subsequent lease by the mortgagor is a nullity as against the mortgagee,²⁶¹ and consequently it would seem questionable whether the mortgagor could, by making a lease, enable another to annex and remove articles as against the mortgagee. The view that he cannot do so would seem to be necessarily adopted in those jurisdictions in which the courts hold that a mortgagor of land has no power, though remaining in possession, to make an agreement with a third person, such as the vendor of a chattel, by which a chattel annexed shall remain the property of such person.²⁶² In one of such jurisdictions it has accord-

²⁵⁹ 2 Jones, Mortgages, § 1654.

²⁶⁰ See ante, § 73 c. But there are two decisions in the New York intermediate courts of appeal to the effect that, as against a purchaser at foreclosure, the tenant under a subsequent lease has the right of removal. *Sprague Nat. Bank v. Erie R. Co.*, 22 App. Div. 526, 48 N. Y. Supp. 65; *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93. These cases appear inconsistent with *McFadden v. Allen*, 134 N. Y. 489,

22 N. E. 21, 19 L. R. A. 446, supra, note 257.

²⁶¹ See ante, § 73 b.

²⁶² As in Massachusetts (*Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105, 9 L. R. A. 122, 23 Am. St. Rep. 819), Wisconsin (*Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 60, 84 Am. St. Rep. 867), and England (see cases cited *infra*, note 264). This view is apparently adopted in New

ingly been held that the mortgagee's rights are superior to those of a subsequent lessee annexing a trade fixture,²⁶³ though in another there is a contrary decision.²⁶⁴

In those jurisdictions in which, though a mortgagee has the legal title, an agreement by the mortgagor with a third person, upon the annexation of a chattel, that he may remove it, is regarded as effective as against the mortgagee,²⁶⁵ a mortgagor might perhaps be regarded as empowered to confer on another the same privilege of removing articles annexed by making a lease to such other. The removal is no more injurious to the mortgagee in the latter case than in the former. There are occasional decisions in accordance with this view,²⁶⁶ but it is somewhat difficult to reconcile this position with the numerous decisions that a mortgagor cannot himself remove annexations which

Yerk, though there a mortgage creates merely a lien. *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446.

²⁶³ *Lynde v. Rowe*, 94 Mass. (12 Allen) 100. It was there said that "the mortgagor cannot create a tenancy after the execution of the mortgage, which will be valid against the mortgagee, unless the mortgagee chooses to recognize the tenant as such."

²⁶⁴ *Sanders v. Davis*, 15 Q. B. Div. 218. This case, although approved in *Gough v. Wood* [1854] 1 Q. B. 713, seems clearly inconsistent with the later cases of *Hobson v. Corrinse* [1897] 1 Ch. 183, and *Reynolds v. Ashby* [1903] 1 K. B. 87, in which it is held that the mortgagor has no authority to agree with a third person that an article to be annexed by him shall be removable, as against the mortgagee who thereafter enters into possession. In *Thomas v. Jennings*, 66 Law J. Q. B. 5, it was held that the lessor could not, as against one claiming

under a mortgage made subsequent to the lease, authorize the lessee to remove fixtures after the latter's relinquishment of possession at the end of the term.

²⁶⁵ As in Alabama (*Warren v. Liddell*, 110 Ala. 232, 20 So. 891, New Jersey (*Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889), Pennsylvania (*Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209), and Vermont (*Davenport v. Shants*, 43 Vt. 546; *Buzzell v. Cummings*, 61 Vt. 213, 18 Atl. 93).

²⁶⁶ *Brondus v. Smith*, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042. In *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655, it was held that the fixtures were removable as against a prior mortgagee of the land, even though the lessee had transferred them to the mortgagor, the latter, as a part of the same transaction, having transferred them to a trustee to secure payment to the lessee of the purchase price.

he may make,²⁶⁷ since, if he cannot himself annex and remove fixtures, he should not be able to empower others to do it.

§ 247. Rights of removal by person other than lessee.

It appears never to have been questioned that one to whom the leasehold has been assigned has the same right as the lessee had before assignment to remove articles annexed by himself.

The right to remove a fixture may be exercised by one to whom a tenant, after making the annexation, has undertaken to transfer the fixture, either absolutely²⁶⁸ or by way of mortgage.²⁶⁹ And so, it seems, regarding a removable fixture as part of the land, one to whom the leasehold interest is transferred after the annexation may remove the article annexed.²⁷⁰ In all such cases, however, though the transfer by the lessee is nominally of the fixture itself, what is really transferred is, it seems, merely the right of removal.²⁷¹ That an assignment of the leasehold was in violation of a covenant of the lease has been held not to deprive the assignee of the right to remove a house erected by the lessee, such covenant not appearing to be intended to control the sale of the house, and the assignee having paid a considerable sum for the assignment.²⁷²

A judgment creditor of the tenant may, as has been before stated, exercise the right of removal after levying upon the fixtures as personalty.²⁷³

A creditor,²⁷⁴ or other person claiming under the tenant,²⁷⁵

²⁶⁷ See cases cited *Bronson, Fixtures*, § 60; 13 Am. & Eng. Enc. v. Shinn, 18 App. Div. 276, 46 N. Y. Law, 670, note 3. ²⁶⁹ See ante, at note 94.

²⁶⁸ *Ballou v. Jones*, 37 Ill. 95; *Ward v. Earl*, 86 Ill. App. 635; *Osgood v. Howard*, 6 Me. (6 Greenl.) 452, 20 Am. Dec. 322; *Shapira v. Barney*, 30 Minn. 59, 14 N. W. 270; *Union Terminal Co. v. Wilmar & S. F. R. Co.*, 116 Iowa. 392, 90 N. W. 92; *Talbot v. Whipple*, 96 Mass. (14 Allen) 177; *Lanphere v. Lowe*, 3 Neb. 131; *Higgins v. Riddell*, 12 Wis. 587, 78 Am. Dec. 762; *McMath v. Levy*, 74 Miss. 450, 21 So. 9, 523. ²⁷⁰ See ante, at note 100.

²⁷¹ *Upton v. Hosmer*, 70 N. H. 493, 49 Atl. 96. ²⁷² See ante, at notes 98, 99. ²⁷³ *Minshall v. Lloyd*, 2 Mees. & W. 450; *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611; *Donnewald v. Turner Real Estate Co.*, 44 Mo. App. 250; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700; *Thropp's Appeal*, 70 Pa. 395.

²⁶⁹ *Wintermute v. Light*, 46 Barb. (N. Y.) 278; *Denham v. Sankey*, 38 ²⁷⁵ *Menger v. Ward* (Tex. Civ.

has ordinarily no right of removal if the tenant would not have such right. So it has been held that if the tenant would have no right of removal owing to the expiration of the tenancy, or his relinquishment of possession, one to whom he has sold²⁷⁶ or mortgaged²⁷⁷ the article would not have such right. Such a person may likewise lose his right of removal by the taking of a new lease.²⁷⁸

One to whom the right to a removable fixture has been transferred by sale or mortgage is not, it has been decided, deprived of his right of removal by the fact that the tenant, after the sale or mortgage, surrenders his leasehold interest to the landlord,²⁷⁹ this being in accord with the recognized rule that a stranger cannot be adversely affected by a surrender.²⁸⁰ An English judge has decided, upon the analogy of these decisions, that the mortgagee of a chattel was not deprived of the right of removal by reason of a declaration of forfeiture based upon a purely voluntary act on the part of the tenant.²⁸¹

App.) 28 S. W. 821 (Article intended by tenant not to be removed held not removable by his mortgagee); 53 N. W. 187. But see *In re Glasdir Copper Mines* [1904] 1 Ch. 819, post, note 281.

Miller v. Gray, 29 Tex. Civ. App. 183, 68 S. W. 517 (House which it is agreed shall belong to the lessor cannot be removed by the lessee's transferee).

²⁷⁶ *Marks v. Ryan*, 63 Cal. 107; *Gaffield v. Hapgood*, 34 Mass. (17 Pick.) 192, 28 Am. Dec. 290; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554.

²⁷⁷ *Talbot v. Whipple*, 96 Mass. (14 Allen) 177; *Smith v. Park*, 31 Minn. 70, 16 N. W. 490; *Free v. Stuart*, 39 Neb. 220, 57 N. W. 991; *Fuller v. Brownell*, 48 Neb. 145, 67 N. W. 6; *Massachusetts Nat. Bank v. Shinn*, 18 App. Div. 276, 46 N. Y. Supp. 329; *Id.*, 103 N. Y. 360, 57 N. E. 611. So a purchaser at a sale under mortgage of a fixture annexed by the tenant cannot remove it if the tenant would not have such right. *Ozark v. Adams*, 73 Ark. 227, 83 S. W. 920; *Sweet v. Myers*, 3 S. D. 324,

²⁷⁸ See ante, at notes 145-147.

²⁷⁹ *London & Westminster Loan & Discount Co. v. Drake*, 6 C. B. (N. S.) 798; *Saint v. Pilley*, L. R. 10 Exch. 137; *Dobschuetz v. Holliday*, 82 Ill. 371; *Adams v. Goddard*, 48 Mo. 212. And see *Free v. Stuart*, 39 Neb. 220, 57 N. W. 991. But *Talbot v. Whipple*, 96 Mass. (14 Allen) 177, is to the contrary.

In *Thropp's Appeal*, 70 Pa. 395, it was held that a surrender by the lessee for a valuable consideration took effect as against a prior levy of execution on a removable fixture, made by a creditor of the lessee, the lessor not knowing of the levy, it being said that if he had known of the levy the result would have been otherwise.

²⁸⁰ See ante, § 191 b.

²⁸¹ *In re Glasdir Copper Mines* [1904] 1 Ch. 819.

It has been held in several cases that if the tenant holding under a lease annexes a chattel which he has procured from a third person under an agreement that the title shall remain in the latter,²⁸² or on which he has given a chattel mortgage to a third person,²⁸³ the rights of such third person take precedence of the rights of the lessor to claim the article annexed. Presumably, however, if the removal of the article would cause injury to the premises, such person, as having put it in the tenant's power, by allowing him to have possession of the article, to annex it to the land, would be allowed to remove it only upon reimbursing the lessor for such injury. It has been decided that the lessor has no right, upon a re-entry for breach of condition, to claim machinery affixed by the lessee, as against the statutory lien of the seller thereof.²⁸⁴

§ 248. Remedies.

Adopting the theory that structures or articles annexed by the tenant, which are removable by him because within the class of trade, domestic and ornamental, or agricultural fixtures, are part of the realty until severed,²⁸⁵ it would follow that, so long as they remain unsevered, they are not the subject of conversion, and so it has been decided that an action of trover cannot be brought by the tenant against the landlord because he wrongfully prevents the removal of trade fixtures.²⁸⁶ In other cases, however, the courts, regarding removable fixtures as personalty,²⁸⁷ have held that the tenant may maintain trover in case the landlord prevents their removal by him.²⁸⁸ In case the right to re-

²⁸² *Medicke v. Sauer*, 61 Minn. 15, 63 N. W. 110; *Wetherill v. Gallagher*, 217 Pa. 622, 66 Atl. 849; *Best Mfg. Co. v. Cohn*, 3 Cal. App. 657, 86 Pac. 829; *Joseph Hall Mfg. Co. v. Hazlitt*, 11 Ont. App. 749. But *Kaestner v. Day*, 65 Ill. App. 623, seems contra.

²⁸³ *Hewitt v. General Elec. Co.*, 164 Ill. 420, 45 N. E. 725; *Metropolitan Concert Co. v. Sperry*, 9 N. Y. St. Rep. 342; *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655.

²⁸⁴ *Marinette Iron Works Co. v. Cody*, 108 Mich. 381, 66 N. W. 334.

²⁸⁵ See ante, at note 83.

²⁸⁶ *Minshall v. Lloyd*, 2 Mees. & W. 450; *Mackintosh v. Trotter*, 3 Mees. & W. 184; *Roffey v. Henderson*, 17 Q. B. 575; *Guthrie v. Jones*, 108 Mass. 191, 11 Am. Rep. 335; *Brown v. Wallis*, 115 Mass. 156; *Radcliff v. Arnold*, 116 Mass. 270. See *Overton v. Williston*, 31 Pa. 155.

²⁸⁷ See ante, at note 82.

²⁸⁸ See *Finney v. Watkins*, 13 Mo. 291; *Lewis v. Ocean Nav. & Pier Co.*, 125 N. Y. 341, 26 N. E. 301; *Moore v. Wood*, 12 Abb. Pr. (N. Y.) 393; *Rosenau v. Syring*, 25 Or. 386, 35

move articles is based on agreement, it seems that they are properly to be regarded as personalty,²⁸⁹ and are consequently the subject of conversion.²⁹⁰

The right of the tenant to maintain replevin for fixtures, in case the landlord refuses to allow their removal, is also dependent upon whether, in that particular jurisdiction, a removable fixture can be regarded as personal property.²⁹¹

In case the tenant removes articles annexed by him which he has no right to remove, he is liable to the landlord as for a conversion,²⁹² or the latter may, it seems, bring trespass *de bonis asportatis*,²⁹³ or he may recover the articles by an action of replevin,²⁹⁴ provided they have not been annexed to other land and so again lost their chattel character.

The landlord may obtain an injunction to restrain the wrongful removal of fixtures by the tenant, or one claiming under him, if this removal is calculated to cause irreparable injury,²⁹⁵ and not otherwise, it has been said.²⁹⁶ It was decided that an injunction would issue when the tenant threatened to remove an addition to a building and this removal would leave the building open to the elements,²⁹⁷ and when a sale of the fixtures under execution was threatened by the sheriff, the threatened injury being irreparable and partaking of the nature of waste.²⁹⁸ An

Pac. 844; *Watts v. Lehman*, 107 Pa. 106; *Vilas v. Mason*, 25 Wis. 310; *Eldridge v. Hoefer*, 45 Or. 239, 77 Pac. 874.

²⁸⁹ See ante, at note 174.

²⁹⁰ See *Chalifoux v. Potter*, 113 Ala. 215, 21 So. 322; *Stout v. Stoppel*, 30 Minn. 56, 14 N. W. 268; and cases cited 13 Am. & Eng. Enc. Law, 679, note 2.

²⁹¹ See *Raymond v. Strickland*, 124 Ga. 504, 52 S. E. 619, 3 L. R. A. (N. S.) 69.

²⁹² *Weeton v. Woodcock*, 7 Mees. & W. 14; *McNally v. Connolly*, 70 Cal. 3, 11 Pac. 320; *Morgan v. Negley*, 3 Pittsb. R. (Pa.) 33.

²⁹³ See *Ewell, Fixtures* (2d Ed.) 424; 13 Am. & Eng. Enc. Law (2d Ed.) 681.

²⁹⁴ *Anderson v. Happler*, 34 Ill. 436, 85 Am. Dec. 318.

²⁹⁵ See *Sunderland v. Newton*, 3 Sim. 450; *Hamilton v. Stewart*, 59 Ill. 330; *Nolan v. Rotsler*, 135 Cal. 264, 67 Pac. 127. Compare ante, § 109 b (2).

²⁹⁶ *Hamilton v. Stewart*, 59 Ill. 330. But see *Brigham v. Overstreet*, 128 Ga. 447, 57 S. E. 484, 10 L. R. A. (N. S.) 452, to the contrary, provided the removal would constitute waste. And see ante, § 109 b (2), as to injunctions against waste.

²⁹⁷ *Fortescue v. Bowler*, 55 N. J. Eq. 741, 38 Atl. 445. See *Camp v. Chas. Thatcher Co.*, 75 Conn. 165, 52 Atl. 953.

²⁹⁸ *Richardson v. Ardley*, 38 Law J. Ch. 508.

injunction has also issued to restrain removal pending an action at law to ascertain the rights of the parties.²⁹⁹ An injunction was refused, however, when the fixtures sought to be removed had been substituted for others belonging to the lessor, it being said that the lessor's claim to such substituted fixtures, conceding that it was justified, was "based on strict legal right as to the result of substitution."³⁰⁰

²⁹⁹ *Sunderland v. Newton*, 3 Sim. ³⁰⁰ *Fox v. Lynch*, 71 N. J. Eq. 537, 450; *Baker v. National Biscuit Co.*, 64 Atl. 439.
96 Ill. App. 228.

CHAPTER XXIV.

CROPS.

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§ 249. Tenant entitled to crops and annual fruits.

A lease, like any other conveyance of a present estate in land,¹ transfers the right to the vegetable products of the soil which are growing at the time, unless they are expressly excepted from its operation.² And since the tenant under the lease is given

¹ See 1 Tiffany, Real Prop. § 226. *Broughton v. Powell*, 52 Ala. 123;

² *Robinson v. Kruse*, 29 Ark. 575; *Tuttle v. Langley*, 68 N. H. 464, 39

the full right of possession and enjoyment of the premises, he is also entitled to such vegetable products as may be the result of his own planting during the tenancy, "*fructus industriales*," as they are sometimes called.³ The fact that the tenant had the benefit of the crop growing at the time of the lease in no way affects his rights as to subsequent crops, even though the effect is to give him more annual crops than the number of the years of his term.⁴ Nor does the fact that a portion of the profits from the leased premises is to be paid to the landlord affect the tenant's absolute ownership of the crops.⁵

In the case of *fructus naturales*, such as trees, growing timber and grass, the right of the tenant under the lease to appropriate such products is restricted by reason of the prohibition of waste,⁶ but he may take the periodical products of such permanent plantings, such as the fruits on the trees and bushes, and the crops of grass or hay, since this cannot be regarded as waste.⁷ In one

Atl. 488; *Martin v. Knapp*, 57 Iowa, 336, 10 N. W. 721; *Hosli v. Yokel*, 57 Mo. App. 622; *Edwards v. Perkins*, 7 Or. 149; *Emery v. Fugina*, 68 Wis. 505, 32 N. W. 236; *Comfort v. Duncan*, 1 Miles (Pa.) 229; *Willey v. Conner*, 44 Vt. 68; *Piper v. Piper*, 122 Mich. 662, 81 N. W. 554; *Albright v. Mills*, 86 Ala. 324, 5 So. 591. In *Hisey v. Troutman*, 84 Ind. 115, it was held that the growing crop may be orally excepted from the lease.

It has been decided that the lessee may have, by custom, the right to enter to sow crops before the commencement of the term. *Stephenson v. Elliott*, 2 Ind. App. 233, 28 N. E. 326.

³ In *re Luckenbill*, 127 Fed. 984; *Robinson v. Kruse*, 29 Ark. 575; *Cheney v. Bonnell*, 58 Ill. 268; *Frame v. Badger*, 79 Ill. 441; *Munier v. Zachary* (Iowa) 114 N. W. 525; *Holdeman v. Smith*, 3 Kan. App. 423, 43 Pac. 272; *Brown v. Turner*, 60 Mo. 21; *Torche v. Bodin*, 28 La. Ann. 761; *Stadden v. Hazzard*, 34

Mich. 76; *Iddings v. Nagle*, 2 Watts & S. (Pa.) 22; *Doremus v. Howard*, 23 N. J. Law (3 Zab.) 390; *McLellan v. Whitney*, 65 Vt. 510, 27 Atl. 117.

The lessor is not entitled to driftwood landed by the lessee from the adjoining river. *Dyer v. Haley*, 29 Me. 277.

⁴ *Comfort v. Duncan*, 1 Miles (Pa.) 229; *Willey v. Conner*, 44 Vt. 68.

⁵ *McLellan v. Whitney*, 65 Vt. 510, 27 Atl. 117; *Rowlands v. Voechting*, 115 Wis. 352, 91 N. W. 990; *Randall v. Ditch*, 123 Iowa, 582, 99 N. W. 190.

So when a certain portion of the product of the tenant's factory is to be paid as rent, the tenant owns all the product until payment is made.

Howland v. Forlaw, 108 N. C. 567, 13 S. E. 173.

⁶ See ante, § 109 a (5).

⁷ *Hurt v. Woodland*, 24 Md. 417 (fruit); *Felch v. Harriman*, 64 N. H. 472, 13 Atl. 418 (fruit); *Lewis v. McNatt*, 65 N. C. 63 (turpentine on trees); *Quiggle v. Vining*, 125 Ga. 98, 54 S. E. 74 (fruit). That the

case there is a suggestion that a tenant, if he harvests a crop of hay prematurely, at a time when it is not good husbandry so to do, in order not to leave it on the premises at the end of his term, would not be entitled to retain it.⁸ If such cutting can be regarded as waste, this view is no doubt correct, since a tenant is not entitled to the proceeds of waste committed by him,⁹ but it might perhaps be regarded as merely a breach of his implied contract to cultivate according to the rules of good husbandry,¹⁰ rendering him liable in damages only.

The tenant being the owner of the annual crops, he has a right

tenant is entitled to hay and grass, see *Turner v. Bachelder*, 17 Me. 257; *Shaw v. Mayer*, 95 Cal. 301, 30 Pac. 541. This seems to be equivalent to a decision that it was not a lease. *Dockham v. Parker*, 9 Me. (9 Greenl.) 137, 23 Am. Dec. 547; *Orcutt v. Moore*, 124 Mass. 48, 45 Am. Rep. 278; *Doremus v. Howard*, 23 N. J. Law (3 Zab.) 390; *McCombs v. Becker*, 3 Hun (N. Y.) 342; *St. Louis, I. M. & S. F. R. Co. v. Hall*, 71 Ark. 302, 74 S. W. 293, 100 Am. St. Rep. 73; *Tuttle v. Langley*, 68 N. H. 464, 39 Atl. 488. See *Cartenbrook v. Wedderien*, 5 Cal. App. 603, 91 Pac. 117.

That the lessee has agreed to "keep" cows which were included in the lease of the premises does not prevent the title to the hay from vesting in the lessee, although he has no means otherwise with which to keep the cows. *Briggs v. Austin*, 129 N. Y. 208, 29 N. E. 4.

An instrument whereby the landowner agreed to "furnish to" another a certain number of acres, more or less, to sow in wheat during a season, the landowner to receive one-fifth of the crop, and the other party agreeing to "put in wheat the above mentioned land," was held, "whether it be called a lease or a cropping contract," to give the latter a right in so much of the land only as he sowed in wheat and not to entitle him to claim a "volun-

teer" crop growing on the balance.

In *Henderson v. Treadway*, 69 Ill. App. 357, it was apparently held that where one in possession under a lease left the grass on the land uncut because he had obtained a lease for the next year, he could recover its value if taken by the lessor, the court undertaking to apply the general rule that one delivering property under a contract within the statute of frauds may recover its value under a *quodcumque valeat*. One difficulty with the decision appears to be that there was in fact no delivery of property, and the rule referred to is of course applicable to an entirely different class of transactions, executory contracts within the fourth section of the English statute. The lessor was, however, evidently liable as a trespasser for taking the hay during the period of the second year's lease.

⁸ *Willey v. Conner*, 44 Vt. 68. There it is said that the tenant was entitled to the hay, it appearing to be good husbandry to harvest it at that time.

⁹ See ante, § 109 c.

¹⁰ See ante, § 119 a (1).

to transfer them by way of mortgage or otherwise,¹¹ and they are subject to levy by his creditors under execution.¹²

Occasionally the question has arisen whether, by reason of the fact that trees, bushes, or shrubs were planted by the tenant, he has a right to remove them, though he would not have such right had they been growing on the premises at the time of the lease. It has been decided that such growths, if planted by the tenant in the course of his conduct of a nursery business on the premises, with the purpose of removing them for sale, may be removed by him, this view being occasionally based on the theory that they are in the nature of trade fixtures, and sometimes on the theory that they have never become part of the realty.¹³ Conceding that trees and bushes, if planted by a nurseryman for the purpose of sale, are removable as trade fixtures, it would seem that, if planted by a tenant for the purpose of adornment, they might be removable as ornamental fixtures.¹⁴ It has, however, been decided in England that the tenant cannot remove a border of box planted by himself,¹⁵ and it is in the same case said that he cannot remove a hedge.¹⁶

¹¹ *Jones v. Webster*, 48 Ala. 169; *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Strawlaacker v. Ives*, 114 Iowa, 661, 87 N. W. 669; *Northern v. State*, 1 Smith (Ind.) 71; *Headrick v. Brattain*, 63 Ind. 438; *Brown v. Turner*, 60 Mo. 21; *Everman v. Robb*, 52 Miss. 662, 24 Am. Rep. 682; *Jencks v. Smith*, 1 N. Y. (1 Comst.) 96; *Yates v. Kinney*, 19 Neb. 275, 27 N. W. 132; *Doremus v. Howard*, 23 N. J. Law (2 Zab.) 399. A mortgage of crops to be grown, made by a lessee after the lease but before the commencement of the term, has been held not to be valid, he not being the owner of the premises and having therefore no potential ownership in the crop. *Page v. Larrowe*, 66 Hun. 636, 22 N. Y. Supp. 1099. A mortgage of the crops by the tenant to the landlord does not affect the existence of the tenancy. *Steele v. Moore*, 54 Ind. 52.

¹² *Porche v. Bodin*, 28 La. Ann. 761; *Whipple v. Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442. And see post, § 253 g.

¹³ *Wardell v. Usher*, 3 Scott N. R. 598; *Oakley v. Monck*, L. R. 1 Exch. 162; *Wyndham v. Way*, 4 Taunt. 316 (dictum); *Fox v. Brissac*, 15 Cal. 223; *Maples v. Millon*, 31 Conn. 598 (dictum); *Miller v. Baker*, 42 Mass. (1 Mete.) 27; *Adams v. St. Louis & S. F. R. Co.*, 138 Mo. 242, 28 S. W. 496, 29 S. W. 826; *Duffus v. Bangs*, 122 N. Y. 423, 25 N. E. 980; *King v. Wilcomb*, 7 Barb. (N. Y.) 263; *Wintermute v. Light*, 46 Barb. (N. Y.) 278. That they must be removed before the end of the term, see *Brooks v. Galster*, 51 Barb. (N. Y.) 196.

¹⁴ See ante, § 240 b.

¹⁵ *Empson v. Soden*, 4 Barn. & Adol. 655, 1 Nev. & M. 720.

¹⁶ In *Wyndham v. Way*, 4 Taunt.

In case of surrender by the tenant to the landlord, the tenant loses all right to the crops, they passing to the landlord with the land, as in the case of any other conveyance. Consequently, no question can arise as to the tenant's right to enter for the purpose of harvesting them after the termination of the tenancy by surrender,¹⁷ and it is immaterial that the surrender is not express but is by operation of law, as when the tenant abandons and the landlord resumes possession.¹⁸ If, however, the tenant has, before the surrender, sold his crop to another, the latter's rights cannot be affected by the surrender, at least if the landlord has notice of such sale,¹⁹ this according with the general rule that a surrender does not divest rights previously vested in a third person.²⁰ And crops which have been cut, it appears, remain the property of the tenant.^{20a}

§ 250. Stipulations against removal of crops.

Occasionally the lease provides that the hay or straw or some other particular class of crop shall not be removed from the land, or that it shall be consumed thereon, the purpose of such a provision being ordinarily to prevent the impoverishment of the soil. A provision of this character has by some cases been regarded as vesting the title to the crop named in the landlord,²¹

316. it is said, per Heath, J., that a farmer who raises young trees for the purpose of filling up the orchards on the premises cannot remove such trees.

¹⁷ *Sweeper v. Randal*, Cro. Eliz. 153; *Clements v. Matthews*, 11 Q. B. Div. 808; *Shahan v. Herzberg*, 73 Ala. 59; *Silva v. Bair*, 141 Cal. 539. 75 Pac. 162; *McClary v. Turner*, 3 Houst. (Del.) 281, 32 Atl. 325.

¹⁸ *Carpenter v. Jones*, 63 Ill. 517; *Gregg v. Boyd*, 69 Hun. 588, 23 N. Y. Supp. 918; *Hetfield v. Lawton*, 108 App. Div. 113, 95 N. Y. Supp. 451; *Sharp v. Kinsman*, 18 S. C. 108.

¹⁹ *Shaw v. Bowman*, 91 Pa. 414; *Nye v. Patterson*, 35 Mich. 413; *Dayton v. Van Dozer*, 39 Mich. 749. See *Carney v. Mosher*, 97 Mich. 554, 56 N. W. 935.

It was decided in England that the purchaser of the crops could, upon a surrender taking place, assert a right to the crops only subject to liability to distress for rent, that is, the purchaser could not assert that the surrender was invalid as against him for the purpose of giving him the crops, and valid in his favor for the purpose of relieving the crops from liability to distress. *Clements v. Matthews*, 11 Q. B. Div. 808.

²⁰ See ante, § 191 b.

^{20a} See *Griswold v. Morse*, 59 N. H. 211.

²¹ *Moulton v. Robinson*, 27 N. H. 550; *Hatch v. Hart*, 40 N. H. 93; *Lewis v. Lyman*, 39 Mass. (22 Pick.) 437; *Heald v. Builders' Mut. Fire Ins. Co.*, 111 Mass. 38; *Potter v.*

while by other cases it is not regarded as affecting the tenant's ownership of the crop, it being in effect merely a covenant sounding in damages.²²

There is sometimes a provision to the effect that the hay or straw shall be kept on the premises for the purpose of feeding stock thereon belonging to the lessor. That this, rather than the improvement of the soil, is the purpose of the prohibition of removal or sale, does not, it seems, affect the question of the title to such crop.²³

§ 251. The doctrine of emblements.

a. **Nature of the right.** It is a general rule that if one's estate in land comes to an end at a time which he could not have

Cunningham, 34 Me. 192; Coe v. Wil-
son, 46 Me. 314 (compare Symonds
v. Hall, 37 Me. 354, 59 Am. Dec. 53);
Hunt v. Scott, 3 Pa. Co. Ct. R. 411;
Young v. Watters, 5 Pa. Co. Ct. R.
127.

²² Colville v. Miles, 127 N. Y. 159,
27 N. E. 809, 12 L. R. A. 848, 24
Am. St. Rep. 433; Munier v. Zachary
(Iowa) 114 N. W. 525; McLellan v.
Whitney, 65 Vt. 510, 27 Atl. 117;
Ridgway v. Stafford, 6 Exch. 404
(dictum). That a stipulation
against removal of hay gives the
landlord no property in the hay
available against an innocent pur-
chaser, see Marshall v. Luiz, 115 Cal.
622, 47 Pac. 597.

In England there is a *dictum* in
Ridgway v. Stafford, 6 Exch. 404,
that a covenant by the tenant not
to sell did not affect his power to
sell, but only rendered him liable
in case of breach. In Crosse v.
Duckers, 27 Law T. (N. S.) 816, an
injunction was granted against a
sale in violation of the covenant.
In Snetzinger v. Leitch, 32 Ont. 440,
it was decided that "while the prop-
erty might be legally in the tenant,
yet his contract to feed the hay and

straw to the cows on the farm de-
prived him of the beneficial use
thereof and of the right to take
such crops off the farm, and that
an execution creditor of the tenant
had no greater right. The opinion
of Boyd, Ch., in this case, reviews
all the English authorities in any
way bearing upon the question of
the effect of such a clause.

In Hunt v. Rublee, 6 Vt. 448, 58
Atl. 724, it is stated that a provision
that "no hay shall be sold, but the
stock shall be increased to consume
it," made the parties tenants in com-
mon of the hay. In this state it has
been decided that if the tenant sells
the crops in violation of a provision
in the lease, he and his vendee im-
mediately become liable to the land-
lord in damages. Briggs v. Oaks, 26
Vt. 138; Briggs v. Bennett, 26 Vt.
146; Gray v. Stevens, 28 Vt. 1, 65
Am. Dec. 216; Wilmarth v. Pratt, 56
Vt. 474.

²³ See Lewis v. Lyman, 39 Mass.
(22 Pick.) 437; Potter v. Cunning-
ham, 34 Me. 192; Colville v. Miles,
127 N. Y. 159, 27 N. E. 809, 12 L.
R. A. 848, 24 Am. St. Rep. 433; Snet-
zinger v. Leitch, 32 Ont. 440.

previously ascertained, without his fault and without any action on his part to bring about such a result, he is entitled to take the annual crops planted by him before the termination of the estate.²⁴ This right is ordinarily referred to as the right or doctrine of "emblemments," and is based upon the justice of assuring to the tenant compensation for his labor, and also upon the desirability of encouraging husbandry, as a matter of public policy.

The fact that the tenant has done work on the land in the nature of plowing or manuring, before the termination of his tenancy, does not, if he has not actually sown the crop, entitle him to assert any claim to the crop subsequently grown.²⁵

The tenant entitled to emblemments has the right of ingress to and egress from the premises for the purpose of harvesting and taking away the crops.²⁶ He also has the right to go upon the premises for the purpose of doing such cultivation as may be necessary.²⁷ He has not, however, the right of exclusive occupation.²⁸ The right of ingress and egress for this purpose also

²⁴ Co. Litt. 55 b; 2 Blackst. Comm. (Md.) 139; *Den d. Humphries v. Humphries*, 25 N. C. (3 Ired. Law) 362; *Edghill v. Mankey*, 79 Neb. 347, 112 N. W. 570, 11 L. R. A. (N. S.) 688.

²⁵ Bro. Abr., Emblemments, pl. 7; *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567; *Price v. Pickett*, 21 Ala. 741; *Stewart v. Doughty*, 9 Johns. (N. Y.) 108; *Thompson's Adm'r v. Thompson's Ex'r*, 6 Munf. (Va.) 514; *Kingsbury v. Collins*, 4 Bing. 202. Contra by statute, in Virginia. Code 1904, § 2808.

²⁶ Litt. § 68; Co. Litt. 56 a; *Simpkins v. Rogers*, 15 Ill. 397; *Reilly v. Ringland*, 39 Iowa, 106; *Van Doren v. Everett*, 5 N. J. Law (2 Southard) 460, 8 Am. Dec. 615; *Reeves v. Hannan*, 65 N. J. Law, 249, 48 Atl. 1018; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438; *Towne v. Bowers*, 81 Mo. 491; *Davis v. Brocklebank*, 9 N. H. 73; *Stewart v. Doughty*, 9 Johns. (N. Y.) 108.

²⁷ *Bevans v. Briscoe*, 4 Har. & J. (Md.) 139; *Den d. Humphries v. Humphries*, 25 N. C. (3 Ired. Law) 362; *Edghill v. Mankey*, 79 Neb. 347, 112 N. W. 570, 11 L. R. A. (N. S.) 688; *Collins v. Crownover* (Tenn.) 57 S. W. 357; *Smith, Landl. & Ten.* (3d Ed.) 404; 1 Williams, *Executors* (9th Ed.) 632. See *Stoddard v. Waters*, 30 Ark. 156. But in *Bevans v. Briscoe*, 4 Har. & J. (Md.) 139, it is said that "the reversioner is not entitled to the occupation of the lands on which a crop is growing until that crop is taken off, or a reasonable time is given for taking it off." And in *Griffiths v. Puleston*, 13 Mees. & W. 358, a customary right to take away-going crops (post, notes 59, 60) was regarded as giving a right of possession.

²⁸ *Bevans v. Briscoe*, 4 Har. & J.

exists in favor of one interested in the crop with the tenant,²⁹ of the tenant's grantee,³⁰ and of the tenant's personal representative on his death,³¹ and it can be asserted against any transferee of the reversion.³²

It has been suggested that the tenant or his representative might be held liable for rent on account of his occupation of the land during the time necessary for the maturing and harvesting of the crops,³³ but the cases generally make no reference to such possibility,³⁴ and it seems entirely opposed to the view that the tenant has merely a right of occupancy, and of ingress and egress, for the purpose of caring for the crop, and no right of exclusive possession. In one state the statute makes the tenant liable for rent proportioned to the extent of the land required for the crop.³⁵

b. **Things which are the subject of the right.** The right to emblements is confined to those things which yield an annual profit. If the lessee "plant young fruit trees, or young oaks, ashes, elms, etc., or sow the ground with acorns, etc., there the lessor may put him out notwithstanding, because they will yield no present annual profit."³⁶ "The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit trees, grass and the like, which are not planted annually at the expense and labor of the tenant, but are either a permanent or natural profit of the earth. For when a man plants a tree he cannot be presumed to plant it in contemplation of any present profit: but merely with a prospect of its being useful to himself in future, and to future successions of tenants."³⁷ It does not extend to fruit growing on trees or bushes at the time of the termination of the tenancy.³⁸ Grass, even though sown from seed, and ready to be cut for hay, cannot be taken as emblements, since "the improvement

²⁹ *Kingsbury v. Collins*, 4 Bing. 202. See 1 Williams, Executors (9th Ed.) 632.

³⁰ Sheppard's Touchstone, 244.

³¹ 1 Williams, Executors (9th Ed.) 623.

³² *Kingsbury v. Collins*, 4 Bing. 202.

³³ Plowden's Queries, No. 239. Ed.) 620, 624.

³⁴ It is negatived in *Bevans v. Briscoe*, 4 Har. & J. (Md.) 139.

³⁵ Virginia Code 1904, § 2807.

³⁶ Co. Litt. 55 b.

³⁷ 2 Blackst. Comm. 123.

³⁸ 1 Williams, Executors (9th

is not distinguishable from what is natural product, although it may be increased by cultivation."³⁹ It seems, however, that artificial grasses, such as clover, saintfoin and the like, may be taken as emblements.⁴⁰⁻⁴¹ The right of emblements applies to the straw as well as to the grain raised by the annual planting.⁴²

Hops, though they grow from ancient roots, have been regarded as "like emblements," because they grow "by the manurance and industry of the owner,"⁴³ that is, "the labor and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and planting of other vegetables."⁴⁴ The same theory has been applied in this country with regard to crude turpentine forming on the body of the tree, usually known as "scrape."⁴⁵

The doctrine of emblements applies to "a crop of that species only, which ordinarily repays the labor by which it is produced, within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period."⁴⁶

A tenant who has taken one crop from a single sowing cannot, after the tenancy has come to an end, take a second crop from the same sowing, although he has applied additional labor to make the second crop.⁴⁷

c. **Classes of tenants entitled—**(1) **Life tenant.** The doctrine of emblements is applied when a life tenant plants crops and dies before they are gathered, his personal representatives being in such case entitled to the crops.⁴⁸ A tenant *pur autre vie* may take the crops upon the death of the *cestui que vie*.⁴⁹

³⁹ 1 Williams, Executors, 625; Compare *Florida Saw Mill Co. v. Reiff v. Reiff*, 64 Pa. 134. *Parrish* (Ala.) 46 So. 461.

^{40,41} 1 Williams, Executors, 625; ⁴⁶ *Graves v. Weld*, 5 Barn. & Adol. 105. *Graves v. Wells*, 5 Barn. & Adol. 105.

⁴² *Craig v. Dale*, 1 Watts & S. (Pa.) 509, 37 Am. Dec. 477. The case involved the right to the straw as a part of the away-going crop, but the principles asserted by the court would apply to the right of emblements. ⁴⁷ *Graves v. Weld*, 5 Barn. & Adol. 105. This rule was applied, in *Hendrixson v. Cardwell*, 68 Tenn. (9 Baxt.) 389, 40 Am. Rep. 93, to a case in which the tenant, after taking one crop of oats, "plowed in" the stubble to make a second crop.

⁴³ *Latham v. Atwood*, Cro. Car. 515. ⁴⁸ Co. Litt. 55 b; 2 Blackst. Comm. 122.

⁴⁴ *Graves v. Weld*, 5 Barn. & Adol. 105, 119. ⁴⁹ Co. Litt. 55 b; Bro. Abr., Emblements, pl. 16.

⁴⁵ *Lewis v. McNatt*, 65 N. C. 63.

(2) **Life tenant's lessee.** One holding under a lease from a life tenant is entitled to the benefit of the rule. Thus, if a life tenant, after making a lease, dies before the end of the term thereby created, the lessee is entitled to take the crops as against the remainderman,⁵⁰ and he is so entitled when the lessor's estate comes to an end by the latter's own act, though the lessor himself would not have been entitled in such case to crops planted by himself.⁵¹

(3) **Tenant at will.** A tenant at will, or his representative, is entitled to the crops planted by such tenant, if the tenancy comes to an end by some providential cause, as by his own death or by that of his landlord, or if the landlord terminates the tenancy,⁵² but not if the tenant himself terminates it by some vol-

⁵⁰ Co. Litt. 55 b; Bro. Abr., Leases, pl. 24; Emblements, pl. 6; Edghill v. Mankey, 79 Neb. 347, 112 N. W. 570, 11 L. R. A. (N. S.) 688; Bevens v. Briscoe, 4 Har. & J. (Md.) 139. The fact that the lessee knows, at the time of planting the crop, that his lessor will almost certainly die before they mature, is immaterial. Bradley v. Bailey, 56 Conn. 374, 15 Atl. 746, 1 L. R. A. 427, 7 Am. St. Rep. 316. Occasionally the statute provides that in such case the tenancy shall continue until the crop matures. Ante, § 69 c, note 21.

In Kentucky the provision of a statute (St. 1903, § 3862) naming the persons entitled to crops upon the death of a life tenant was regarded as applying when the tenant in possession held under a lease from the life tenant so dying. Devers v. May, 30 Ky. Law Rep. 528, 99 S. W. 255.

⁵¹ As when one having an estate during widowhood makes a lease and then marries. In such case the lessee is entitled to emblements. Oland v. Burdwick, Cro. Eliz. 460; Debow v. Colfax, 10 N. J. Law (5 Halst.) 128; 2 Blackst. Comm. 124. And so a subtenant does not ordinarily lose his crops by reason of the enforcement of a forfeiture by the head landlord on account of a breach of condition by the head tenant. Bevens v. Briscoe, 4 Har. & J. (Md.) 139; Samson v. Rose, 65 N. Y. 411. But it has been held that a sublessee who sowed after the commencement of an ejectment proceeding by the chief landlord to enforce a forfeiture of the interest of the sublessor could not claim the crops as against the chief landlord. Samson v. Rose, 65 N. Y. 411.

⁵² Litt. § 68; Co. Litt. 55 b, 56 a, 63 a; Oland's Case, 5 Coke, 116 a; Morgan v. Morgan, 65 Ga. 493; Ellis v. Paige, 18 Mass. (1 Pick.) 43; Harris v. Frink, 49 N. Y. 24, 10 Am. Rep. 318; Reilly v. Ringland, 39 Iowa, 106; Brown v. Thurston, 56 Me. 126, 96 Am. Dec. 438; Simpson v. Rogers, 15 Ill. 397; Howell v. Schenck, 24 N. J. Law (4 Zab.) 89; Towne v. Bowers, 81 Mo. 491; Monday v. O'Neil, 44 Neb. 724, 63 N. W. 32, 48 Am. St. Rep. 760; Davis v. Brocklebank, 9 N. H. 73. Occasionally a statute gives such rights to a tenant at will. Georgia Code 1895, §

untary act on his part.⁵³

(4) **Tenant for years.** A tenant for years is not ordinarily entitled to emblements, since he knows when the term is to come to an end, and should not plant crops which will not mature before that time,⁵⁴ but he is so entitled if the tenancy comes to an end, without his connivance, before the end of the term, as, for instance, when this results from the termination of his landlord's estate,⁵⁵ or by reason of a "special limitation."⁵⁶

3134; *Montana* Rev. Codes, § 4519; *North Dakota* Rev. Codes 1905, § 4800; *South Dakota* Rev. Civ. Code 1903, § 280.

In *Reilly v. Ringland*, 39 Iowa, 106, it was held that where an occupying claimant was given a judgment for the cost of his improvements, to be paid within three years, and the owner delayed to pay off the judgment, the latter thereby assented to his continued occupancy, and the claimant being so in possession by the owner's assent, was entitled to emblements. The decision was in part based on the statute (Code, § 2991) providing that a person in possession with the assent of the owner is presumed to be a tenant at will unless the contrary is shown.

⁵³ Co. Litt. 55 b; *Chandler v. Thurston*, 27 Mass. (10 Pick.) 205; *Oland's Case*, 5 Coke, 116; *Oland v. Burdwick*, Cro. Eliz. 460.

⁵⁴ Litt. § 68; 2. Blackst. Comm. 145; *Floralia Sawmill Co. v. Parrish* (Ala.) 46 So. 461; *Whitmarsh v. Cutting*, 10 Johns. (N. Y.) 360; *Chesley v. Welch*, 37 Me. 106; *Harris v. Carson*, 7 Leigh (Va.) 632, 30 Am. Dec. 510; *Gossett v. Drydale*, 43 Mo. App. 430; *Whitmarsh v. Cutting*, 10 Johns. (N. Y.) 360; *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567; *Clarke v. Rannie*, 6 Lans. (N. Y.) 210; *Sanders v. Ellington*, 77 N

C. 255; *Rasor v. Qualls*, 4 Blackf. (Ind.) 286, 30 Am. Dec. 658.

That the lessee is entitled to continue the lease for an additional period gives him no right to take the crops, he having left before the end of the original term. *Bain v. Clark*, 10 Johns. (N. Y.) 424; *Dircks v. Brant*, 56 Md. 500.

In *North Dakota* (Rev. Codes 1905, § 4800) and *South Dakota* (Civ. Code 1908, § 280), the statute provides that a tenant for years, as well as one at will, may "cultivate and harvest the crops growing at the end of his tenancy."

⁵⁵ As when the lessor has merely an estate for life and dies before the crops are harvested. Co. Litt. 55 b; Bro. Abr., Emblements, pl. 6. The same principle has been applied when, after a husband had leased his wife's land to another, she procured a divorce *a vinculo*, his estate thus coming to an end, and consequently that of his lessee also. *Gould v. Webster*, 1 Tyler (Vt.) 409.

⁵⁶ As when a lease is for years *si tamdiu vixerit*, and the tenant, after sowing, dies before severance of the crop. 1 Rolle's Abr., Emblements, pl. 12, p. 727. So the tenant has been held to be entitled to emblements when the tenancy came to an end by reason of a provision terminating it on notice from the

The landlord may validly stipulate that the tenant for years shall have the right to harvest the crop after the end of the term,⁵⁷ and he may, it has been in one case decided, by his conduct in inducing the tenant to plant a particular crop, become estopped to deny the right of the latter to harvest such crop after the term.⁵⁸

Though the doctrine of emblements is not ordinarily applied in favor of a tenant for years after the end of the term, a custom that such tenant shall take his crops, not harvested by him during the term, has been recognized and given effect in several jurisdictions, such a customary right being known as the right to "waygoing (or away going) crops." In England the custom which controls in this respect is that of the particular locality or neighborhood,⁵⁹ while in several states in this country such a

landlord to that effect (*Stewart v. § 1*) is substantially similar, but is Doughty, 9 Johns. [N. Y.] 108) and not restricted to leases for years.

on a sale by the landlord (*Comfort v. Duncan*, 1 Miles [Pa.] 229; *Pfanner v. Sturmer*, 40 How. Pr. [N. Y.] 401). In *Toles v. Meddaugh*, 106 Mich. 398, 64 N. W. 329, 37 L. R. A. 561, 58 Am. St. Rep. 499, it was held that a tenant who agreed to relinquish possession upon a sale by the landlord could nevertheless retain possession after such sale till he had harvested and threshed his wheat.

The North Carolina statute (Revisal 1905, § 1990) provides that if a lease for years comes to an end "by the happening of an uncertain event determining the estate of the lessor, the tenant, in lieu of emblements, shall continue his occupation to the end of the current year," he paying a proportional rent for such continued occupation and being allowed for the seed and tillage of any crop not gathered by him. This applies to a lease for a year only as well as to one for a longer time. *King v. Fosene*, 91 N. C. 116. The English statute (14 & 15 Vict. c. 25

⁵⁷ See *Hyatt v. Griffiths*, 17 Q. B. 505; *Caldecott v. Smythies*, 7 Car. & P. 808; *Stoddard v. Waters*, 30 Ark. 156; *Hudson v. Porter*, 13 Conn. 59.

In *Kelley v. Todd*, 1 W. Va. 197, a stipulation that the land should be sown in wheat and timothy the last autumn of the term was construed as being intended for the benefit of the tenant, entitling him to the wheat growing at the termination of the lease, which occurred in the spring. The decision was in part based on *Mason v. Moyers*, 2 Rob. (Va.) 606, where a like construction was placed on a lease providing that the tenant was not to farm "more than one-half of the cleared land in a year," and that, "at any time he should give up the land, the one-half was to be clear (that is, of a crop) and ready for tillage."

⁵⁸ *Carmine v. Bowen*, 104 Md. 198, 64 Atl. 932.

⁵⁹ See *Wigglesworth v. Dallison*, 1 Doug. 205; *Boraston v. Green*, 16 East, 71.

custom in favor of the tenant has been recognized as common to the whole state.⁶⁰ In one state, on the other hand, the possibility of the existence of a legal custom to that effect has been denied, on the ground that a custom must be immemorial, and that this is not possible in this country.⁶¹ Such a custom would not prevail in opposition to express stipulations of the lease bearing on the subject.⁶²

The effect of the common-law rule, that a tenant for a certain time is not entitled to the crop unmaturing at the termination of the tenancy, taken in connection with the rule that a lease of land gives the tenant the right to the crops thereon at the time

⁶⁰ In Delaware it is said that the tenant is entitled by custom to the wheat crop, but not to the crop of oats. *Templeman v. Biddle*, 1 Har. 522. *Clark v. Banks*, 6 Houst. 584, is to the effect that the custom applies generally to grain sown in the fall; and in *Ellison v. Dolby*, 3 Penn. 45, 49 Atl. 178, it is asserted that the off-going tenant has the right to the crop.

In New Jersey the tenant is ordinarily entitled to the away-going crop (*Van Doren v. Everitt*, 5 N. J. Law [2 Southard] 460, 8 Am. Dec. 615; *Corle v. Monkhouse*, 47 N. J. Eq. 73, 20 Atl. 367; *Reeves v. Hannan*, 65 N. J. Law, 249, 48 Atl. 1018), but the custom has been held not to extend to a crop sown in March when the term was to expire in April (*Howell v. Schenck*, 24 N. J. Law [4 Zab.] 89).

In Ohio the tenant's right has been regarded as dependent on the custom of the neighborhood. *Foster v. Robinson*, 6 Ohio St. 90.

In Pennsylvania the tenant has the right to the away-going crop by force of custom. *Stultz v. Dickey*, 5 Bin. 285, 6 Am. Dec. 411; *Forsythe v. Price*, 8 Watts, 282, 34 Am. Dec. 465; *Shaw v. Bowman*, 91 Pa. 414. But the custom has been held not

to apply in the case of a crop planted in the spring, just before the end of the term. *Demi v. Bossler*, 1 Pen. & W. 224. The fact that the tenant has lost his possession by reason of the execution of a writ of *habere facias* under a judgment in ejectment does not affect his right to the away-going crop. *Biggs v. Brown*, 2 Serg. & R. 14.

In North Carolina the tenant's right to an away-going crop of crude turpentine was recognized in *Lewis v. McNatt*, 65 N. C. 63.

⁶¹ *Harris v. Carson*, 7 Leigh (Va.) 632, 30 Am. Dec. 510. The same view is indicated in *Burrowes v. Cairns*, 2 U. C. Q. B. 288. But in England, it seems, an immemorial custom is not regarded as necessary for this purpose, a common usage of the neighborhood being sufficient. See *Senior v. Armytage*, Holt, N. P. 197.

⁶² *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith's Leading Cases (11th Ed.) 545, and notes; *Boraston v. Green*, 16 East, 71. The custom has been regarded as excluded by a covenant on the part of the lessee to give up the land at the end of the term. *Burrowes v. Cairns*, 2 U. C. Q. B. 288; *Kaatz v. White*, 19 U. C. C. P. 36.

of the lease,⁶³ is, it seems, to give to the tenant under a lease a right to crops planted by a prior tenant for years, not harvested at the termination of the first tenancy or at the commencement of the new tenancy. In a recent case, however, the contrary view was adopted, that the incoming tenant is not thus entitled to a crop planted by the outgoing tenant, on the theory, apparently, that such crop belongs to the latter, and that his mere failure to remove it cannot transfer the title to the former.⁶⁴ The assumption that, because the crop is planted by the outgoing tenant, it is his crop, is opposed to the common-law view of the subject, which regards the person entitled to the possession of land as ordinarily the person entitled to the crops thereon. The position of a tenant for years whose tenancy comes to an end, and who relinquishes or is expelled from possession before he has gathered the crop planted by him, seems analogous to that of a disseisor who is expelled before he has gathered the crop planted by him. It is not his crop merely because he planted it.⁶⁵

(5) **Tenant from year to year.** It has been decided in England that a tenant from year to year, whose estate is terminated by notice from the landlord, is entitled to emblements, in view of the uncertainty as to whether the landlord will give the legal notice to quit in any year.⁶⁶ In this country the right of such a tenant to emblements has been denied.⁶⁷ In one case the rule is asserted to be that he is entitled to emblements which result from his sowing before the receipt of the notice to quit, and not so entitled to crops sown thereafter,⁶⁸ and this seems to accord with the ordinary rules bearing on the subject.

(6) **Tenant at sufferance.** One who wrongfully retains pos-

⁶³ See ante, § 249.

⁶⁶ *Kingsbury v. Collins*, 4 Bing

⁶⁴ *Meffert v. Dyer*, 107 Mo. App. 462, 81 S. W. 643. The fact that the crop was matured is referred to as tending to make it personalty, and the fact that the second lessee knew of the first lessee's claim to such crop is referred to as showing that he could not regard it as passing under his lease.

202. See *Haines v. Welch*, L. R. 4 C. P. 91.

⁶⁷ *Gossett v. Drydale*, 48 Mo. App. 430; *Sanders v. Ellington*, 77 N. C. 255. In Pennsylvania such a tenant is given the right by custom. *Clark v. Harvey*, 54 Pa. 142.

⁶⁸ *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567.

⁶⁵ See cases cited 12 *Cyclopedia Law & Proc.* 977.

session of land after his rightful tenancy under a lease has come to an end, a "tenant at sufferance,"⁶⁹ has no right to the crops then growing on the land by reason of such retention of possession.⁷⁰ Were the rule otherwise, a tenant for years could obtain a right to emblements by merely holding over his term. If he actually severs the crops, however, he would apparently, in jurisdictions in which a disseisor is regarded as entitled to crops severed by him,⁷¹ likewise obtain title to such crops,⁷² and the landlord would in such case be relegated to an action for mesne profits to recover the value of the crops, or an action for the use and occupation of the land.⁷³

d. **Effect of forfeiture by tenant.** A tenant whose estate is terminated by his own act or default, as when he is guilty of a breach of condition subsequent and the landlord re-enters therefor, cannot ordinarily assert any right to emblements.⁷⁴ As has

⁶⁹ See ante, § 15.

⁷⁰ In *Doe d. Bennett v. Turner*, 7 Mees. & W. 226, it is said by Parke, B., that a tenant at sufferance has no right to emblements. The view that a tenant at sufferance is not entitled to the crops is also asserted in *Simpkins v. Rogers*, 15 Ill. 397. In *Baker v. McInturff*, 49 Mo. App. 505, it was held that the landlord could, after the end of the term, though the tenant retained possession, take such crops, if still unsevered, by an action of replevin.

⁷¹ That the trespasser or disseisor is entitled to crops sowed and harvested by him, see *Brothers v. Hurdle*, 32 N. C. (10 Ired. Law) 490, 51 Am. Dec. 400; *Faulcon v. Johnston*, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737; *Stockwell v. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Jenkins v. McCoy*, 50 Mo. 348; *Lindsay v. Winona & St. P. R. Co.*, 29 Minn. 411, 13 N. W. 191, 43 Am. St. Rep. 228; *Johnston v. Fish*, 105 Cal. 420, 38 Pac. 979, 45 Am. St. Rep. 53. There seems to be

no modern English decision on this point. The year book decisions on the question whether a disseisor is entitled to the crops are collected in *Viner's Abridgement, Emblements*, p. 48, 51-57. The cases and dicta there referred to are in irreconcilable conflict, but rather favor on the whole the view that a trespasser or disseisor cannot claim the crops sown by him even though he has severed them before re-entry by the disseisee, and to this effect also are *Liford's Case*, 11 Coke, 51 b; *Anonymous*, *Dyer*, 31 b; *Moore*, 24; *Dalison*, 20; *Co. Litt.* 55 b. This view is referred to with approval in *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105, but *Stockwell v. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710, favors the prevailing American view.

⁷² See *Wolcott v. Hamilton*, 61 Vt. 79, 17 Atl. 39, to this effect.

⁷³ See post, § 306 d.

⁷⁴ *Co. Litt.* 55 b; 1 Rolle's Abr., *Emblements*, pl. 3; *Wicks v. Jordan*, 2 Bulst. 213; *Oland v. Burdwick*, Cro. Eliz. 460; *Bulwer v. Bulwer*, 2 Barn. & Adol. 470; *Davis v. Eyton*,

been remarked, under a contrary rule, a tenant, having sown his crop, would have little or no object in complying with his stipulations.⁷⁵ There are, however, decisions in two states which assert a contrary view, to the effect that the forfeiture of the leasehold does not affect the tenant's right to the crop.⁷⁶

It has been decided in New York that when the forfeiture was enforced by the bringing of an action of ejectment by him, the landlord was to be regarded as having taken possession at the time of the commencement of such action, and that crops maturing thereafter, though harvested before the landlord was put in possession, could not be removed by the tenant.⁷⁷ This view has been questioned, however, and there is in another jurisdiction a decision that no such principle is applicable when the landlord brings a proceeding to recover possession for nonpayment of rent, not by force of an express provision in the lease, but under the statute authorizing recovery of possession on this

7 Bing. 154; *Russell v. Moore*, 8 L. Ir. 318; *Samson v. Rose*, 65 N. Y. 411; *Kiplinger v. Green*, 61 Mich. 340, 28 N. W. 121, 1 Am. St. Rep. 584; *Cheney v. Bonnell*, 58 Ill. 268; *Myer v. Roberts*, 50 Or. 81, 89 Pac. 1051, 12 L. R. A. (N. S.) 194, 126 Am. St. Rep. 733; *Gregg v. Boyd*, 69 Hun, 588, 23 N. Y. Supp. 918.

⁷⁵ *Hunter v. Jones*, 2 Brewst. (Pa.) 370; *Id.*, 7 Phila. (Pa.) 233. And see ante, § 194 i (2), at note 246.

⁷⁶ *Collier v. Cunningham*, 2 Ind. App. 254, 28 N. E. 341; *Koeleg v. Phelps*, 80 Mich. 466, 45 N. W. 350.

⁷⁷ *Samson v. Rose*, 65 N. Y. 411, citing *Hodgson v. Gascoigne*, 5 Barn. & Ald. 88; *Doe d. Upton v. Witherwick*, 3 Bing. 11, 10 Moore, 267; *Adams, Ejectment* (4th Ed.) 416; *Tyler, Ejectment*, 590. In reference to these citations, it may be said that in *Hodgson v. Gascoigne*, 5 Barn. & Ald. 88, only crops which were still growing at the time of the issuance of the writ of dispossession were involved. And in *Doe d. Up-*

ton v. Witherwick, 3 Bing. 11, 10 Moore, 267, the question was whether the court would direct its prothonotary to ascertain the value of several crops which had been taken by the landlord, along with the land, under a writ of *habere facias*, and require the landlord to pay such value to the tenant, and this the court refused to do, holding that any rights in the tenant as to the crops must be asserted by action. The statement in *Adams, Ejectment*, is based on these two cases merely, and that in *Mr. Tyler's work* also cites no other authority. See the remarks on these citations in *Brothers v. Hurdle*, 32 N. C. (10 Ired. Law) 490, 51 Am. Dec. 400; *Woodcock v. Carlson*, 41 Minn. 542, 43 N. W. 479. The New York case is, however, in great part at least, based on the express statute of that state making the service of the declaration in an action of ejectment brought by the landlord for the purpose of enforcing a forfeiture for nonpayment of rent equivalent to a re-entry.

ground, and that if pending appeal in such statutory proceeding the tenant harvests his crop, the landlord cannot assert any claim thereto.⁷⁸ It is remarked in the latter case that "it is difficult to see why, on principle, a more severe rule should be applied against a tenant, who holds over after his term expires, or after he is in default in payment of rent, than is applied to a disseisor whose entry was a willful trespass."⁷⁹⁻⁸¹

The termination of a tenant's estate by reason of an act of forfeiture on his part will not usually affect a subtenant's right to harvest his crops.⁸²

It would seem that if a tenant is not entitled to take the crop after his tenancy has come to an end, whether by reason of the character of the tenancy, as being for a certain period, or because the termination of the tenancy is the result of his own act or default, one to whom he has previously transferred the crop, but who has not harvested it, should not be allowed to enter for that purpose after the end of the tenancy.⁸³ In one state, however, it is the rule that such transferee of the crop is entitled to claim the crop after a forfeiture of the tenant's interest in the land, although the crop is still growing at the time the landlord regains possession of the land.⁸⁴

⁷⁸ Woodcock v. Carlson, 41 Minn. 542, 43 N. W. 479.

⁷⁹⁻⁸¹ Woodcock v. Carlson, 41 Minn. 542, 43 N. W. 479, per Mitchell, J.

⁸² See ante, note 51.

⁸³ Sanders v. Ellington, 77 N. C. 255; Debew v. Colfax, 10 N. J. Law (5 Halst.) 128. In this last case it is said, per Ewing, C. J., that the rule that one who terminates his estate by his own default has no right to emblements "would be worthless from obvious liability to evasion, if the widow might, the hour before her marriage, or the tenant on the day antecedent to his commission of waste, avoid the consequence of those acts by so simple a device as the sale of the crop."

⁸⁴ It is so stated in Miller v. Havens, 51 Mich. 482, 16 N. W. 865, and

Carney v. Mosher, 97 Mich. 554, 56 N. W. 935. In the latter case there was, however, a surrender and not a forfeiture, it appears, as there was in Nye v. Patterson, 35 Mich. 413, cited therein. In this state it would seem, from Koeleg v. Phelps, 80 Mich. 466, 45 N. W. 350, that even the tenant himself can take the crops after forfeiture.

It has been decided that it is immaterial, as regards the tenant's right to crops, that he is not a party to the foreclosure proceeding. Stanbrough v. Cook, 83 Iowa, 705, 49 N. W. 1010; Reilly v. Carter, 75 Miss. 798, 23 So. 435, 65 Am. St. Rep. 621; Downard v. Groff, 40 Iowa, 597. St. John v. Swain, 14 N. Y. Supp. 743, is contra, and it seems questionable whether a proceeding divesting rights in crops, or in any other

§ 252. Tenant's rights as against prior mortgage or paramount title.

The question whether a tenant, holding under a lease made after the making of a mortgage on the land, can claim the crops sown by him as against one who has obtained title to the land upon a foreclosure of the mortgage, has been the subject of a number of decisions, and is one of difficulty.

Under the common-law theory of a mortgage, as vesting the legal title in the mortgagee, the mortgagee has, in the absence of a stipulation to the contrary, the right to take possession of the land at any time without notice,⁸⁵ and it has been decided that the mortgagor, upon such dispossession by the mortgagee, is not entitled to take the crops, for the reason, says Lord Mansfield, that "all is liable to the debt,"⁸⁶ that is, "the crop, as well as the land, is a security for the debt."⁸⁷ This view, that the mortgage is intended to cover the crops as well as the land itself, as security for the debt, has been applied in numerous cases in this country, in which it was held that upon foreclosure of a mortgage the person obtaining title thereunder, by sale or otherwise, is entitled to the crops then on the land as against the mortgagor, a different rule being applied, however, as to crops already severed from the land.⁸⁸ In several states, however, it has been decided that a purchaser at foreclosure cannot claim the crops as against the mortgagor. In perhaps two states such decisions in favor of the mortgagor's right to the crops are based primarily upon the provisions of the local statutes requiring that the land be appraised before sale, and that it shall be sold only at a price bearing some proportion to its appraised value, taken in connection with the fact that the value of the annual crops is not included in the appraisal.⁸⁹ Occasionally such decisions have been based upon the ground that, in the particular jurisdiction,

property, should be effective as against one not a party thereto. See ante, § 73 c. at notes 137, 138. 261, 7 S. E. 669; Thompson v. Union Warehouse Co., 110 Ala. 499, 18 So. 105; 1 Jones, Mortgages, § 697.

⁸⁵ See ante, § 73 a (2).

⁸⁶ Keech v. Hall, 1 Doug. 21.

⁸⁷ 1 Powell, Mortgages, 156, 159 b,

Coventry's notes. See Gilman v. Wills, 66 Me. 273; Jones v. Hill, 64 N. C. 198; Coor v. Smith, 101 N. C.

⁸⁸ See Jones, Mortgages, §§ 697, 1116, 1658, and authorities there cited.

⁸⁹ Cassilly v. Rhodes, 12 Ohio. 88, 40 Am. Dec. 461; Heuts v. Showalter, 10 Ohio St. 125; Foss v. Marr, 40

a mortgage does not vest the legal title in the mortgagee, but constitutes merely a lien.⁹⁰ Elsewhere, however, it has been remarked that "the fact that the right to ejectment is taken away from the mortgagee by the statute and the mortgage reduced to a mere chose in action secured by lien upon the land, while the defeasance remains effectual, does not seem to have any essential bearing upon the question, inasmuch as the perfecting of title under it has relation to the time it became a lien."⁹¹ and since the common-law rule in this regard appears to have been based, not on the fact that the mortgagee has the legal title, but rather upon the theory that the crop is intended to be included in the security,⁹² the view asserted in the language quoted has certainly much in its favor. The opposite view seems to involve the assumption that the statutory change in the nature of a mortgage involves a change in the intention of the parties as to whether the crops are to be included in the security. In two or three states it has been decided that if the crops are matured, they are to be regarded as in the same position as if severed, and that consequently the foreclosure sale passes title only to unmatured crops.⁹³

Such being the divergent views as to the rights of the mortgagor to crops planted by him, it is but to be expected that a like divergence should exist as to the right of a tenant under a lease, made by the mortgagor subsequently to the mortgage, as to the crops planted by such tenant. In England the right of

Neb. 559, 59 N. W. 122; *Monday v. Pac.* 153, 17 L. R. A. 284, 33 Am. O'Neil, 44 Neb. 724, 63 N. W. 32, 43 St. Rep. 373; *Reed v. Swan*, 123 Mo. 100, 34 S. W. 483; *Reilly v. Carter*, 75 Miss. 798, 23 So. 421, 65 Am. St. Rep. 621. So where the mortgage expressly included "the rents, issues and profits." *Montgomery v. Merrill*, 65 Cal. 432, 4 Pac. 414.

⁹⁰ See *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284; *Heavilon v. Farmers' Bank*, 81 Ind. 249. And see cases cited post, note 106.

⁹¹ *Batterman v. Albright*, 122 N. Y. 484, 25 N. E. 856, 11 L. R. A. 800, 19 Am. St. Rep. 510, per Bradley, J. In other states, also, in which the mortgagee has not the legal title, the purchaser at foreclosure has been given the crops. See *Downard v. Groff*, 40 Iowa, 597; *Wheeler v. Kirkendall*, 67 Iowa, 612, 25 N. W. 829; *Goodwin v. Smith*, 49 Kan. 351, 31

⁹² See ante, notes 86, 87.

⁹³ *Hecht v. Dettman*, 56 Iowa, 679, 7 N. W. 495, 10 N. W. 241, 41 Am. Rep. 131; *Everingham v. Braden*, 58 Iowa, 133, 12 N. W. 142; *First Nat. Bank v. Beegle*, 52 Kan. 709, 35 Pac. 814, 39 Am. St. Rep. 365; *Porche v. Bodin*, 28 La. Ann. 761.

the mortgagor's tenant to crops planted by him has been denied by the textbook writers on the ground that he is in the position of a disseisor, a mortgagor allowed to remain in possession having no right to make leases, and that consequently, upon entry by the mortgagor, it is as if a disseisee had re-entered upon a disseisor.⁹⁴ There seems to have been no actual decision in that country on the question whether the tenant is so entitled.⁹⁵ In this country, also, the right of the mortgagor's tenant to crops, as against one claiming under foreclosure, has been denied in a number of cases, usually upon the ground that the mortgagor cannot, by a lease, give to another a right in this respect which he has not himself.⁹⁶ Conversely, in several states in which the mortgagor is regarded as entitled to the crops, the same right has been recognized in his tenant.⁹⁷

⁹⁴ Powell, *Mortgages*, 158, 161 a, made, or, perhaps, advertised. In *Coventry's notes*; Coote, *Mortgages* (4th Ed.) 706. *Monday v. O'Neil*, 44 Neb. 724, 63 N. W. 32, 48 Am. St. Rep. 760, the ten-

⁹⁵ In *Keech v. Hall*, 1 Doug. 22, Lord Mansfield refused to decide this question. ant was given crops planted after the decree of foreclosure, but there the purchaser at foreclosure sale

⁹⁶ *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 165; *Howell v. Schenck*, 24 N. J. Law (4 Zab.) 83; *Reilly v. Carter*, 75 Miss. 798, 23 So. 435, 65 Am. St. Rep. 621; *Reed v. Swan*, 133 Mo. 100, 34 S. W. 483; *Fowler v. Carr*, 63 Mo. App. 486; *Downard v. Groff*, 40 Iowa, 597; *Martin v. Knapp*, 57 Iowa, 336, 10 N. W. 721; *Wheeler v. Kirkendall*, 67 Iowa, 612, 25 N. W. 829; *Stanbrough v. Cook*, 83 Iowa, 705, 49 N. W. 1010; *Goodwin v. Smith*, 49 Kan. 351, 31 Pac. 153, 17 L. R. A. 284, 33 Am. St. Rep. 373. had permitted him to retain possession until after the crop was harvested by him. In *Brown v. Leath*, 17 Tex. Civ. App. 262, 42 S. W. 655, 44 S. W. 42, the lease of the land seems to be regarded as effecting a severance of the crops, so as to take them from out of the operation of the mortgage. Occasionally the tenant's right to the crops is based on the appraisement law. *Cassilly v. Rhodes*, 12 Ohio, 88, 40 Am. Dec. 466. See *Monday v. O'Neil*, 44 Neb. 724, 63 N. W. 32, 48 Am. St. Rep. 760, ante, note 89.

⁹⁷ It is so decided in *Heavilon v. Farmers' Bank*, 81 Ind. 249, distinguishing *Jones v. Thomas*, 8 Blackf. (Ind.) 428, contra, as having been decided when the legal title was regarded as in the mortgagee. It is here said that probably the tenant could not claim crops planted by him after the foreclosure sale was In *Hecht v. Dettman*, 56 Iowa, 679, 7 N. W. 495, 10 N. W. 241, 41 Am. Rep. 131; *Richards v. Knight*, 78 Iowa, 69, 42 N. W. 284, 4 L. R. A. 453; *Caldwell v. Alsop*, 48 Kan. 571, 29 Pac. 1150, 17 L. R. A. 782; *Porche v. Bodin*, 28 La. Ann. 761, the mortgagor's tenant was regarded as entitled to the crops sown by him on

If the tenant has actually severed the crops before such purchaser acquires title or possession, he may, according to cases in this country, retain them as against such purchaser,⁹⁸ and according to a few decisions a constructive severance, by a conveyance or transfer to a third person, is sufficient to divest the rights of the purchaser at foreclosure sale.⁹⁹ In one state the statute expressly reserves the tenant's right to the crops as against a purchaser at a sale under a power in a mortgage.¹⁰⁰

Occasionally, in discussing the tenant's rights, it has been suggested or stated that, as his estate comes to an end at a time which he could not have ascertained at the time of planting the crops, and without any act on his part to produce this result, the common-law doctrine of emblements¹⁰¹ should be applied in his

the ground that they were matured at the time of the foreclosure sale. See ante, note 93.

⁹⁸ *Johnson v. Camp*, 51 Ill. 219 (but compare *Anderson v. Strauss*, 98 Ill. 485); *Allen v. Elderkin*, 62 Wis. 627, 22 N. W. 842; *Yeazel v. White*, 40 Neb. 422, 24 L. R. A. 449; *Reilly v. Carter*, 75 Miss. 798, 23 So. 435, 65 Am. St. Rep. 621. It is so decided in *Gray v. Worst*, 129 Mo. 122, 31 S. W. 585, but there the decision is based on the special language of the statute. In *Gregory v. Rosenkrans*, 72 Wis. 220, 39 N. W. 378, 1 L. R. A. 176, this rule was applied in favor of a tenant in connection with an "ice crop" cut by him, as against a purchaser at foreclosure.

⁹⁹ *Dail v. Freeman*, 92 N. C. 351; *Hershey v. Metzgar*, 90 Pa. 217. See *Caldwell v. Alsop*, 48 Kan. 571, 29 Pac. 1150, 17 L. R. A. 782; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284. But see to the contrary *Batterman v. Albright*, 122 N. Y. 484, 25 N. E. 856, 11 L. R. A. 800, 19 Am. St. Rep. 510; *Sexton v. Breese*, 135 N. Y. 387, 32 N. E. 133; *Shepard v. Philbrick*, 2 Denio (N. Y.) 174; *Beckman v. Sikes*, 35 Kan. 120, 10 Pac. 592, 57 Am. Rep. 145; *Ander-*

son v. Strauss, 98 Ill. 485; *Thompson v. Union Warehouse Co.*, 110 Ala. 499, 18 So. 105.

¹⁰⁰ *Missouri Rev. St. 1899*, § 4355. See *Reed v. Swan*, 133 Mo. 100, 34 S. W. 483.

In Pennsylvania the provisions of the execution law of that state that the lessee in possession at the time of the sheriff's deed should become the tenant of the purchaser, and that he should give up possession in three months on notice from the purchaser, were regarded as making him in effect a tenant at will of the purchaser and as so entitling him to emblements, though sowing after the sale. *Bittinger v. Baker*, 29 Pa. 66, 70 Am. Dec. 154. That this decision is based on the local statute (see *Adams v. McKesson's Ex'r*, 53 Pa. 81, 91 Am. Dec. 183) is lost sight of in *Dollar v. Roddenbery*, 97 Ga. 148, 25 S. E. 410, and *Heavilon v. Farmers' Bank*, 81 Ind. 249, where it is cited as sustaining the proposition that, apart from any statute, the tenant's rights take precedence of those of a purchaser at a sale under a judgment prior to the lease.

¹⁰¹ See ante, § 251.

favor.¹⁰² According to this view, a tenant of a mortgagor, who has planted and, through the mortgagor's default, has been entered upon by the mortgagee or by a purchaser at a sale under the mortgage, is to be regarded as in a position analogous to that of the lessee of a person having a life estate during widowhood, who, owing to the life tenant's marriage, is entered on by the remainderman, such lessee being, as before stated,¹⁰³ entitled to emblements. On this theory, a tenant of a mortgagor might be regarded as entitled to his crops even in a jurisdiction where the right would be denied to the mortgagor himself.¹⁰⁴ The difficulty, however, remains, that if the crops are to be regarded as an integral part of the security,¹⁰⁵ the mortgagor should not be at liberty to lessen this security by making a lease and so enabling the lessee to take the crops, while himself receiving their equivalent in rent. It does not seem that one acquiring a limited estate from the mortgagor, and so becoming his tenant, should be in any better position than one acquiring a fee simple estate from the mortgagor. In both cases he should take subject to the rights of the mortgagee, provided he has actual or constructive notice thereof.

The tenant of a judgment debtor has, in at least two jurisdictions, been given the right to crops as against a purchaser of the land under a judgment prior to the lease,¹⁰⁶ the courts adopting the view, which has, as above stated,¹⁰⁷ been occasionally assert-

¹⁰² *Heavilon v. Farmers' Bank*, 81 Ind. 249; *Hecht v. Dezman*, 56 Iowa, 679, 7 N. W. 495, 10 N. W. 241, 41 Am. Rep. 121; *Young v. Chandler*, 102 Mo. 251, 66 Atl. 539; *Monday v. O'Neil*, 44 Neb. 724, 63 N. W. 32, 48 Am. St. Rep. 799; *Dollar v. Roddenbery*, 97 Ga. 148, 25 S. E. 410. See *Gray v. Worst*, 129 Mo. 122, 21 S. W. 585, and *Bittinger v. Baker*, 29 Pa. 66, 70 Am. Dec. 154.

¹⁰³ See ante, note 51.

¹⁰⁴ Such seems to be the law in Pennsylvania. See *Bittinger v. Baker*, 29 Pa. 66, 70 Am. Dec. 154; *Miller v. Clement*, 40 Pa. 484; *McKeeby v. Webster*, 170 Pa. 624, 32 Atl. 1096.

¹⁰⁵ See ante, at notes 86, 87.

¹⁰⁶ *Heavilon v. Farmers' Bank*, 81 Ind. 249; *Dollar v. Roddenbery*, 97 Ga. 148, 25 S. E. 410; *Blitch v. Lee*, 115 Ga. 112, 41 S. E. 275, 57 L. R. A. 752. In *Dail v. Freeman*, 92 N. C. 351, the decision that the purchaser at sale under the lien is not entitled to the crops is based on the theory that there was a prior constructive severance by the giving of an agricultural lien on the crops. In *Bittinger v. Baker*, 29 Pa. 66, 70 Am. Dec. 154, there is a decision to that effect, based on a local statute. Ante, note 100.

¹⁰⁷ See ante, at note 90.

ed in the case of a mortgage, that where there is a lien merely, without any legal title in the creditor, a sale under the lien does not pass the crops.

The tenant of one in possession adversely to the rightful owner has presumably the same rights as to the crops, as against the latter, as his landlord would have had if the lease had not been made. That is, according to the decisions in this country, he would, it seems, have the right to crops severed by him before re-entry or recovery of possession in ejectment by the rightful owner,¹⁰⁸ while he would have no such right as to crops which are still growing at the time of his dispossession.¹⁰⁹

§ 253. Agreements for the division of crops.

a. **General considerations.** We have in another place considered the question of the difference between a lease, with a provision that a share of the crops shall go to the lessor, and a contract for the division of crops between the landowner and the cultivator, without the creation of the relation of landlord and tenant between them.¹¹⁰ We shall here consider the nature of the relation created by a contract of the latter sort, and then discuss the rights of the parties as to the crops, before their division, in the case both of a lease for a share of the crops and of a mere "cropping contract."

The view is quite frequently asserted, expressly or by implication, that if the cultivator cannot, in the particular case, be regarded as the tenant of the landowner, he must necessarily sustain to him the relation of a servant or employee, hired to do work for a share of the crops.¹¹¹ Occasionally, however, it is as-

¹⁰⁸ See cases cited ante, note 71.

¹⁰⁹ Rowell v. Klein, 44 Ind. 290, 15 Am. Rep. 235. See Sedgwick & Wait, Trial of Title to Land, § 683, and cases cited 12 Cyclopaedia Law & Proc. 977.

In McKean v. Smoyer, 37 Neb. 694, 56 N. W. 492, it appears to have been decided that a lessee who planted a crop was entitled to recover it from one who had a prior lease for the same year from the same lessor, and who was consequently entitled to possession of the land. The opinion says that such subsequent

lessee was not in the position of a trespasser because he acted in good faith. But *quære* as to this.

¹¹⁰ See ante, §§ 19, 20.

¹¹¹ Burgie v. Davis, 34 Ark. 179; Tinsley v. Craig, 54 Ark. 346, 15 S. W. 897, 16 S. W. 579; Williams v. Cleaver, 4 Houst. (Del.) 452; Chase v. McDonnell, 24 Ill. 236; Gray v. Robinson, 4 Ariz. 24, 33 Pac. 712; Graham v. Houston, 15 N. C. (4 Dev. Law) 222; Richards v. Wardwell, 82 Me. 343, 19 Atl. 863; Reeves v. Hannan, 65 N. J. Law, 249, 48 Atl. 1018; McKenzie v. Sykes, 47 Mich. 294, 11

serted that their relation is, if not that of landlord and tenant, that of parties to a joint adventure,¹¹² and this view seems more in accordance with the probable intention of the parties in the ordinary case, since if the "cropper" is to be regarded as a servant merely, he would, it seems, be subject to the absolute control of the landowner as regards the manner of sowing and cultivating the land, and his failure to comply with the latter's instructions would be ground for the termination of the contract by the latter, that is, for the servant's discharge. It may, however, clearly appear from the contract that the work is so to be done under the supervision and control of the landowner, in which case it is most properly to be regarded as one of employment.¹¹³ An agreement of this character by which the landowner and the cultivator are to divide the crops between them does not make them partners.¹¹⁴ It contemplates a sharing of the gross returns and not of the profits of the undertaking.¹¹⁵

N. W. 164; *Steel v. Frick*, 56 Pa. 172, 280; *Romero v. Dalton*, 2 Ariz. 210, 94 Am. Dec. 51; *Mann v. Taylor*, 52 11 Pac. 863; *Smith v. Schultz*, 89 Tenn. (5 Heisk.) 267; *Smith v. Cal. 526, 26 Pac. 1087; Parker v. Rice*, 56 Ala. 417 (semble); *Rake-straw v. Floyd*, 54 S. C. 288, 32 S. E. 419; *Fergus*, 43 Ill. 437; *Jeter v. Penn.*

28 La. Ann. 230, 26 Am. Rep. 98; *Williams v. Rogers*, 110 Mich. 418, 68 N. W. 240; *Putnam v. Wise*, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; *Perrine v. Hankinson*, 11 N. J. Law (6 Halst.) 181; *Rose v. Buscher*, 80 Md. 225, 30 Atl. 637; *Donnell v. Harshe*, 67 Mo. 170; *Day v. Stevens*, 88 N. C. 83, 43 Am. Rep. 732; *Brown v. Jaquette*, 94 Pa. 113, 39 Am. Rep. 770; *Freeman v. Gordon*, 59 Ill. App. 189; *Mann v. Taylor*, 52 Tenn. (5 Heisk.) 267.

¹¹² See *Parsons, Partnership* (4th Ed.) § 61, note; 22 Eng. & Am. Enc. Law (2d Ed.) 45; *Burdick, Partnership*, 23.

¹¹³ As, for instance, in *Huff v. Watkins*, 15 S. C. 82, 40 Am. Rep. 680; *McCutchen v. Crenshaw*, 40 S. C. 511, 19 S. E. 140. And such apparently was the contract in *Maverick v. Lewis*, 3 McCord Law (S. C.) 211; *Bryant v. Pugh*, 86 Ga. 525, 12 S. E. 927. See ante, § 20, at note 115.

¹¹⁴ *Gardenhire v. Smith*, 39 Ark. 1905, § 1982, provides that no lessor of property, merely by reason that he is to receive as rent, or compensation for its use, a share of the proceeds or net profits of the business in which it is employed, or any

Not infrequently the lease, though providing for a division of the crop, also provides that until division the title to the crop shall be in the landlord. This in effect gives him a lien on the whole crop to secure the delivery to him of his share.¹¹⁵

There are one or two *doctrines*¹¹⁷ and perhaps one decision,¹¹⁸ to the effect that under an agreement for the division of crops the parties may be tenants in common of the land as well as of the crops. Such a relation would, no doubt, be created between the parties if it clearly appears to be intended, the agreement being construed in effect as involving a demise by the landowner to the cultivator of an undivided interest in the land, but this result cannot be regarded as ordinarily within the contemplation of the parties, and such a construction of the agreement has but seldom been even suggested.

b. **Tenancy in common in crops.** The question most frequently discussed in connection with agreements for the division of crops between the landowner and the cultivator has been with regard to the rights of the parties in the crop before division. If one party has title to the whole crop to the exclusion of the other, he may, it is evident, by a transfer or mortgage thereof to an innocent purchaser, deprive the other party of his share, or the former's creditors may levy thereon, and so put it out of his power to deliver to the other party the latter's agreed share. Furthermore, the character of the rights of the respective parties to the crop before division will affect the character of the remedies which may be adopted by one in case the other undertakes to deprive him of his share. A number, perhaps the majority, of the courts, recognizing the possibility of the loss by one party of the share to which his agreement entitles him, if the whole title is regarded as being vested in the other, have asserted the doctrine that before division the two parties are tenants in common of the crop, that is, that each has an undivided interest

other uncertain consideration, shall be held a partner of the lessee. In *Am. St. Rep.* 171; *De Loach v. Delk*, 119 Ga. 884, 47 S. E. 204.

Georgia, likewise, the view that there is no partnership in such case is in part, at least, based on statutory provisions. See *Padgett v. Ford*, 117 Ga. 508, 43 S. E. 1002, 97

¹¹⁵ See post, § 322 a, at note 463.

¹¹⁷ *Warner v. Abbey*, 112 Mass. 355; *Wells v. Hollenbeck*, 37 Mich. 504 (semble).

¹¹⁸ *Harrower v. Heath*, 19 Barb. (N. Y.) 331.

therein which is subject to his sole control, this view being perhaps more frequently based in terms upon grounds of expediency than upon the construction of the particular agreement. This view, that the parties are tenants in common of the crops, has been most frequently taken in cases in which the agreement was not regarded as involving a demise, creating the relation of landlord and tenant,¹¹⁹ but in some cases, even though the cultivator is expressly stated to be a tenant, a tenancy in common in the crops is recognized as existing.¹²⁰ Occasionally such tenancy

- ¹¹⁹ *Hare v. Celey*, Cro. Eliz. 143; *Smith v. Rice*, 56 Ala. 417; *Adams v. Thornton*, 1 Cal. App. XVIII, 82 Pac. 215; *Herskell v. Bushnell*, 37 Conn. 36, 9 Am. Rep. 299; *Alwood v. Ruckman*, 21 Ill. 200; *Creel v. Kirkham*, 47 Ill. 344; *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Loomis v. O'Neal*, 73 Mich. 582, 41 N. W. 701; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Delaney v. Root*, 99 Mass. 546, 97 Am. Dec. 52; *Reed v. McRill*, 41 Neb. 206, 59 N. W. 775; *Reynolds v. Reynolds*, 43 Hun (N. Y.) 142; *De Mott v. Hagerman*, 8 Cow. (N. Y.) 220, 18 Am. Dec. 443; *Caswell v. Districh*, 15 Wend. (N. Y.) 379; *Putnam v. Wise*, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; *Armstrong v. Bicknell*, 2 Lans. (N. Y.) 216; *Guest v. Opdyke*, 31 N. J. Law, 552; *Reeves v. Hannan*, 65 N. J. Law, 249, 48 Atl. 1018; *Doty v. Heath*, 52 Miss. 530; *Romero v. Dalton*, 2 Ariz. 210, 11 Pac. 863; *Jones v. Chamberlin*, 52 Tenn. (5 Heisk.) 210 (semble); *Betts v. Ratliff*, 50 Miss. 561; *Mosier v. Union Warehouse Co.*, 39 Or. 546, 65 Pac. 808; *Lowe v. Miller*, 3 Grat. (Va.) 205, 46 Am. Dec. 188; *Stedman v. Gassett*, 18 Vt. 346; *Aiken v. Smith*, 21 Vt. 172; *Cutting v. Cox*, 19 Vt. 517; *Mead v. Owen*, 80 Vt. 273, 67 Atl. 722, 12 L. R. A. (N. S.) 655.
- case, makes a contract with another person for the latter to do part of the work for a part of his share, all the parties become tenants in common in the crops, it has been decided. *Tripp v. Riley*, 15 Barb. (N. Y.) 333; *Putnam v. Wise*, 1 Hill (N. Y.) 234, 37 Am. Dec. 309.
- In *Moore v. Spruill*, 35 N. C. (13 Ired. Law) 55, the landowner and cultivator were regarded as "joint owners," with the result that the survivor could dispose of the crop.
- ¹²⁰ *Baughman v. Reed*, 75 Cal. 319, 17 Pac. 222, 7 Am. St. Rep. 170; *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027; *Smith v. State*, 84 Ala. 438, 4 So. 683, 5 Am. St. Rep. 381 (semble); *Tinsley v. Craig*, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570; *Connell v. Richmond*, 55 Conn. 401, 11 Atl. 852 (semble); *Ferrall v. Kent*, 4 Gill (Md.) 209; *Moulton v. Robinson*, 27 N. H. 550; *Carr v. Dodge*, 40 N. H. 403; *Brown v. Lincoln*, 47 N. H. 468; *Cooper v. McGrew*, 8 Or. 327; *Abernethy v. Uhlman* (Or.) 93 Pac. 936; *Johnson v. Hoffman*, 53 Mo. 504; *Moser v. Lower*, 48 Mo. App. 85; *Mouser v. Davis*, 11 Wkly. Law Bul. (Ohio) 249; *Fagan v. Vogt*, 35 Tex. Civ. App. 528, 80 S. W. 664; *Rentfrow v. Lancaster*, 10 Tex. Civ. App. 32, 31 S. W. 229; *Horsley v. Moss*, 5 Tex. Civ. App. 341, 23 S. W. 1115; *Bradley v. Arnold*, 16 Vt. 382. And

Where the cultivator, in such a

in common is stated to exist, without any reference being made to the question whether the cultivator is to be regarded as a tenant of the landowner as regards the land.¹²¹

We will consider this question, of the existence of a tenancy in common in the crops, firstly, on the theory that the agreement does not involve a demise of the land, creating the relation of landlord and tenant. If the agreement in such case be regarded as one of hiring, making the cultivator the servant of the landowner, a view quite frequently asserted,¹²² it is difficult to understand how the share of the crops which is to be delivered to the cultivator as wages can, before such delivery, be regarded as belonging to him. He has, it would seem, a mere contractual right against the landowner. That one thus employed to cultivate the land for a share of the crops has no proprietary interest therein is recognized in a number of cases.¹²³ If, however, instead of regarding the cultivator as the servant of the landowner, we re-

see *Frost v. Kellogg*, 23 Vt. 308; *Sowles v. Martin*, 76 Vt. 180, 56 Atl. 979; *Willard v. Wing*, 70 Vt. 123, 39 Atl. 632, 67 Am. St. Rep. 657. In the latter case it was held that milk from cows leased with the land belonged to the parties as tenants in common.

In *Case v. Hart*, 11 Ohio, 364, 38 Am. Dec. 735, it is said that where there is a lease under which the landlord is to receive one-third of the corn and oats, the landlord has a "lien or species of property," and that the tenant, or those claiming under him, cannot remove the entire crop without first satisfying the claim for rent.

In *Bradley v. Arnold*, 16 Vt. 382, under an agreement that the lessee was to pay to the lessor 1,000 pounds of wool each year from the sheep on the premises, which were included in the lease, and that the lessee should not dispose of any of the wool till he had paid this 1,000 pounds, the lessor and lessee were regarded as tenants in common of the wool, in

the proportion of 1,000 pounds to the whole.

¹²¹ See *Thompson v. Mawhinny*, 17 Ala. 362, 52 Am. Dec. 176; *Pruitt v. Ellington*, 59 Ala. 454; *Schmitt v. Cassilius*, 31 Minn. 7, 16 N. W. 453; *Knox v. Marshall*, 19 Cal. 617; *Consolidated Land & Irr. Co. v. Hawley*, 7 S. D. 229, 63 N. W. 904; *McLaughlin v. Salley*, 46 Mich. 219, 9 N. W. 256; *McClure v. Thorpe*, 68 Mich. 33, 35 N. W. 829; *Kamerick v. Castleman*, 23 Mo. App. 431.

¹²² See ante, at note 111.

¹²³ *Gray v. Robinson*, 4 Ariz. 24, 33 Pac. 712; *Bryant v. Pugh*, 86 Ga. 525, 12 S. E. 927; *Chase v. McDonnell*, 24 Ill. 236; *Gifford v. Meyers*, 27 Ind. App. 348, 61 N. E. 210; *Woodward v. Conder*, 33 Mo. App. 147; *Richards v. Wardwell*, 82 Me. 343, 19 Atl. 863; *Patten v. Heustis*, 26 N. J. Law (2 Dutch.) 293; *State v. Jones*, 19 N. C. (2 Dev. & B.) 544; *Cole v. Hester*, 31 N. C. (9 Ired. Law) 23; *Huff v. Watkins*, 15 S. C. 85, 40 Am. Rep. 680; *Richey v. DuPre*, 20 S. C. 6; *Porter v. Chandler*,

gard the two as parties to a joint adventure, as has occasionally been suggested,¹²⁴ they may well be joint owners or tenants in common of the crops. This would be in accordance with a principle which has been recognized in other connections,¹²⁵ that if two persons enter into an agreement for the manufacture or production of any class of property, each party contributing labor, materials, or capital for the purpose, they are to be regarded as tenants in common of the product. Adopting still another view, the owner of the land might be regarded as conveying to the cultivator, by his entry into the agreement, an interest in the crops to be produced in the future equal to his stipulated share, it being recognized, in most jurisdictions at least, that the owner of land may transfer an interest in a crop yet to be planted.¹²⁶ Even though the agreement be verbal, it might thus, it seems, take effect as a transfer of an interest in future crops, annual crops (*fructus industriales*) not being regarded as land within the Statute of Frauds.¹²⁷

As regards the existence of a tenancy in common in the crops when the relation of landlord and tenant exists between the owner of the land and the cultivator on shares, the cases are by no means in unison. As before stated,¹²⁸ there are a number of decisions in which the landlord and tenant have been regarded as tenants in common of the crop. But there are perhaps even more cases in which the two relations are regarded as incon-

27 Minn. 301, 7 N. W. 142, 38 Am. Rep. 293; *Tanner v. Hills*, 48 N. Y. 602 (semble); *Delaney v. Root*, 99 Mass. 546, 97 Am. Dec. 52 (semble); *Decker v. Stewart*, 75 Hon. 214, 31 Abb. N. C. 224, 27 N. Y. Supp. 114; *Kelly v. Rummerfield*, 117 Wis. 620, 94 N. W. 649, 98 Am. St. Rep. 951.

The Alabama statute (Code 1896, § 2712) providing that when one party furnishes the land and the team to cultivate it, and another the labor, the contract of hire shall be held to exist, and the laborer shall have a lien on the crop for the value of his portion of the crop, excludes the relation of tenants in common in the crops, and recognizes the title as vested in the landowner. *Jordan v. Lindsay*, 132 Ala. 567, 31 So. 484; *Farrow v. Wooley*, 138 Ala. 267, 36 So. 384.

¹²⁴ See ante, at note 112.

¹²⁵ *Freeman, Cotenancy & Partition*, § 94; *Beaumont v. Crane*, 14 Mass. 400; *White v. Brooks*, 43 N. H. 402; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161; *Boylston Ins. Co. v. Davis*, 68 N. C. 17, 12 Am. Rep. 624; *Thomas v. Morrison* (Tex. Civ. App.) 46 S. W. 46.

¹²⁶ 8 Am. & Eng. Enc. Law (2d Ed.) 311; 1 *Mechem, Sales*, § 200.

¹²⁷ *Benjamin, Sales*, § 126; 1 *Mechem, Sales*, § 342.

¹²⁸ See ante, note 120.

sistent, for the reason that crops regularly belong to the tenant,¹²⁹ and the share of the crop which is eventually to go to the landlord is in the nature of rent, and the fact that an article is to be delivered in payment of rent cannot make it the property of the landlord until it is delivered or "rendered" to him.¹³⁰ Regarding the landlord's share of the crop, in the particular case, as rent to be rendered or paid to him, the view asserted in these cases, that the whole crop in the first place belongs to the tenant, seems on principle entirely sound. The view has been taken, however, in one jurisdiction at least,¹³¹ that such a provision that the landlord shall have a share of the crop is to be regarded, not as a reservation of rent, but rather as an exception, out of the operation of the lease, of such proportion of the future profits of the land, these future profits being a proper subject for an exception, as they are for a grant,¹³² and, in support of this view, attention was at the same time called to the statement of the common-law writers that part of the profits of the land cannot be reserved as rent.¹³³ This view of the provision for a sharing

¹²⁹ See ante, § 249.

¹³⁰ *Chicago & W. M. R. Co. v. Linard*, 34 Ind. 319, 48 Am. Rep. 155, disapproving *Scott v. Ramsey*, 82 Ind. 330; *Smyth v. Tankersley*, 20 Ala. 212, 56 Am. Dec. 193; *Treadway v. Treadway*, 56 Ala. 390; *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Ponder v. Rhea*, 32 Ark. 435; *Sargent v. Courier*, 66 Ill. 245; *Alwood v. Ruckman*, 21 Ill. 200; *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312; *Townsend v. Isenberger*, 45 Iowa, 670; *Howard County v. Kyte*, 69 Iowa, 307, 28 N. W. 609 (but see *Riddle v. Dow*, 98 Iowa, 7, 66 N. W. 1066, 32 L. R. A. 811); *Holderman v. Smith*, 3 Kan. App. 423, 43 Pac. 272; *Taylor v. Coney*, 101 Ga. 655, 28 S. E. 974; *Warner v. Abbey*, 112 Mass. 355; *Dockham v. Parker*, 9 Me. (9 Greenl.) 137, 23 Am. Dec. 547; *Turner v. Bachelder*, 17 Me. 257; *Symonds v. Hall*, 37 Me. 354, 59 Am. Dec. 53; *Richards v. Wardwell*, 82 Me. 343, 19 Atl. 863; *Betts*

v. Ratliff, 50 Miss. 561; *Doremus v. Howard*, 23 N. J. Law (3 Zab.) 390; *Reeves v. Hannan*, 65 N. J. Law, 249, 48 Atl. 1018; *Deaver v. Rice*, 29 N. C. (4 Dev. & B.) 567; *Peebles v. Lassiter*, 33 N. C. (11 Ired. Law) 73; *Ross v. Swaringer*, 31 N. C. (9 Ired. Law) 481; *Rinehart v. Olwine*, 5 Watts & S. (Pa.) 157; *Burns v. Cooper*, 31 Pa. 426; *Ream v. Har-nish*, 45 Pa. 376; *Magill v. Holston*, 65 Tenn. (6 Baxt.) 322 (semble); *Texas & P. R. Co. v. Bayliss*, 62 Tex. 571; *Hurd v. Darling*, 16 Vt. 377. In Wisconsin it is decided that *prima facie* the whole crop belongs to the tenant, but it is recognized that by special stipulation the parties may be tenants in common thereof. *Rowlands v. Voechting*, 115 Wis. 352, 91 N. W. 990.

¹³¹ This view is fully and ably stated by Bell, J., in *Moulton v. Robinson*, 27 N. H. 550.

¹³² See ante, at note 126.

¹³³ See ante, § 168, at note 50.

of the crops, as constituting an exception from the thing demised, and not a reservation of rent, and as consequently vesting an undivided interest in the crops in the landlord as they come into existence, would seem, in the majority of cases, to be a reasonable one, though so to regard the provision when the lease expressly states that the landlord's share is to be paid to him "as rent" would seem to involve considerable latitude of construction. It is on such a theory that the numerous cases recognizing a tenancy in common in the crops¹³⁴ may perhaps best be supported. In the last analysis, however, the question in every case would seem to be, what was the intention of the parties, as indicated by the language used.¹³⁵

c. **Duties as regards cultivation and harvesting.** If one who has agreed to cultivate the land on shares, but who is not in the position of a tenant, abandons the cultivation before completion, without justification, the landowner is entitled to take the whole crop,¹³⁶ and the cropper would also be liable in damages for breach of his contract to cultivate.¹³⁷ If a tenancy exists, the breach of the tenant's contract to work the land and to give the landlord a share of the crops, it has been decided, does not give the latter a right to re-enter, in the absence of an express condition to that effect in the lease,¹³⁸ or unless the tenant has abandoned the premises.¹³⁹ In two cases, although there was a condition for re-entry, it was decided that the landlord, on re-enter-

¹³⁴ See ante, note 120.

¹³⁵ *Orcutt v. Moore*, 134 Mass. 48, 45 Am. Rep. 278; *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312; *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Antone v. Miles* (Tex. Civ. App.) 19 Tex. Ct. Rep. 748, 105 S. W. 39.

¹³⁶ *Butler v. Rice*, 17 Hun (N. Y.) 406; *Preston v. Smallwood*, 65 Hun. 624, 20 N. Y. Supp. 504; *Chandler v. Thurston*, 27 Mass. (10 Pick.) 205; *Kiplinger v. Green*, 61 Mich. 340, 28 N. W. 121, 1 Am. St. Rep. 584. But in the case last cited it is decided that if the cropper has sold his share before abandonment, the purchaser may claim it as against the landowner. This view

seems to assume that they are joint owners of the crop.

¹³⁷ In *Culley v. Taylor*, 62 Neb. 651, 87 N. W. 334, it was decided that if the cropper fails wholly in his contract to cultivate, the measure of damages is whatever injury may have been caused the land by allowing it to lie idle and the probable value of the landowner's share of the crop had the contract been fulfilled.

¹³⁸ *Hanaw v. Bailey*, 83 Mich. 24, 46 N. W. 1029, 9 L. R. A. 801. Compare ante, § 3 b (2), at notes 56-60.

¹³⁹ *Dillon v. Wilson*, 24 Mo. 278. See ante, § 3 c, at notes 52-55.

ing, could not assert title to the share of the crops which was to go to the tenant.¹⁴⁰

A mere cropper does not lose his right to a share of the crop, of which he is a tenant in common, by abandoning the cultivation of the land, if he is justified in so doing, as when the behavior of the landowner is harassing and insulting,¹⁴¹ though if not regarded as a tenant in common of the crop he would presumably be entitled merely to assert a claim for damages in such case. Nor does he lose his right to his share of the crop because he withdraws entirely from the premises at the time at which his contract is to come to an end, without having received his share, owing to the landowner's failure to divide it, as agreed, when ready for market.¹⁴²

The view has been asserted that, when the landlord is to receive a share of the crop, the tenant is bound, as regards the landlord, to use reasonable diligence to raise a full crop, and that, if he fails to do so, the landlord is entitled to such a portion of the crop as his share would have amounted to if the tenant had used such diligence.¹⁴³ Elsewhere, however, a contrary decision has been rendered, it being said that "it would give rise to interminable litigation, if landlords, leasing on shares, could claim all that would have enured to their benefit, if the tenant had exercised ordinary industry, and judgment in the cultivation of the crops. The amicable adjustments of rents would be almost exceptional. The landlord chooses his tenant, and must judge of his skill and fidelity in husbandry, or if he desires as-

¹⁴⁰ *Collier v. Cunningham*, 2 Ind. App. 254, 28 N. E. 341; *Koeleg v. Phelps*, 80 Mich. 466, 45 N. W. 350. Compare ante, at notes 74-76.

¹⁴¹ *Reynolds v. Reynolds*, 48 Hun (N. Y.) 142. But an expression by the landowner of dissatisfaction with him and of a desire to have him "get off" does not justify an abandonment, it has been decided. *Preston v. Smallwood*, 65 Hun, 624, 20 N. Y. Supp. 504.

¹⁴² *Wood v. Noack*, 84 Wis. 398, 54 N. W. 785.

¹⁴³ *Wheat v. Watson*, 57 Ala. 581. Somewhat similar to this view is

that adopted in *Long v. Fitzimmons*, 1 Watts & S. (Pa.) 530, to the effect that where the lessor of a grist mill reserved two-thirds of the tolls received, and the lessee ground so badly as to be unable to collect tolls from his customers, the latter must account for what the lessor's two-thirds would have amounted to had the grinding been well done. In *Cammack v. Rogers*, 32 Tex. Civ. App. 125, 74 S. W. 945, it is said that, in the case of a lease on shares, there is an implied covenant to cultivate in a farmer-like manner.

insurance on these points, should make special stipulations, or have money rent secured."¹⁴⁴ It has, however, been decided in the same jurisdiction that the tenant is liable in damages if the landlord fails to receive all his share of the crop owing to the tenant's failure to gather it, even though this could not be done without great inconvenience and expense.¹⁴⁵ The tenant is obviously not liable for a deficiency in the quantity received by the landlord resulting from a partial failure of the crop caused by bad weather.¹⁴⁶ If the tenant makes express stipulations in regard to the cultivation, he is liable in damages for failure to comply therewith.¹⁴⁷

In the case of a mere contract to work the land on shares, as distinguished from a lease for a share of the crop, the landowner, if he prevents the other party to the contract from going on the land and cultivating it, is liable in damages for breach of the contract.¹⁴⁸ On the other hand, if a tenancy exists, the landlord's liability in case of interference by him with the tenant would be either in tort, as for a trespass, or on the covenant for quiet enjoyment.

d. *Ascertainment of landlord's share.* Under an agreement for a division of the crops, the straw as well as the grain of the

¹⁴⁴ *Patton v. Garrett*, 27 Ark. 605, 312, 22 S. W. 1081, to the effect that per Eakin, J. That the landlord's loss by reason of the tenant's bad cultivation cannot be collected as rent, see *Patterson v. Hawkins*, 71 Tenn. (3 Lea) 483. And that there can be no distress for the value of what the landlord's portion would have been had the tenant performed his stipulations as to cultivation, see *Reynolds v. Howard*, 111 Ga. 888, 36 S. E. 967.

¹⁴⁵ *Johnson v. Bryant*, 61 Ark. 312, 22 S. W. 1081. And see *Caruthers v. Williams*, 53 Mo. App. 181, to the effect that a tenant is liable for the landlord's share of the crop which he neglected to gather.

¹⁴⁶ *Spencer v. Cullom*, 36 La. Ann. 213; *Brown v. Owen*, 94 Ind. 21. And see *Johnson v. Bryant*, 61 Ark.

312, 22 S. W. 1081, to the effect that he is not liable for failure caused by "act of God."

¹⁴⁷ *Enley v. Nowlin*, 60 Tenn. (1 Baxt.) 163; *Reynolds v. Chynoweth*, 48 Vt. 103, 24 Atl. 36.

¹⁴⁸ See *Williams v. Bemis*, 108 Mass. 91, 11 Am. Rep. 218; *Jewett v. Brooks*, 124 Mass. 595; *Reynolds v. Reynolds*, 48 Hun (N. Y.) 142; *Shoemaker v. Crawford*, 82 Mo. App. 487; *Tigner v. Toney*, 12 Tex. Civ. App. 518, 35 S. W. 831. Even though the landowner permits another to harvest the crop, the crop-er's only redress is an action for the breach of contract, and if he enters and takes the crop so harvested he is guilty of trespass. *Woodward v. Conder*, 33 Mo. App.

wheat is to be divided,¹⁴⁹ and in the case of a corn crop, the agreement applies to the stalks after the corn is gathered.¹⁵⁰ In the case of a cotton crop, the seed as well as the lint is within the agreement.¹⁵¹

It has been decided that an agreement that the crop shall be divided between the landlord and tenant according to the custom among the farmers of the neighborhood is valid.¹⁵² A custom by which a tenant on shares is given a share in the product of sugar trees only when he furnishes the utensils for making the sugar has been regarded as controlling,¹⁵³ but a custom has been regarded as inadmissible to show that a tenant on shares was not entitled to a share of the straw as well as the grain, this being a question of the construction of the contract, and the tenant being entitled to a share in all the crop, unless the contract gives a part to the landlord.¹⁵⁴

It is always assumed that the obligation to gather the whole crop, including the landlord's share, is upon the tenant, and that he can charge no part of the cost thereof to the landlord.^{155, 156}

c. **Delivery of landlord's share**—(1) **Mode of delivery.** After a division of the crop and a delivery to one party of his share, his title to the part delivered becomes complete.¹⁵⁷ The question of what constitutes a delivery by the tenant, such as to vest

¹⁴⁹ Rank v. Rank, 5 Pa. 211; Smith v. Dixie, 66 Neb. 823, 92 N. W. 1018, 103 Am. St. Rep. 745.

¹⁵⁰ Moser v. Lower, 48 Mo. App. 85; Black v. Scott, 104 Mo. App. 37, 78 S. W. 301.

¹⁵¹ McBride v. Puckett (Tex. Civ. App.) 66 S. W. 242.

¹⁵² Clem v. Martin, 34 Ind. 341.

¹⁵³ Brown v. Burrington, 36 Vt. 40.

¹⁵⁴ Iddings v. Nagle, 2 Watts & S. (Pa.) 22.

^{155, 156} See, to this effect, Johnson v. Bryant, 61 Ark. 312, 32 S. W. 1081; Field v. Wheeler, 120 N. C. 264, 26 S. E. 812; Caruthers v. Williams, 53 Mo. App. 181; Gore v. Gardner (Tex. Civ. App.) 68 S. W. 520.

¹⁵⁷ Durdin v. Hill, 75 Ga. 228, 58

Am. Rep. 467; Rohrer v. Babcock, 126 Cal. 222, 58 Pac. 537; Hart v. State, 29 Ind. 200; Burns v. Cooper, 31 Pa. 426. In Rohrer v. Babcock, 126 Cal. 222, 58 Pac. 537, the stacking of the landowner's share of the crop in a place named was regarded as a delivery. In Burns v. Cooper, 31 Pa. 426, it was decided that while delivery of the landlord's share was necessary to vest title in him, there was a sufficient delivery for this purpose if the tenant threshed the wheat, divided it in his barn in the presence of the landlord, and took away his own half.

The mere attachment of the cultivator's undivided share does not effect a division, though the officer takes the stipulated portion of the

the title to the stipulated share in the landlord, has not frequently been the subject of litigation. If the tenant is in terms required merely to separate the landlord's share on the premises, this, it seems, is sufficient to vest in him the title thereto.¹⁵⁸ A mere placing of the whole crop, without any division, in the place named for delivery of the landlord's share, is not a compliance with the tenant's contract to deliver.¹⁵⁹

The parties may waive a provision in regard to the mode of division of the crop, and one who has assented to the division, as made, cannot thereafter question its correctness.¹⁶⁰ And so if one accepts a money payment in lieu of his share of the crop, he cannot thereafter assert any claim as to the crop.¹⁶¹

(2) **Time of delivery.** There are occasional decisions that a yearly crop rent, like a money rent, is payable at the end of the yearly period.^{161a} It was in effect so decided when the question involved was whether the right to the rent passed on a transfer of the reversion during such period,¹⁶² and likewise when the question involved was that of the time for levy of a distress.¹⁶³ It has, however, frequently been said that rent payable in a share of the crop must be delivered within a reasonable time after the harvesting of the crop,¹⁶⁴ and what is a reasonable time has been said to depend largely on the nature of the crop and the circumstances of each case, and to be a question for the jury.¹⁶⁵ It has

crop, it being provided by the lease that the crop should be threshed in the landowner's barn, and this not having been done. *Bishop v. Doty*, 1 Vt. 38.

¹⁵⁸ In Indiana, though it is fully recognized that the landlord has no interest in the crop merely because a share thereof is to be delivered to him, it is considered that if no delivery of his share is to be made, but it is merely to be "laid by" for him on the premises, his title thereto becomes complete when so laid by. *Hart v. State*, 29 Ind. 200. And so, if it is expressly stipulated that he is "to save and take care of" his half of the crop "at cutting up time," he then becomes the owner. *Lindley v. Kelley*, 42 Ind. 294. See

also, *Chicago & W. M. R. Co. v. Linard*, 94 Ind. 319, 48 Am. Rep. 155.

That tender of the landlord's share places the title in him, see *Fordyce v. Hathern*, 57 Mo. 120.

¹⁵⁹ *Roush v. Emerick*, 80 Ind. 551; *Manwell v. Manwell*, 14 Vt. 14.

¹⁶⁰ *Freese v. Arnold*, 99 Mich. 13, 57 N. W. 1038.

¹⁶¹ *Conner v. Schricker*, 42 Neb. 656, 60 N. W. 891.

^{161a} See ante, § 172 i, note 200.

¹⁶² *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312. This was a lease for a year only.

¹⁶³ *Nowery v. Connolly*, 29 U. C. Q. B. 39.

¹⁶⁴ See ante, § 172 i, note 201.

¹⁶⁵ *Caruthers v. Williams*, 58 Mo. App. 100. In this case it is decided

also been said that "unless otherwise provided by agreement, the crop should be divided from time to time, as considerable parts thereof shall be gathered, especially where the gathering of the whole is delayed for a considerable length of time."¹⁶⁶ The tenant is entitled to a reasonable time within which to gather the crop.¹⁶⁷

The tenant cannot withhold the landlord's share until the latter has paid a claim due the tenant by the terms of the lease, if this is not expressly made a lien on the crop.^{167a}

f. **Transfer of undivided share.** If the cultivator of land "on shares" is, in a particular case, to be regarded as a mere servant, and his share of the crop is merely to be "paid" to him as wages,¹⁶⁸ he has, it seems, before he has received his share, no interest in the crop, and the validity of a conveyance or mortgage by him of such share may be open to question.¹⁶⁹ On the other hand, if

that the tenant can show, in an action for the rent, that he made efforts to have the grain threshed and delivered in reasonable time. In *Rawlins v. Bush*, 80 Ga. 588, 5 S. E. 634, evidence that the land was unhealthy, and that the tenant and his family and laborers were consequently sick, was admitted to show that a reasonable time had not elapsed after the maturity of the crops for their gathering and delivery before the suing out of a distress.

¹⁶⁶ *Smith v. Tindall*, 107 N. C. 88, 12 S. E. 121, per Merrimon, C. J. The opinion proceeds: "There is no reason, ordinarily, why this shall not be done, and reasons of convenience, economy, safety of the parts of the crop gathered, and security of the rights of the parties interested, strongly suggest that it should be." And see *Brown v. Adams*, 35 Tex. 447, to the effect that a crop rent should be paid as the crop is gathered.

That by the Iowa statute (Code

1897, § 2991) such a lease terminates December 1st does not render the crop rent payable that day, so as to take the case out of Code, § 3056, which provides that no contract for the delivery of property in which the time of performance is not fixed shall be converted into a money demand until a demand of performance has been made. *Johnson v. Shank*, 67 Iowa, 115, 24 N. W. 749.

¹⁶⁷ *Holt v. Licette*, 111 Ga. 810, 35 S. E. 703.

^{167a} *Rohrer v. Babcock*, 126 Cal. 222, 58 Pac. 537.

¹⁶⁸ See ante, at note 111.

¹⁶⁹ That it is valid is decided in *Beard v. State*, 43 Ark. 284; *Parks v. Webb*, 48 Ark. 293; *McGee v. Fitzer*, 37 Tex. 27. Contra, *Bryant v. Pugh*, 86 Ga. 525, 12 S. E. 927; *McNeely v. Hart*, 32 N. C. (10 Ired. Law) 63, 51 Am. Dec. 377. In most jurisdictions, no doubt, the cultivator may transfer, by way of security or absolutely, his claim against the landowner to have a share of the

he is to be regarded as a tenant in common of the crops, he may no doubt convey or mortgage his undivided interest.¹⁷⁰

In the case of a tenancy, as distinguished from a mere cropping contract, the tenant is, as before stated,¹⁷¹ by perhaps the majority of the cases, regarded as the owner of the whole crop to the exclusion of the landlord, and it would seem that, when such is the case, the landlord cannot convey or mortgage any part of the crop before division,¹⁷² though he could ordinarily transfer his personal claim against the tenant to have the stipulated share delivered to him, that is, he could transfer his right to the rent, but not the specific substance with which the rent is to be paid. In one state, however, it has apparently been decided that, though the tenant is the owner of the whole crop before division, the landlord has a "mortgageable interest therein."¹⁷³

If the landlord and tenant are to be regarded as tenants in common of the crop, the tenant can obviously not convey or mortgage the landlord's share,¹⁷⁴ though he may convey or mortgage his own share.¹⁷⁵ The tenant, if regarded as the owner of the whole crop, may transfer or mortgage it to a third person, even to the injury of the landlord.¹⁷⁶

crop delivered to him, but this is sending opinion, written by Granger, J., is a most forcible one. The case of *Potts v. Newell*, 22 Minn. 561, cited in the opinion of the court, supports the decision, though in the Minnesota case there is no discussion of the question. *Howell v. Pugh*, 27 Kan. 702; *Horseley v. Moss*, 5 Tex. Civ. App. 341, 23 S. W. 1115, and *Ferrall v. Kent*, 4 Gill (Md.) 269, also cited in the Iowa case, are decisions, apparently, that the landlord and tenant have joint interests in the crops, in accordance with the authorities cited ante, note 120.

¹⁷⁰ *Curtner v. Lyndon*, 128 Cal. 35, 60 Pac. 462; *McGee v. Filger*, 37 Tex. 27; *Aiken v. Smith*, 21 Vr. 172; *Dentson v. Sawyer*, 95 Minn. 417, 104 N. W. 305; *Alexander v. Ziegler*, 84 Miss. 560, 26 So. 536. One to whom the cultivator has transferred his share of the crop, a purchaser in good faith, cannot be affected, as regards his rights in the crop, by the cultivator's subsequent abandonment of the contract. *Kiplinger v. Green*, 61 Mich. 340, 28 N. W. 121, 1 Am. St. Rep. 584.

¹⁷¹ See ante, note 130.

¹⁷² See *Oreutt v. Moore*, 134 Mass. 48, 45 Am. Rep. 278, to this effect.

¹⁷³ *Riddle v. Dow*, 98 Iowa, 7, 66 N. W. 1066, 32 L. R. A. 811. The dis-

gagement did not know of the landlord's

¹⁷⁴ *Sunol v. Molloy*, 63 Cal. 369.

¹⁷⁵ *Sunol v. Molloy*, 63 Cal. 369.

¹⁷⁶ *Holmes v. Holifield*, 97 Ill. App. 185; *Doremus v. Howard*, 23 N. J. Law (3 Zab.) 390. In the former case the fact that the tenant's mort-

gagee did not know of the landlord's

If the landowner and cultivator are to be regarded as tenants in common of the crop, whether or not the relation of tenancy exists, a mortgagee of the interest of either becomes a tenant in common with the other, having the same rights as the mortgagor with reference to the crop.¹⁷⁷

g. Rights of creditors. The creditors of either party stand in the same position as the party himself, and if, until delivery of his share, the title in no part of the crop is vested in the landlord, his creditors cannot levy upon it.¹⁷⁸ Conversely, if the title to the whole crop is in the landowner, the creditors of the cultivator cannot levy thereon.¹⁷⁹ And if they are tenants in common of the crop, the share of each is alone subject to the claims of his creditors.¹⁸⁰ If the whole crop is regarded as belonging to the tenant before division, it is subject as a whole to a levy by his creditors, although the effect be to deprive the landlord of his share.¹⁸¹

Upon delivery to the landlord of the share which he is to re-

rights was regarded as material upon the question of priority.

¹⁷⁷ *Sunol v. Molloy*, 63 Cal. 369; *Abernethy v. Uhlman* (Or.) 93 Pac. 936; *McGee v. Fitzer*, 37 Tex. 27.

It has been decided that if a tenant delivers a part, not exceeding his own share, to one to whom he had previously conveyed such share, and an equal part to the landlord, the latter cannot take the part thus delivered to the other, even though this, with the part delivered to him, does not exceed the share of the whole crop to which he is entitled. *Hopper v. Haines*, 71 Md. 64, 18 Atl. 29, 20 Atl. 159.

¹⁷⁸ *Hansen v. Dennison*, 7 Ill. App. (7 Bradw.) 73; *Williams v. Smith*, 7 Ind. 559; *Ream v. Harnish*, 45 Pa. 376; *Gordon v. Armstrong*, 27 N. C. (5 Ired. Law) 409; *Devore v. Kemp*, 3 Hill Law (S. C.) 259. In *Flournoy v. Wardlaw*, 67 Ga. 378, it was held that even though the tenant had the crop, consisting of cotton, placed in

the landlord's gin house, and the latter, acting as the tenant's agent, had it carried to town, where it was inadvertently placed in the warehouse of the landlord's creditor, the latter could not levy on it.

The landlord's creditors can reach his share only by garnishing the tenant. *Howard County v. Kyte*, 69 Iowa, 307, 28 N. W. 609.

¹⁷⁹ *Chandler v. Thurston*, 27 Mass. (10 Pick.) 205; *Gray v. Robinson*, 4 Ariz. 24, 33 Pac. 712; *Wanamaker v. Buchanan*, 33 Pa. Super. Ct. 138.

¹⁸⁰ *Stickney v. Stickney*, 77 Iowa, 699, 42 N. W. 518; *Case v. Hart*, 11 Ohio, 364, 38 Am. Dec. 735.

¹⁸¹ *Deaver v. Rice*, 20 N. C. (4 Dev. & B.) 567, 34 Am. Dec. 388; *Turner v. Bachelder*, 17 Me. 257; *Sargent v. Courrier*, 66 Ill. 245. *Atkins v. Womeldorf*, 53 Iowa, 150, 4 N. W. 905, is to the contrary, but there the decision seems to be based upon the existence of the statutory lien for rent in favor of the landlord.

ceive, the title therein is vested in him, and it becomes subject to the claims of his creditors,¹⁸² while it is thereby placed out of the reach of the tenant's creditors.¹⁸³

In a few jurisdictions there are statutory enactments designed to protect the share of one party in the crop from liability for the other's debts.¹⁸⁴

h. **Enforcement of rights as between the parties.** Since the possession of the land, in the case of a lease by which a share of the crop is reserved, is in the tenant, the landlord has no right to go on the land for the purpose of taking his share of the crop,¹⁸⁵ and this has been decided to be the case even when the crops are likely not to be harvested at all, owing to the tenant's neglect,¹⁸⁶ though there are other decisions supporting a contrary view.¹⁸⁷ Nor has the landlord a right to any part of the crop, even though the crop has been harvested and stored in a

¹⁸² *Hart v. State*, 29 Ind. 200. So, in the case of a mere cropping contract, upon delivery to the tenant of his share, it becomes subject to his debts. *Crocker v. Cunningham*, 122 Cal. 547, 55 Pac. 404.

¹⁸³ *Durbin v. Hill*, 75 Ga. 228, 58 Am. Rep. 467; *Symonds v. Hall*, 37 Me. 354, 59 Am. Dec. 53.

¹⁸⁴ In *Kansas* (Gen. St. 1905, § 5834) it is provided that a sale under execution against a tenant does not affect the landlord's interest. And in *Ohio* (Ann. St. 1906, § 6679) and *Oklahoma* (Rev. St. 1902, § 5080), it is provided that the interest of the landlord or tenant shall not be affected by an execution against the other, but the crops may be sold subject to his claim. In *Nebraska* (Ann. St. 1907, § 2018) there is a substantially similar provision. In *Georgia* it is provided (Code 1895, § 3127) that when the tenant is to pay a part of the crop for rent, any part of the crop delivered in good faith to the landlord by the tenant shall be free from the lien of any judgment, decree or other process

against the tenant. It is also provided in this state (Code, § 3129), that when the relation of "landlord and cropper" exists, the title to, and right of control of, the crops, shall be vested in the landlord until he has received his share and has been repaid all advances made by him to assist in making the crops.

¹⁸⁵ *Blake v. Coates*, 3 G. Greene (Iowa) 548; *Dockham v. Parker*, 9 Me. (9 Greenl.) 137, 23 Am. Dec. 547. Compare ante, § 3 b (2), at notes 56-60.

¹⁸⁶ *Wadley v. Williams*, 75 Ga. 272.

¹⁸⁷ See *Secrest v. Stivers*, 35 Iowa, 580, where it was held that the landlord may harvest the crops in such case and may include the cost of doing so in his claim for a lien, as being part of the rent. In *Charles v. Davis*, 59 Cal. 479, it is said that if the landlord harvests the crop in such case, and the cost of so doing exceeds the value of the crop, the lessee has no further interest therein. To the same effect is *Beckwith v. Carroll*, 56 Ala. 12.

place accessible to him, if there has been no separation of the shares and the title is consequently to be regarded as still solely in the tenant.¹⁸⁸

If the relation of tenancy does not exist, and the parties are to be regarded as tenants in common of the crop, either may, it seems, after the crops are matured, take his share from the land.¹⁸⁹

One tenant in common of chattels cannot ordinarily maintain an action of trespass in regard thereto, and this doctrine has been applied as between tenants in common of crops raised by one on the other's land.¹⁹⁰ So if the parties are tenants in common of the crop, one cannot ordinarily bring trover as for a conversion of his share, unless the other has actually disposed of or destroyed the crop.¹⁹¹ And likewise, one tenant in common of

¹⁸⁸ *Cunningham v. Baker*, 84 Ind. 597.

¹⁸⁹ See *Com. v. Rigney*, 86 Mass. (4 Allen) 316; *Walker v. Fitts*, 41 Mass. (24 Pick.) 191; *Messinger v. Union Warehouse Co.*, 39 Or. 546, 65 Pac. 808.

¹⁹⁰ *Wells v. Hollenbeck*, 37 Mich. 504; *Daniels v. Brown*, 34 N. H. 454, 69 Am. Dec. 505. But that the landlord may bring trespass if the tenant, in violation of his agreement, sells the crop, see *Willmarth v. Pratt*, 56 Vt. 474, citing *Briggs v. Bennett*, 26 Vt. 146; *Gray v. Stevens*, 28 Vt. 1, 65 Am. Dec. 216. When the crop is not regarded as the joint property of the landlord and tenant, the latter, being entitled to the possession of the whole crop, may maintain trespass for damage done to the crop by the landlord. *Froust v. Hardin*, 56 Ind. 165, 26 Am. Rep. 18.

¹⁹¹ *Williams v. Nolen*, 34 Ala. 167; *Strong v. Colter*, 13 Minn. 82 (Gil. 77); *Rector v. Anderson*, 96 Minn. 123, 104 N. W. 884; *Carr v. Dodge*, 40 N. H. 403; *Richards v. Wardwell*, 82 Me. 343 19 Atl. 863; *Stafford v. Ames*, 9 Pa. 343; *Hurd v. Darling*, 16

Vt. 377; *Tignor v. Toney*, 13 Tex. Civ. App. 518, 35 S. W. 881. Compare *Neilson v. Slade*, 49 Ala. 253, 20 Am. Rep. 275; *Marlowe v. Rogers*, 102 Ala. 510, 14 So. 790; *McClure v. Thorpe*, 68 Mich. 33, 35 N. W. 829; *Northness v. Hillestad*, 87 Minn. 304, 91 N. W. 1112; *Burns v. Winchell*, 44 Hun (N. Y.) 261; *Stafford v. Ames*, 9 Pa. 343; *Fagan v. Vogt*, 35 Tex. Civ. App. 528, 80 S. W. 664, cases in which an action of trover or for conversion was sustained.

In *Parker v. Brown*, 136 N. C. 280, 48 S. E. 657, it appeared that the tenant died before completing the crop, and it was held that his representative could, upon the landlord's denial of any rights in the latter, recover "by a civil action" the value of the tenant's share, less the amount of advancements made by the landlord, and "such damage as he may have sustained by reason of the inability of the lessee to perform his contract." It does not clearly appear whether the recovery is based on the theory that a part of the crop belonged to the tenant, or on the theory that the landlord

the crop cannot usually bring replevin against the other to recover his share therein, he having no right to the exclusive possession.^{192, 193} The question of the circumstances under which these various possessory actions are available to one joint owner of personalty against the other is one on which the decisions are by no means in unison, and the fact that in the particular case crops are the subject of the joint ownership, and that this is the result of an agreement between landowner and cultivator, is entirely immaterial.

It has been decided in several cases that, though the parties are tenants in common of the crop, either may maintain assumpsit upon the other's refusal to deliver his share.¹⁹⁴ The action in such case is; it seems, to be regarded as based upon a contract, either express, or necessarily involved in such an agreement for the division of the crops, to allow the other to have the stipulated share, rather than upon any mere legal duty arising out of their relations as tenants in common. On the other hand, it was in one case decided that assumpsit will not lie in favor of a landlord against a tenant who had disposed of the crop, it not appearing that the parties had adjusted their rights respecting such com-

had agreed to deliver such part to him. The crop was completed by the landlord at the request of the representative of the tenant, and perhaps the decision can best be regarded as involving a recovery for the conversion of the share belonging to the tenant's representative, subject to a set-off in favor of the landlord for the value of his services in completing the crop at the tenant's request.

^{192, 193} *Reeves v. Hannan*, 65 N. J. Law, 249, 48 Atl. 1018; *Lacy v. Weaver*, 49 Ind. 373, 19 Am. Rep. 683; *Bowen v. Roach*, 78 Ind. 361; *Treadway v. Treadway*, 56 Ala. 390. Contra, *Alexander v. Ziegler*, 84 Miss. 560, 36 So. 536; *Freese v. Arnold*, 99 Mich. 13, 57 N. W. 1038. And see *Monser v. Davis*, 11 Wkly. Law Bul. (Ohio) 249. In Kansas the statute gives the landlord the right to bring replevin for his share. Gen. St. 1905, § 4075. See *Tarpy v. Persing*, 27 Kan. 745.

Even though the title to the crop was, by the express terms of the lease, in the landlord, the right of possession was held to be necessarily in the tenant until harvesting and division, so that the landlord could not maintain replevin against the tenant. *Dunning v. South*, 62 Ill. 175. But it has been decided that when the landowner was entitled to the whole crop, though bound to deliver a share to the cultivator in pay for his services, he could recover in replevin for the whole crop. *Kelly v. Rummerfield*, 117 Wis. 620, 94 N. W. 649, 98 Am. St. Rep. 951.

¹⁹⁴ *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *McLaughlin v. Salley*, 46 Mich. 219, 9 N. W. 256; *Pearce v. Pearce*, 83 Ill. App. 77.

mon property, or that the tenant had received any money or its equivalent for the crop.¹⁹⁵

Occasionally an injunction has been issued to restrain one party, who was in possession of the crop, and who was insolvent, from appropriating or disposing of it, so as to deprive the other of his share.¹⁹⁶ And it has been held that the owner of the land may, in case the tenant sells the crop, maintain a bill against him for an accounting of the proceeds of sale, making the vendee a party.¹⁹⁷

i. **Actions against third persons.** When the landowner and the cultivator, whether a tenancy exists or not, can be regarded as tenants in common of the crop, they may unite in an action against one who injures or removes the crop,¹⁹⁸ and it has been held that one suing alone may recover if no objection is made for nonjoinder of the other,¹⁹⁹ though he can, in such case, recover only for the loss of or injury to his own share.²⁰⁰

If the title to the whole crop is, until division, in one of the parties, it does not seem that the other can have a right of action for injuries to the crop, since his claim is contractual merely, a right *in personam* against the other party to the contract, while such a recovery would presuppose a right *in rem*. A party to a contract has ordinarily no right of action against a third person for acts rendering the performance of the contract by the other party less valuable to him.²⁰¹ There are, however, cases at least

¹⁹⁵ Hunt v. Rublee, 76 Vt. 448, 58 Atl. 724.

¹⁹⁶ Williams v. Green, 37 Ga. 37; Lewis v. Christian, 40 Ga. 187; Schmitt v. Cassilius, 31 Minn. 7, 16 N. W. 453; Parker v. Garrison, 61 Ill. 250.

¹⁹⁷ Sowles v. Martin, 76 Vt. 180, 56 Atl. 979.

¹⁹⁸ Foote v. Colvin, 3 Johns. (N. Y.) 216, 3 Am. Dec. 478; Harris v. Frink, 49 N. Y. 24, 10 Am. Rep. 318; Decker v. Decker, 17 Hun (N. Y.) 13; Van Hoozier v. Hannibal & St. J. R. Co., 70 Mo. 145; Moulton v. Robinson, 27 N. H. 550.

¹⁹⁹ Van Hoozier v. Hannibal & St. J. R. Co., 70 Mo. 145. That the ob-

jection if made is valid, see Pruitt v. Ellington, 59 Ala. 454; Cutting v. Cox, 19 Vt. 517; Hatch v. Hart, 40 N. H. 93. But in the latter case it was decided that if the cultivator abandons possession of the crop or relinquishes all claim thereto, the landowner may sue alone.

²⁰⁰ Texas Pac. R. Co. v. Saunders (Tex. Civ. App.) 18 S. W. 793.

²⁰¹ That the tenant only can sue for conversion, see Ream v. Harnish, 45 Pa. 376. That he may sue alone, see Chicago & W. M. R. Co. v. Linard, 94 Ind. 319, 48 Am. Rep. 155; Parker v. Hale (Tex. Civ. App.) 73 S. W. 155. And that he can recover the full value of the crop destroyed,

suggesting that a landlord entitled to receive a share of the crop as rent may recover for injuries to the crop.²⁰²

see *Texas & P. R. Co. v. Bayliss*, 62 Tex. 570.

²⁰² There is a dictum to that effect in *Ohio & M. R. Co. v. Hoeltman*, 34 Ill. App. 429. And in *Neal v. Ohio River R. Co.*, 47 W. Va. 316, 34 S. E. 914, it is said, without any discussion, that one who has leased land for a share of the crop may sue one who damages the crop. It does not appear, however, whether in this case the court did not regard the

parties as tenants in common of the crop. That the landlord has no right of action seems to be involved in the decision, in *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708, that a third person, when sued by the tenant for delay in performing his contract to harvest the crop for the tenant, cannot assert that a part was to be paid as rent to the landlord.

CHAPTER XXV.

CHATTELS ON THE PREMISES.

- § 254. Lease of land and chattels.
255. Chattels belonging to the tenant.
 a. Time of removal.
 b. Failure to remove.

§ 254. Lease of land and chattels.

As we have before remarked,¹ not infrequently a lease of land includes therewith chattels, as when a farm is leased with the stock thereon, or a residence is leased with the furniture therein. It is obvious that, in the case of such a lease, the lessee is bound to return the chattels, as well as the land, at the end of the term named, in the absence of any provision to the contrary. Occasionally there is an express provision for the return of the chattels leased, and sometimes for the return of either such chattels or chattels similar thereto in kind and value.²

In two cases, a covenant by the lessee to deliver to the lessor at the end of the term articles of the same value as those received has been regarded as so absolute in character as to bind the lessee, even though the things received were lost or destroyed without his fault.³ In one of these cases it was held that an exception of "inevitable accident" contained in the lease was not intended to apply to the chattels as well as the land.⁴ But in

¹ See ante, § 23 b. As to the ap- the identical animals, so far as these portionment of the rent reserved on were of a class which it was the a lease of land and chattels, see custom to market each year. ante, §§ 169 c, 180 b (3).

² In Brockway v. Rowley, 66 Ill. 39 Atl. 979; Smalley v. Corliss, 37 99, it was held that a covenant by Vt. 486.

the lessee to return, at the end of ⁴ Davis v. George, 67 N. H. 393, 39 the term, "stock" included in the Atl. 979. lease, did not involve his return of

another case, in a different jurisdiction, an exception, in the covenant to re-deliver the premises at the end of the term in as good condition as at the time of the demise, of "damage by the elements" was held to apply likewise to a covenant to return certain chattels on the premises at the end of the term, the lease providing that these should be considered as "part of the premises hereby demised."⁵

A covenant to return chattels on the premises "in as good condition as said articles now are," is, it is said, not broken till the end of the term, if the chattels are merely injured, while if the lessee destroys them, there is an immediate breach, he thus putting it out of his power to perform his contract.⁶ A covenant by the lessee to leave all the timber on the premises has been held, on a construction of the covenant, to be broken if he cuts down the timber, although he leaves it on the premises, while it is not broken if it is cut down by a stranger.⁷

It has been stated that if one leases live stock for a certain number of years, he retains no such property in them, during the term or afterwards, until their redelivery, that he can make a grant of them to another, he being considered to have merely a possibility of property in case they outlive the term.⁸ This statement accords with the view once held that the gift or grant of a chattel personal for a limited time, as distinguished from the gift or grant of the use and occupation of the chattel, transfers the whole property in the chattel;⁹ but it can hardly be questioned that such a lease would, at the present day, ordinarily be construed as involving a grant of the use and occupation only of the live stock, that is, as a bailment, strictly so called, leaving

⁵ *Allen v. Culver*, 3 Denio (N. Y.) 284. Compare *Scheidt v. Belz*, 4 Ill. App. (4 Bradw.) 431.

⁶ *Fratt v. Hunt*, 108 Cal. 288, 41 Pac. 12.

⁷ Vin. Abr., Covenant (L 4), pl. 3, citing Anonymous, Skin. 40.

⁸ Bac. Abr., Leases (A); *Wood v. Foster*, 1 Leon. 42. In this case, however, the facts were that the lessee of a farm with sheep thereon covenanted merely to return the same number of sheep, of a certain

number of years' shearing, which could not include the sheep existing at the time of the lease. In another report of the same case (*Wood v. Ash*, Godb. 112), it is said that the original sheep leased are the property of the lessor rather than of the lessee, even though there is a stipulation by the lessee to restore, at the end of the term, a number equal to that included in the lease.

⁹ See Gray, *Perpetuities* (2d Ed.) § 822 et seq.

the property in the live stock in the lessor,¹⁰ with full powers of transfer subject to the rights of the bailee. It has been decided, however, in a modern case, that during the term of the lease the lessor has no interest which can be levied on under execution against him, the property being, by reason of the lessee's right of possession, not susceptible of actual seizure.¹¹

In a case in which live stock was leased with a farm, it was decided that the lessee, even though given the right to return, at the end of the term, either the stock or the value thereof, could not dispose of parts of the stock.¹² There is, on the other hand, a decision that, where a lease of a farm and of the live stock thereon provided that stock of equal age and quality, though not necessarily the same stock, should be returned at the end of the term, the title to the stock was vested in the lessee and that it was liable for his debts.¹³ The question involved in such cases seems to be, primarily, whether the transaction was, as regards the personal property, intended to be a bailment or a sale,¹⁴ and the fact that it was a part of a transaction looking to the leasing of land might perhaps be regarded as tending to show that it was a bailment.

In two cases it is assumed, apparently, in the case of a lease of land and chattels with a provision for a return of the chattels or of their equivalent in kind and value, that chattels acquired by the lessee in place of chattels disposed of by him immediately become the property of the lessor.¹⁵ In one of these cases it is said that where there is an agreement to return stock and tools of a value equal to that of those leased, it is necessary, on the termination of the lease, to ascertain by agreement or equitable action what part of the personal property on the farm belongs to each.¹⁶

¹⁰ See Gray, Perpetuities, §§ 828-855; *Smith v. Niles*, 20 Vt. 315, 49 Am. Dec. 782.

¹¹ *Smith v. Niles*, 20 Vt. 315, 49 Am. Dec. 782.

¹² *Billings v. Tucker*, 72 Mass. (6 Gray) 368. See, also, as in accord with this case, apparently, *Wilson v. Griswold*, 80 Conn. 14, 66 Atl. 783; *Smith v. Niles*, 20 Vt. 315, 49 Am. Dec. 782; *Downer v. Rowell*, 22 Vt.

¹³ *Carpenter v. Griffin*, 9 Paige (N. Y.) 310, 37 Am. Dec. 396.

¹⁴ See 2 Kent's Comm. 590, and note thereto; *Mechem, Sales*, §§ 19-35.

¹⁵ *Billings v. Tucker*, 72 Mass. (6 Gray) 368; *Wilson v. Griswold*, 80 Conn. 14, 66 Atl. 783.

¹⁶ *Wilson v. Griswold*, 80 Conn. 14, 66 Atl. 783.

In the case of a lease of land and live stock, as in the case of a bailment of live stock alone, the property in the increase born during that time is in the lessee, even though the original stock may, without the lessee's fault, have died.¹⁷ It has been decided, however, that where it was provided that the calves raised from the stock should be kept on the farm during the term, and that each party should have one-half thereof, the title of the tenant to one-half would not become perfected until the term had come to an end.¹⁸

The question whether a lessee of land and chattels has a right to transfer the chattels to another for the term of the lease, as he ordinarily has the right to transfer the land, is to be determined, it seems, by the consideration whether the bailment of the chattels can be considered a personal trust.¹⁹ He could not, presumably, in the ordinary case of a lease of land and chattels thereon, give even a temporary right to another to use the chattels off the land. On the other hand, he would, it seems, have a *prima facie* right to transfer his leasehold interest in the chattels together with the land. A contrary view would in effect prevent any assignment by him of his interest in the land, since a transfer of the possession of the land without the chattels would involve the removal of the latter from the land, in contravention of the evident intention of the parties.

One who has leased chattels for a term of years, whether alone or together with land, cannot maintain trespass or trover on account thereof, not being entitled to the immediate possession.²⁰

§ 255. Chattels belonging to the tenant.

a. Time of removal. The common-law authorities are clearly to the effect that a tenant at will has the right of access to the premises, for a reasonable time, for the purpose of removing his goods.²¹ The reason for such a rule in favor of a tenant at will,

¹⁷ Wood v. Ash, Godb. 112; Woods v. Charlton, 62 N. H. 649; 2 Kent, 489; Trisomy v. Orr, 49 Cal. 612; Comm. 361. ²⁰ Ward v. Macauley, 4 Term R. Putnam v. Wyley, 8 Johns. (N. Y.)

¹⁸ Lewis v. Lyman, 39 Mass. (22 Pick.) 437; Briggs v. Oaks, 26 Vt. 138. 432, 5 Am. Dec. 346. See Hale, Bailments, p. 197; Schouler, Bailments, § 134.

¹⁹ See Bailey v. Colby, 34 N. H. 29, 66 Am. Dec. 752; and ante, § 152 a, at note 61. ²¹ Litt. § 69; 2 Blackst. Comm. 147; Com. Dig., Estates, H 9. See ante, § 13 b (6), at note 437.

who is liable to be deprived of possession by the landlord at any time, without previous notice, is sufficiently obvious. Such a reason does not apply in the case of a tenant for years or from year to year, but nevertheless it has been not infrequently asserted judicially that a tenant, without naming any particular class of tenant, has a reasonable time for the removal of chattels belonging to him.²² It would rather seem, on principle, that a tenant who knows beforehand when his tenancy will come to an end should remove his chattels during his own possession, and not be allowed to encroach on that of another for this purpose.²³

b. **Failure to remove.** The fact that the tenant fails to remove his chattels during the tenancy, or within such reasonable time thereafter as may be allowed for removal, does not have the effect of divesting his title.²⁴ In order to transfer the ownership of goods, something more is necessary than merely leaving them on another's land.

Chattels belonging to the tenant, which are not removed by him during the tenancy or within a reasonable time thereafter, may be removed by the landlord, or by a subsequent tenant, to some place in the neighborhood, reasonable care being exercised to avoid injury,²⁵ and such a person is, it has been held, under no obligation further to protect the chattels until the owner chooses to take possession.²⁶ The landlord is liable, however, it seems, as for negligence, if he removes the articles to an obviously unsafe or unsuitable place, unless at least he notifies their owner of such removal.²⁷ In one case it is said to be his duty to have

²² *Floralia Sawmill Co. v. Parrish* Meffert v. Dyer, 107 Mo. App. 462, (Ala.) 46 So. 461; *Smith v. Boyle*, 66 81 S. W. 643; and ante, § 242 a, note Neb. 823, 92 N. W. 1018, 103 Am. 113.

St. Rep. 745; *Edghill v. Mankey*, 79 25 *Stearns v. Sampson*, 59 Me. 568. Neb. 347, 112 N. W. 570, 11 L. R. A. 8 Am. Rep. 442; *Rollins v. Mooers*. (N. S.) 688; *Daniels v. Brown*, 34 25 Me. 192; *Whitney v. Swett*, 22 N. N. H. 456, 69 Am. Dec. 505. To the H. 10, 53 Am. Dec. 228. See *Lash v. Ames*, 171 Mass. 487, 50 N. E. 996. same effect is *Comyn's Landlord & Tenant*, 356.

²³ In *Cornish v. Stubbs*, L. R. 5 N. W. 1018, 103 Am. St. Rep. 745; C. P. 334, an express stipulation that United States Mfg. Co. v. Stevens, 52 Mich. 330, 17 N. W. 934. for removal is held to be valid.

²⁴ *Smith v. Boyle*, 66 Neb. 823, 92 426, 51 N. W. 976; *Whitney v. N. W. 1018, 103 Am. St. Rep. 745; Swett*, 22 N. H. 10, 53 Am. Dec. 228.

²⁷ See *Burk v. Dempster*, 34 Neb.

a chattel so left on the premises "removed to a place of storage," charging the expense thereof to the former tenant.²⁸ In another case it is decided that if the landlord, instead of removing the articles, keeps them on the premises, he is entitled to compensation as for storage.²⁹

The landlord is, it has been held, guilty of conversion if he refuses to allow the tenant to remove his goods during the tenancy, or at a subsequent time when the latter has a legal right to do so,³⁰ and he is so guilty if he disposes to a stranger of goods which the tenant has left.³¹ His action in removing the goods in order to deliver them to his former tenant, which he is unable to do, owing to the latter's refusal to receive them, evidently does not constitute a conversion.³² The landlord can obviously not be held liable for the value of the goods as a purchaser thereof merely because the tenant failed to remove them.³³

The landlord is not liable, it has been held, for injuries to the tenant's property caused by blasting operations properly conducted by him on neighboring property, the tenant having refused to remove such property at the end of the tenancy.³⁴ And it has been decided that, on condemnation of land for railroad purposes, the railway company is not liable for injuries to articles belonging to a tenant at will, caused by the destruction of the building on the land, he having failed to remove such articles after reasonable notice.³⁵

Compare ante, § 216 d; post, § 285, and the lessor was held liable for the value thereof.

²⁸ *Burk v. Dempster*, 34 Neb. 426, 51 N. W. 976. ³¹ *Blackwell v. Baily*, 1 Mo. App. 328; *Schwulst v. Neely* (Tex. Civ.

²⁹ *Preston v. Neale*, 78 Mass. (12 App.) 50 S. W. 608.

Gray) 222. ³² *Browder v. Phinney*, 37 Wash.

³⁰ *Smith v. Boyle*, 66 Neb. 823, 92 70, 79 Pac. 598.

N. W. 1018, 103 Am. St. Rep. 745; ³³ *Hindman v. Edgar*, 24 Or. 581, 17 Pac. 862.

Watts v. Lehman, 107 Pa. 106; *Voss v. Bassett*, 4 Tex. Civ. App. 177, 115 S. W. 503; *Vilas v. Mason*, 25 Wis. 310. See *Morris v. Pratt*, 114 La. 98, 17 L. R. A. 699.

³⁴ *Emry v. Roanoke Nav. & Water-Power Co.*, 111 N. C. 94, 16 S. E. 18; ³⁵ *Lyons v. Philadelphia & R. R. Co.*, 209 Pa. 550, 58 Atl. 924.

³⁸ So. 70, where the goods which the lessor refused to allow the lessee to remove were destroyed by fire

CHAPTER XXVI.

OPTION OF PURCHASE IN TENANT.

§ 256. Nature and validity of the stipulation.

- 257. Option as interest in land.
- 258. Alternative right in lessor.
- 259. Right of "refusal" in tenant.
- 260. Conditions for exercise of option.
- 261. Time for exercise of option.
- 262. Mode of exercise of option.
- 263. Payment or tender of price.
- 264. Exercise as to part of premises.
- 265. Effect of exercise.
- 266. Sufficiency of conveyance.
- 267. Change of parties to the tenancy.
- 268. Remedy for breach of stipulation.
- 269. Statutory provisions.

§ 256. Nature and validity of the stipulation.

An instrument of lease quite frequently contains a provision giving the lessee the right to purchase the reversion in the premises should he so desire.

The existence of such an option in no way affects the relation of landlord or tenant, nor the latter's liability for rent,¹ even though it is afterwards exercised,² and so the owner of the land may, after giving an option on the land to another, give a lease to the latter without affecting the option.³ That the presence of an option of purchase does not affect the operation of the lease as creating the relation of tenancy is assumed in nearly all the

¹ *Smith v. Brannan*, 13 Cal. 107; and see cases cited ante, § 43 d.
Gilbert v. Port, 28 Ohio St. 276; ² *Granger v. Riggs*, 118 Ga. 164, 44
Hand v. Williamsburgh City Fire S. E. 983.
Ins. Co., 57 N. Y. 41; *Clifford v.* ³ *Wade v. South Penn Oil Co.*, 45
Gressinger, 96 Ga. 789, 22 S. E. 399, W. Va. 380, 32 S. E. 169.

cases on the subject, and any statements to the contrary⁴ must, it is conceived, be based on a misapprehension. The question whether the relation of tenancy is terminated by the actual exercise of the option is referred to below.⁵

A provision of this character is not invalid for want of "mutuality" because it binds the lessor to sell and does not bind the lessee to buy.⁶ Nor is there, ordinarily at least, any lack of consideration to support the lessor's agreement in this regard, this being supplied by the lessee's agreement to pay rent or assume other burdens in connection with the land.⁷ Even apart from any consideration issuing from the lessee, the option would be binding upon the lessor if under his seal.⁸

The instrument of lease, in giving an option to the lessee to purchase, need not specify the price, but it is sufficient if it provides that the price shall be fixed by appraisement,⁹ or by the amount which a third person may offer to pay.¹⁰ But the price

⁴ See *Nightingale v. Barens*, 47 Wis. 389, 2 N. W. 767; *Reeder v. Bell*, 70 Ky. (7 Bush) 255; *Thalheimer v. Tischler* (Fla.) 46 So. 514, *infra*, note 22.

⁵ See post, § 265.

⁶ *Marske v. Willard*, 169 Ill. 276, 48 N. E. 290; *Lazarus v. Heilman*, 11 Abb. N. C. (N. Y.) 93; *De Rutte v. Muldrow*, 16 Cal. 505.

⁷ *Walker v. Edmundson*, 111 Ga. 454, 36 S. E. 800; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Howralty v. Warren*, 18 N. J. Eq. (3 C. E. Green) 124, 90 Am. Dec. 613; *Waters v. Bew*, 52 N. J. Eq. 787, 29 Atl. 590; *Schroeder v. Gemeinder*, 10 Nev. 355; *Bank of Louisville v. Baumeister*, 87 Ky. 6, 7 S. W. 170; *Heyward v. Willmarth*, 87 App. Div. 125, 84 N. Y. Supp. 75; *Tilton v. Sterling Coal & Coke Co.*, 28 Utah, 173, 77 Pac. 758, 107 Am. St. Rep. 689. It is immaterial in this regard that the rent paid is, in case of exercise of the option, to be applied on the price. *Brink v. Mitchell*, 135 Wis. 416, 116 N. W. 16.

In *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963, it was held that a provision that the lessee shall deposit a sum as security for the performance of her covenants in the lease was a condition precedent to its operation, without compliance with which the lease was not effective, and that consequently there was no consideration to support a contract to sell to the lessee at his option. Ordinarily the making of an instrument which would be effective in a certain contingency would be regarded as a sufficient consideration for a promise.

⁸ *Willard v. Tayloe*, 75 U. S. (8 Wall.) 557.

⁹ See *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161; *Washburn v. White*, 197 Mass. 540, 84 N. E. 106.

¹⁰ *Slaughter v. Mallett Land & Cattle Co.*, 72 C. C. A. 430, 141 Fed. 282; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Marske v. Willard*, 169 Ill. 276, 48 N. E. 290. See *DeVitt v. Kaufman County*, 27

must be specified or some method named for its ascertainment.¹¹ A covenant by the lessor, in case the lessees shall "then" be tenants of the premises, to "first" offer the property for sale to them at a price named, was held to be too ambiguous to be specifically enforced.¹²

It has been decided by an English judge that an option of purchase, contained in a lease for ninety-nine years, and exercisable at any time during the term, is invalid, in the view of a court of equity, as creating an equitable interest which may arise after the period named by the rule against perpetuities.¹³ The same judge has decided that, in the view of a court of law, for the purpose of an action to recover damages for breach of the contract to convey at the lessee's option, the contract is valid although there is no limit as to the time of its exercise.¹⁴ The view that such an option, exercisable at a remote time, is invalid under the rule, is strongly asserted by writers of eminence, without any suggestion of a distinction between courts of law and equity in this respect.¹⁵ On the other hand, no suggestion appears in any reported case in this country questioning the validity of a provision of this character by reason of the possible remoteness of the exercise of the option.¹⁶ Conceding that, in any particular

Tex. Civ. App. 332, 66 S. W. 224;
Callaghan v. Hawkes, 121 Mass. 298.

¹¹ Folsom v. Harr, 218 Ill. 369, 75
N. E. 987, 109 Am. St. Rep. 297;
Fogg v. Price, 145 Mass. 513, 14 N.
E. 741; Smoyer v. Roth (Pa.) 13
Atl. 191.

An option to purchase "at a price not to exceed \$3,000" is sufficiently specific, it being in effect an option to purchase at \$3,000. Heyward v. Willmarth, 87 App. Div. 125, 84 N. Y. Supp. 75. To the same effect is Wright v. Kaynor, 150 Mich. 7, 113 N. W. 779.

¹² Buckmaster v. Thompson, 36 N. Y. 558.

¹³ Warrington, J., in Woodall v. Clifton (1905) 2 Ch. 257. The case was, on appeal, decided on another point. See post, note 98.

¹⁴ Worthing Corp. v. Heather [1906] 2 Ch. 532. See the criticisms of this case in 51 Solicitors' Journal, at pp. 648, 669; 20 Harv. Law Rev., at p. 240.

¹⁵ See Gray, Perpetuities (2d Ed.) § 230 b; articles by Cyprian Williams in 42 Solicitors' Journal, at pp. 630, 650. Compare the adverse view as stated in 51 Solicitors' Journal, at p. 319.

¹⁶ It has recently been decided in Maryland that an option of purchase, in connection with a lease for ninety-nine years, renewable forever, a very common form of lease in that jurisdiction, does not violate the rule against perpetuities. Hollander v. Central Metal & Supply Co. (Md.) 71 Atl. 442.

jurisdiction, the view first stated might possibly be adopted, it is expedient, when inserting such a provision in a lease for twenty-one years or more, to limit the period within which the option may be exercised to that named by the rule against perpetuities.

§ 257. Option as interest in land.

The fact that the lease gives the lessee an option to purchase the land gives him no additional interest *in presenti* in the land itself, but merely a right of personal recourse against the lessor,¹⁷ it being in effect merely a continuous offer by the lessor to the lessee on the terms mentioned, which he has no right to withdraw.¹⁸ So it has been held that the lessee has no interest in the land, by reason of the option, which he can mortgage,¹⁹ or which can be subjected to the claims of his creditors.²⁰ In one state, however, it has been decided that the lessee had an interest under such an option which might be mortgaged, under a local statute providing that "any interest in or claim to real estate may be disposed of by deed or will in writing," and that the rights of such mortgagee were prior to those of one to whom the lessee mortgaged the land after exercising the option.²¹ And in another state it was held that the option has the effect of creating an "amalgam" of legal and equitable interests, which precludes a sale of the lessee's interest in the land as leasehold property,²² a most questionable view, it is submitted.

§ 258. Alternative right in lessor.

Occasionally the lease imposes an obligation upon the lessor to sell to the lessee or to do something else in the alternative. In such cases the question whether the election between the two alternatives is with the lessor or lessee may arise. Where the lease provided that the lessor would convey a certain part of the

¹⁷ *Bras v. Sheffield*, 49 Kan. 702, 31 Pac. 306, 33 Am. St. Rep. 336; *Elder v. Robinson*, 19 Pa. 364.

¹⁸ *Willard v. Tayloe*, 75 U. S. (8 Wall.) 557; *King v. Raab*, 123 Iowa, 632, 99 N. W. 306; *De Rutte v. Muldrow*, 16 Cal. 505. It cannot be withdrawn because the lessee makes a counter proposition. *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl.

25.

¹⁹ *Conn v. Tanner*, 86 Iowa, 577, 53 N. W. 320; *Bras v. Sheffield*, 49 Kan. 702, 31 Pac. 306, 33 Am. St. Rep. 336.

²⁰ *Sweezy v. Jones*, 65 Iowa, 272, 21 N. W. 603.

²¹ *Bank of Louisville v. Baumeister*, 87 Ky. 6, 7 S. W. 170.

²² *Thalheimer v. Tischler* (Fla.) 46 So. 514.

premises to the lessee, or would sell a certain other part at a price to be fixed by appraisement, it was held that the lessor, and not the lessee, had the right of election, in accordance with the rule in the old books that the person who is to do the first act has the right of election;²³ and there was a like holding when the lessor covenanted that he would renew or would sell to the lessor, it being decided that the lessee must make his request in the alternative for a compliance with the covenant.²⁴ But it was in another case decided that if the lessor failed to make his election in such a case, the right to make the election passed to the lessee.²⁵ A provision that the lessee might buy the land "at the option of the parties" was construed as meaning at the lessee's option, since otherwise it would be meaningless and nugatory.²⁶

§ 259. Right of "refusal" in tenant.

Occasionally the lessee is given an option to purchase, not entirely at his own election, but upon the lessor's desiring to sell, that is, he is given the "refusal." It was held that a covenant in a lease to convey the property to the lessee when the lessor "should find a purchaser," if the lessee desired the property at a certain price named, became obligatory when the lessor found a person able and willing to pay the lessor's price for the property.²⁷ When a lease reserved to the lessor the right to sell the land at any time and terminate the lease at the end of any rental year, "provided" he gave six months' notice prior to the end of the year, and "provided also" the lessee should have the privilege of buying the land at such price as the lessor might see fit to accept, and which might be offered by any other person, it was held that the option to buy was not unconditional, but

²³ *Duke v. Griffith*, 13 Utah, 361, to be under no obligation to do either. *Pearce v. Turner*, 150 Ill. 45 Pac. 276, 57 Am. St. Rep. 766, citing 3 Bac. Abr. 109; Co. Litt. 145 a. 116, 36 N. E. 962.

²⁴ *Baumann v. Binzen*, 65 Hun, 39, 19 N. Y. Supp. 627; *Id.*, 142 N. Y. 636, 37 N. E. 566. ²⁵ *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161.

²⁶ *Mack v. Dailey*, 67 Vt. 90, 30 Atl. 686.

A lessor who was given "the privilege" of renewing or of selling the property at a price named was held ²⁷ *McCormick v. Stephany*, 61 N. J. Eq. 208, 48 Atl. 25.

applied only in case the lessor elected to terminate the lease by making a sale.²⁸

A provision that the lessor might sell the premises at any time, by giving the lessee two months' notice and the privilege of purchase at the price offered, was held to apply only to a sale involving a termination of the lease, and that the lessor had a perfect right to sell subject to the lease, without giving the lessee the privilege of purchase;²⁹ and it was even decided that a provision giving the lessee the first option of purchase, contained in a lease for two years, with a right of extension for four more, which also gave the lessor the right to sell, was intended merely to secure to the lessee the enjoyment of the full term of six years, and that the lessor had a perfect right, without giving the lessee an opportunity to purchase, to sell and convey to a third person subject to the lease.³⁰ A lease giving the lessees "the first privilege of buying said premises, at any time they may wish to do so," at a price named, was construed as requiring the lessor to give the lessees the privilege of buying at that price in case he wished to sell, and as giving the lessees the option to buy at that price at any time until they refused to buy upon notice from the lessor.³¹

In case the lease provides that the lessee may purchase upon the lessor's giving notice of an offer for the property by a third person, the person to give the notice is the lessor, and not the person who made the offer, although the lessor has conveyed to such person before the making of such offer.³²

In case of such a right of "refusal," the landlord cannot, it is obvious, deprive the tenant of the benefit of the lease by offering to sell to him at a price falsely asserted by the landlord to have been offered him for the property, and then making a merely colorable conveyance to another in accordance with such pretended offer.³³

²⁸ DeVitt v. Kaufman County, 27 Tex. Civ. App. 332, 60 S. W. 224.

³¹ Schroeder v. Gemeinder, 10 Nev. 355.

²⁹ Callaghan v. Hawkes, 121 Mass. 298.

³² Harding v. Gibbs, 125 Ill. 85, 17 N. E. 60, 8 Am. St. Rep. 345.

³⁰ Blanchard v. Ames, 60 N. H. 404.

³³ Ogle v. Hubbel, 1 Cal. App. 357, 82 Pac. 217.

§ 260. Conditions for exercise of option.

If the right to buy is expressly made conditional upon the performance of particular stipulations by the lessee, he cannot exercise the right without due performance thereof.³⁴ But the fact that the lessee has not complied with all his covenants would not preclude him from enforcing his claim to purchase, unless his option is, upon a construction of the whole lease, dependent upon compliance with his covenants.³⁵

The acceptance of rent, without objection, by the landlord, after it becomes due, has been held to constitute a waiver of the provision of the lease as to the time of its payment, so that the lessee may thereafter exercise the option, although the lease expressly makes it dependent upon the lessee's compliance with its stipulations.³⁶ But a different view was taken when the lease expressly provided for a forfeiture of the option in case of failure to pay the rent at maturity.³⁷

The lessee's breach of his covenant to pay taxes will, it has been decided, not justify the lessor's refusal to comply with the option, if the lessee, on tendering the price named, also tenders sufficient to cover the amount of the taxes and all possible damage from the breach.³⁸ And it has been decided that the option is not forfeited by failure to pay the taxes when due and payable, though the lease provides for a conveyance to the lessee for a certain sum upon payment of taxes.³⁹

It is a question of construction whether a re-entry by the les-

³⁴ See *Ball v. Canada Co.*, 24 Grant's Ch. 281; *Mack v. Dailey*, 67 Vt. 90, 30 Atl. 686; *Carpenter v. Thornburn*, 76 Ark. 578, 89 S. W. 1047; *Ostrander v. Livingston*, 3 Barb. Ch. (N. Y.) 416.

³⁵ In *Green v. Low*, 22 Beav. 625, it was held, on a construction of a contract by which A agreed to grant a lease to B provided B would build on the land and insure the building, and which also gave B the option to purchase within two years, that the option to purchase was independent of his right to a lease, and that his default in insuring did not affect his right to purchase.

And so in *Raffety v. Schofield* [1897] 1 Ch. 937, it was held that a default by one under a building agreement which gave him a right to a lease upon performance by him, and also gave him an option of purchase, did not prevent his exercise of the option of purchase.

³⁶ *Mack v. Dailey*, 67 Vt. 90, 30 Atl. 686.

³⁷ *Brown v. Larry* (Ala.) 44 So. 841.

³⁸ *Bell v. Wright* 31 Kan. 236, 1 Pac. 595.

³⁹ *Brink v. Mitchell*, 135 Wis. 416, 116 N. W. 16. But compare *Ball v. Canada Co.*, 24 Grant's Ch. 281.

sor for a breach of condition by the lessee terminates the right to exercise the option.⁴⁰ Even in the case of an express stipulation that the option might be annulled on breach of a covenant, it has been regarded as a question of construction whether a mere delay in performance is a breach within the meaning of the stipulation.⁴¹

§ 261. Time for exercise of option.

When the lessor's covenant to sell to the lessee at the latter's option names a time within which the option must be exercised, such provision as to time is usually regarded as of the essence of the contract, so that the covenant will not be enforced in case of delay by the lessee,⁴² and equity will not extend the time, since it looks with special strictness upon a provision as to time in a contract by which one party and not the other is bound.⁴³

Ordinarily the lease provides that the option shall be exercised during the term of the lease. It has been held that, where the lease so provided, it could not be contended that a statute, authorizing a landlord to treat a tenant as holding over his term when he neglects to pay rent,^{43a} had the effect of terminating the lease by reason of his nonpayment of rent for the month in which he exercised the option, so as to render such exercise invalid, since the lessee, having exercised the option, became owner before the rent became due.⁴⁴ The fact that the lessee held over and the lessor accepted rent from him after the term has been regarded as showing that the provision that the option to purchase should be exercised during the term was not of the essence of the contract.⁴⁵

⁴⁰ In *Ober v. Brooks*, 162 Mass. 102, 38 N. E. 429, the lease was regarded as showing an intention that the option should be exercised only by a tenant, and consequently the right of purchase ceased with the re-entry. In *Matthews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972, the lease received a different construction.

⁴¹ *Merrill v. Hexter* (Or.) 94 Pac. 972. Compare *Brown v. Larry* (Ala.) 44 So. 841, ante, note 37.

⁴² See *Usher v. Livermore*, 2 Iowa,

117; *Atlantic Product Co. v. Dunn*, 142 N. C. 471, 55 S. E. 299; *Kruegel v. Berry*, 75 Tex. 230, 9 S. W. 863; *Harding v. Gibbs*, 125 Ill. 85, 17 N. E. 60, 8 Am. St. Rep. 345; *Ranelagh v. Melton*, 2 Drew. & S. 278.

⁴³ See *Fry, Specific Performance* (4th Ed.) § 1103; *Maughlin v. Perry*, 35 Md. 352.

^{43a} See post, § 274 d.

⁴⁴ *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360.

⁴⁵ *D'Arras v. Keyser*, 26 Pa. 249.

A provision that the lessor "will at any time during the tenancy hereby created or agreed upon, sell and convey" to the lessee was held to give the right to a conveyance during a renewal term, this having been "agreed upon" in the lease.⁴⁶ And it was held that when a lease for a year gave the tenant a right to extend the term from year to year, and also to buy the land during the original year, or during any extension, the lessee could exercise his option during a second year's lease, though this omitted all reference to the option, it having been mutually understood that the option should continue.⁴⁷ And an option to buy at any time has been regarded as existing during a renewal term, created in accordance with the provisions of the lease.⁴⁸

A provision that the option may be exercised "at the expiration" of the term has in one state been regarded as requiring the option to be exercised on the last day of the term at latest.⁴⁹ In another state such a provision was held to give the entire next day for the exercise of the option.⁵⁰

It has been said that when there is no time named for the exercise of the option but the lessor agrees to convey "at any time," the fact that the lease has come to an end is immaterial.⁵¹ But in another case it is asserted that even if by the terms of the lease the option does not expire at the end of the term, the lessor may revoke it at any time thereafter, as by a sale and conveyance to another person.⁵² The question whether, when no

⁴⁶ Trustees of Congregation of Sons of Abraham v. Gerbert, 57 N. J. Law, 395, 31 Atl. 383. Compare Atlantic Product Co. v. Dunn, 142 N. C. 471, 55 S. E. 299.

⁴⁷ Abbott v. Seventy-Six Land & Water Co., 87 Cal. 323, 25 Pac. 693.

⁴⁸ Schroeder v. Gemeinder, 10 Nev. 355.

In Thomas v. Gottlieb, Bauernschmidt, Straus Brew. Co., 102 Md. 417, 62 Atl. 633, there was a lease for a year, with a provision that "this agreement, with all its provisions and covenants, shall continue in force from term to term, after the expiration of the term above mentioned," subject to the right of

either party to terminate the lease at the end of any term. It was also provided that the tenant should have the right to purchase the property "at the end of said term" for a price named. It was decided that the option could be exercised at the end of any year, so long as the tenancy endured.

⁴⁹ Tilton v. Sterling Coal & Coke Co., 28 Utah, 173, 77 Pac. 758, 107 Am. St. Rep. 689.

⁵⁰ Herman v. Winter, 20 S. D. 196, 105 N. W. 457.

⁵¹ Prout v. Roby, 82 U. S. (15 Wall.) 471.

⁵² McCauley v. Coe, 150 Ill. 311, 37 N. E. 232.

time is specifically named, the lessee's option will expire at the end of the term of the lease, is no doubt one of construction upon a consideration of the instrument as a whole.

§ 262. Mode of exercise of option.

It has been decided that, where the option to purchase is contained in a lease signed by the lessor, the fact that the lessee's exercise of the option is oral does not render it invalid under the provision of the Statute of Frauds requiring the contract, or some note or memorandum thereof, to be in writing and signed by the party by whom the sale is to be made.⁵³

Any stipulation as to the notice necessary in exercising the option must, it seems, be strictly complied with, and it was held that where, in a lease by three trustees, the lessee was given an option to purchase at any time during the term on giving written notice "to the said lessors or the survivors or survivor of them," a notice given to one only of the trustees, they being all alive, was ineffectual.⁵⁴ And where the lessee was given the right to purchase within five years, upon giving thirty days' notice, he could not exercise the right, it was decided, if he did not give notice till two days before the end of the five years.⁵⁵

§ 263. Payment or tender of price.

It has been decided in England that, when the tenant was to have the option of purchase at any time during the term for a specified sum, and upon payment of such sum, the term and the rent were to cease and he to be entitled to a conveyance, a notice by the lessee of his election to exercise the option was binding on the lessor without payment of the purchase money.⁵⁶ In another case it was decided that, under an undertaking to sell in case the lessees should desire to purchase, and should give notice to that effect, and should pay the purchase money, the payment of the money was necessary to the creation of a binding

⁵³ *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360. But the terms of the option may require an acceptance in writing. See *Birmingham Canal Co. v. Cartwright*, 11 Ch. Div. 421.

⁵⁴ *Sutcliffe v. Wardle*, 63 Law T. (N. S.) 329.

⁵⁵ *Mason v. Payne*, 47 Mo. 517.

⁵⁶ *Mills v. Haywood*, 6 Ch. Div. 196.

contract;⁵⁷ and it has likewise been held that, though the lessee gave the required notice of his exercise of the option, yet if he failed to pay the purchase price at the expiration of the notice, as provided in the lease, he lost his right to purchase.⁵⁸

In this country, also, the payment or tender of the purchase price has occasionally been regarded as an integral part of the exercise of the option, as when the liability for rent was held to continue until such payment or tender,⁵⁹ or when it was said that the lessee cannot, until he actually tenders the price, complain that the lessor has not complied with his contract.⁶⁰ So it has been decided that a provision that the improvements should go to the lessor, in case the lessee should not purchase the premises, became operative if the purchase price was never paid, even though the lessee agreed to purchase and took a bond for title;⁶¹ and when the lessee was given the privilege of purchase "at any time before the expiration of this lease" for a sum named, "to be paid down in cash upon the demand of a deed prior to the expiration of this lease," payment or tender of the sum named within the time named was regarded as essential.⁶² On the other hand it has been decided that if the lessor refused to convey, upon being notified by the lessee of his desire to exercise the option, no tender of the price was necessary as a prerequisite to an action for specific performance.⁶³ The cases bearing on the question are generally obscure and unsatisfactory, but it would seem to be, in each case, a matter for determination with reference to the language of the particular contract.

In a few cases the fact that the purchase price was not paid within the time specified has been regarded as not excluding the

⁵⁷ *Weston v. Collins*, 34 Law J. Ch. 353.

⁵⁸ *Ranelagh v. Melton*, 2 Drew. & S. 278.

⁵⁹ See post, at notes 73-76.

⁶⁰ *Heine v. Treadwell*, 72 Cal. 217, 13 Pac. 503.

⁶¹ *Merritt v. Judd*, 14 Cal. 59.

⁶² *Steele v. Bond*, 32 Minn. 14, 18 N. W. 830.

⁶³ *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360; *Butler v. Threlkeld*, 117 Iowa, 116, 90 N. W. 584.

That the lease gave the tenant the right to apply upon the price the fund obtained by a sale of the products of the leased premises, a farm, was held not to require him to use only such fund for the purpose, the amount so realizable within the period named for the exercise of the option being necessarily insufficient for the purpose. *Rankin v. Rankin*, 216 Ill. 132, 74 N. E. 763.

lessee's right to a conveyance, he having expressed his intention to exercise the option within the time named. It was so decided when his failure to make payment was owing to the lessor's fault,⁶⁴ when, the lessor having died, the administrator refused to receive the purchase money for the heirs, who were infants and nonresidents,⁶⁵ and when the lessee made a part payment within the time, which was accepted by the lessor.⁶⁶

§ 264. Exercise as to part of premises.

An option in the lessee to purchase the premises does not give him the right to purchase a part of the premises at a less price,⁶⁷ nor can this be done by one to whom he has assigned the leasehold interest in a part of the premises.⁶⁸ But it has been decided that the assignee of an undivided moiety can compel performance in equity by suit in the name of all the owners, or, if they refuse to join, by suit in his own name.⁶⁹ Where the lessor actually sold part of the premises included in the option to the lessee, the latter's rights were regarded as superior to those of one to whom the lessor had previously contracted to convey the land.⁷⁰

§ 265. Effect of exercise.

An exercise of the option by the lessee, being an acceptance by him of the continuing offer made by the lessor, creates in effect a contract for the sale of the land.⁷¹ Such a contract, if specifically enforceable, as it usually is, creates, in the view of a court of equity, an equitable estate in the lessee of a *quantum* equal to that which the lessor has contracted to convey, usually the latter's whole interest, and in this the leasehold estate will merge. But in the view of a court of law, until a conveyance is actually

⁶⁴ Wilkins v. Evans, 1 Del. Ch. 156.

⁶⁹ Van Horne v. Crain, 1 Paige

⁶⁵ Page v. Hughes, 41 Ky. (2 B. Mon.) 439.

(N. Y.) 455.

⁶⁶ Hartman v. McAlister, 5 N. C. (1 Murph.) 207.

⁷⁰ Dietz v. Mission Transfer Co., 95 Cal. 92, 30 Pac. 380. See post, note 99.

⁶⁷ Hitchcock v. Page, 14 Cal. 440.

⁷¹ See King v. Raab, 123 Iowa, 632,

⁶⁸ Hitchcock v. Page, 14 Cal. 440;

99 N. W. 306; Willard v. Taylor, 75

Ostrander v. Livingston, 3 Barb.

U. S. (8 Wall.) 557.

Ch. (N. Y.) 416.

made, the lessee is in the position merely of a tenant having a contract for a conveyance.⁷²

There are decisions to the effect that an exercise of the option, accompanied by a tender of the purchase money, terminates the liability for rent.⁷³ In one state, however, it has been decided that this does not occur unless the tenant in some manner seeks enforcement of the lessor's agreement to sell.⁷⁴ That the lessee had an option for three years to buy at a price named, in which case the money paid on the rent was to be credited on the purchase money, was held not to authorize the lessee to occupy rent free for three years upon giving notice of his election to buy, without any tender of the purchase money.⁷⁵ And that the lessee notified the son of the deceased lessor that he intended to exercise the option, and would pay the purchase price when the probate proceedings were completed and the owner could give title, and on the appointment of the administrator, notified him of his desire to avail of the option, without, however, then paying the price because he had not the money, was decided not to terminate the liability for rent.⁷⁶ When the purchase price is not named, but is to be ascertained by arbitration, the lessee is, upon exercising the option, it has been held, entitled to remain rent free for such reasonable time as may be necessary for the arbitration.⁷⁷

In one case it was held that, the lessee enjoying possession rent free after tender by him of the price, he, and not the lessor, should pay the taxes accruing thereafter, although the lessor had

⁷² *Ellis v. Wright*, 76 Law T. (N. Swanston v. Clark, 153 Cal. 300, 95 S.) 522; *Doe d. Gray v. Stanion*, 1 Pac. 1117.

Mees. & W. 695. But in *Knerr v. Bradley*, 105 Pa. 190, the exercise of ⁷⁴ *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111.

the option is regarded as terminating the tenancy, even at law, on the ⁷⁵ *Hill v. Allen*, 185 Mass. 25, 69 N. E. 333.

theory that the relation of vendor and vendee is inconsistent with that ⁷⁶ *Journe v. Hewes*, 124 Cal. 244, 56 Pac. 1032.

of landlord and tenant. See ante, ⁷⁷ *Washburn v. White*, 197 Mass. 540, 84 N. E. 106. In this case, lack

§ 43. ⁷³ *Walker v. Edmondson*, 111 Ga. 454, 36 S. E. 800; *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169; *Gilbert v. Port*, 28 Ohio St. 276; the question involved.

agreed to convey free of incumbrance, and such taxes constituted an incumbrance.⁷⁸

It has in England been decided that the effect of the exercise of the lessee's option, after the death of the lessor, is to make the conversion of the land into purchase money relate back to the time of the giving of the option, so that the purchase money will belong to the lessor's personal representatives and not to his heir or devisee,⁷⁹ unless a contrary intention appears, as when the testator, after the giving of the option, devised the particular property without referring to the contract.⁸⁰ The practical inconvenience of the above doctrine, in that property may thus be shifted from the lessor's heir or devisee to his personal representative by the exercise of the option at a date long subsequent to his death, is sufficiently obvious, and the correctness thereof, particularly when the option is exercisable at a remote date in the future, has been forcibly questioned in a case in this country.⁸¹

The exercise of the option does not, it has been held, relate back to the time of the creation of the option, so as to entitle the lessee to the proceeds of insurance on buildings destroyed between the time of the creation of the option and its exercise, and it was so decided when the premiums were paid by the lessee for insurance taken out for the lessor's benefit,⁸² as well as when the lessor took out the insurance himself and paid the premiums.⁸³ A different view was, however, taken in one case, in regard to insurance paid for by the lessee, on a construction of the particular contract.⁸⁴ When there was a stipulation that the in-

⁷⁸ *Swanston v. Clark*, 153 Cal. 300, 95 Pac. 1117.

⁷⁹ *Lawes v. Bennett*, 1 Cox, 167, 171; *Townley v. Bedwell*, 14 Ves. Jr. 591; *Collingwood v. Row*, 26 Law J. Ch. 649; *In re Isaacs* [1894] 3 Ch. 506.

⁸⁰ *Drant v. Vause*, 1 Younge & C. Ch. 580; *Emuss v. Smith*, 2 De Gex & S. 722; *Weeding v. Weeding*, 1 Johns. & H. 424. So when a codicil was made, on the day of the lease, confirming a prior specific devise of the property. *In re Pyle* [1895] 1 Ch. 724.

⁸¹ *Smith v. Loewenstein*, 50 Ohio

St. 346, 34 N. E. 159. *In re Graves*, 15 Ir. Ch. 357, likewise, the propriety of the doctrine is questioned.

⁸² *Gilbert v. Port*, 28 Ohio St. 276.

⁸³ *Edwards v. West*, 7 Ch. Div. 858. In this case, decided by Fry, J., it is said by him that the doctrine of *Lawes v. Bennett*, 1 Cox, 167 (ante, note 79), is not to be extended.

⁸⁴ *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150. There it was decided that when the lease provided that, upon the lessee's exercise of the option to purchase, the

insurance, which the lessee agreed to take out, should be applied in rebuilding the premises, it was held that if the lessor, by taking out additional insurance without the lessee's knowledge, diminished the amount recoverable under the policy taken out by the lessee, by reason of the "average" clause therein, the lessor was bound to apply to rebuilding the amount received from the insurance taken out by him.⁸⁵

§ 266. Sufficiency of conveyance.

A covenant to convey to the lessee by "warranty deed," upon the payment of a certain sum, was held to require the conveyance of a perfect title, and hence the lessee could demand that the lessor's husband join in the conveyance.⁸⁶ A covenant that the lessee should have the option to purchase the premises in a certain contingency, without naming the estate to be conveyed, was construed as requiring the conveyance of a fee simple.⁸⁷

If a covenant, inserted in the instrument of lease, is intended to continue binding in the event of the purchase of the reversion under the option, the lessee is entitled to have such covenant inserted in the conveyance to him.⁸⁸ Whether it is so intended is a question of the construction of the language used.⁸⁹

sums theretofore received as rent should be applied as part of the purchase price, and he covenanted to pay all taxes and insurance in the meanwhile, to operate the elevator, to heat the building, and generally to make it desirable for tenants, and the lessor agreed to refund to the lessee any excess of the rent paid by him over the net rents received by him, these stipulations showed the intent of the parties to be to treat the lessee's election to purchase the property, when made, as relating back to the date of the lease, and that consequently the money received by the lessor from the insurance taken out by agreement between them, upon the destruction of the building by fire, should be regarded as belonging to the lessee on his exercise of the option.

⁸⁵ Reynard v. Arnold, 10 Ch. App. 386.

⁸⁶ Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118.

⁸⁷ McCormick v. Stephany, 61 N. J. Eq. 208, 48 Atl. 25.

In Brink v. Mitchell, 135 Wis. 416, 116 N. W. 16, it was held that an agreement, upon the lessee's exercise of his option, to convey by "a good and sufficient quitclaim deed," accompanied by recitals that the lessor acquired the title by purchase at foreclosure sale, called for "a conveyance of the entire estate of the lands."

⁸⁸ American Strawboard Co. v. Haldeman Paper Co., 27 C. C. A. 634, 83 Fed. 619.

⁸⁹ See Buffum v. Breed, 116 Mass. 582; Wright v. Kayner, 150 Mich. 7, 14 Det. Leg. N. 631, 113 N. W. 779.

Compliance with a covenant to convey free from incumbrances is obviously not affected by the existence of the leasehold estate, since this is merged upon the making of the conveyance to the owner thereof.⁹⁰

§ 267. Change of parties to the tenancy.

The benefit of an agreement by the lessor to sell to the lessee at the latter's option has been regarded as passing to an assignee of the lessee's interest under the lease,⁹¹ and, on the tenant's death, to the lessee's personal representatives.⁹² There is one decision, however, to the effect that a right given to the lessee to purchase partially on credit does not pass to an assignee of the lease, since otherwise there might be imposed on the landlord an obligor for part of the purchase money not acceptable to him.⁹³ And there is a decision to the effect that the benefit of the provision does not pass under the foreclosure of a mortgage on the leasehold.⁹⁴

One to whom the lessor transfers the reversion has usually been regarded as bound by the lessor's covenant to sell to the lessee,⁹⁵ and, upon the lessor's death, his heirs or devisees have

⁹⁰ *Swanston v. Clark*, 153 Cal. 300, 95 Pac. 1117. *Kensington Vestry*, 27 Ch. Div. 394. In *Prout v. Roby*, 82 U. S. (15 Wall.) 471, it was asserted that "the

⁹¹ *Laffan v. Naglee*, 9 Cal. 662, 70 Am. Dec. 678; *Hall v. Center*, 40 Cal. 63; *Napier v. Darlington*, 70 Pa. 64; *Kerr v. Day*, 14 Pa. 112; *Hollander v. Central Metal & Supply Co. (Md.)* 71 Atl. 442; *Page v. Hughes*, 41 Ky. (2 B. Mon.) 439; *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455; *Hagar v. Buck*, 44 Vt. 295, 8 Am. Rep. 368. In *Blakeman v. Miller*, 136 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120, it was decided that the benefit of the covenant passed because the assignment was in terms of the "indenture of lease," and not of the term only.

⁹² *Gustin v. Union School Dist.*, 94 Mich. 502, 54 N. W. 156, 34 Am. St. Rep. 381; *Hagar v. Buck*, 44 Vt. 295, 8 Am. Rep. 368; *In re Adams &*

⁹³ *Menger v. Ward*, 87 Tex. 622, 30 S. W. 853.

⁹⁴ *Conn v. Tonner*, 86 Iowa, 577, 53 N. W. 320. The decision is based on a prior decision that such a covenant does not constitute an interest in land so as to be subject to execution. There is no reference to the question whether the benefit of the stipulation should not pass as a covenant running with the land.

⁹⁵ *Van Horne v. Grain*, 1 Paige

been held to be bound thereby.⁹⁶ In one case, however, in apparent opposition to the view that the lessor's transferee is bound by the covenant, it was decided that there is a breach of the covenant, entitling the lessee to substantial damages, if the lessor transfers the reversion, even though the transfer is in terms subject to the rights of the lessee.⁹⁷ And in a recent case in England it was explicitly decided that an option to purchase, given to the lessee, is not concerned with the relation of landlord and tenant, and that the burden thereof will consequently not pass upon a transfer of the reversion.⁹⁸

As against one to whom the lessor, after making the lease, agreed to convey the land, the lessor cannot, it has been held, sell the property to the lessee at a price less than that named in the option of purchase.⁹⁹

§ 263. Remedy for breach of stipulation.

The tenant can, no doubt, bring an action for damages on account of the breach of a covenant to convey to the landlord at his option,¹⁰⁰ but the remedy almost invariably adopted is that of a proceeding to compel specific performance.¹⁰¹

(N. Y.) 455; *Thomas v. Gottlieb, etc.*, 134 Pac. 67, 67 L. R. A. 571, 110 Am. Brew. Co., 102 Md. 417, 52 Atl. 633; *Mauger v. Perry*, 35 Md. 352; *Lazarus v. Heilman*, 11 Abb. N. C. (N. Y.) 93; *Harding v. Gibbs*, 125 Ill. 85, 17 N. E. 60, 8 Am. St. Rep. 345. The lessee may, however, by his own conduct be estopped to assert a right to a conveyance as against the transferee, as when he allowed the latter to buy out his stock in trade on the supposition that if this was done the lessee would not call for a conveyance. *Race v. Groves*, 43 N. J. Eq. 284, 7 Atl. 667.

⁹⁶ *Van Horne v. Crain*, 1 Paige (N. Y.) 455; *Buckwall v. Klein*, 5 Ohio Dec. 55. ⁹⁷ *Thuemler v. Brown*, 18 Pa. Super. Ct. 117. And see *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963, where it is said that tender of the price must be made to the lessor and not to the transferee. ⁹⁸ *Woodall v. Clifton* [1905] 2 Ch. 257. See the criticism of this case, as being in conflict with *In re Adams & Kensington Vestry*, 27 Ch. Div. 394, in 51 *Solicitors' Journal*, at p. 319.

⁹⁹ *Millard v. Martin*, 28 R. I. 494, 68 Atl. 420, 17 L. R. A. (N. S.) 582, 125 Am. St. Rep. 755. Compare *Slaughter v. Mallet Land & Cattle Co.*, 72 C. C. A. 430, 141 Fed. 282, and *Pietz v. Mission Transfer Co.*, 95 Cal. 92, 30 Pac. 380.

¹⁰⁰ See *Thuemler v. Ward*, 18 Pa. Super. Ct. 117.

¹⁰¹ *Hall v. Center*, 40 Cal. 63; *King v. Raab*, 123 Iowa, 632, 99 N.

§ 269. Statutory provisions.

In Maryland there are statutory provisions authorizing one holding under a lease for a longer period than fifteen years to "redeem the rent" within a period named in the statutes, varying from five to fifteen years, according to the date of the making of the lease, upon paying a sum no greater than the capitalization of the rent at a rate of interest named.¹⁰² This right of "redemption" is in effect merely a right to purchase the reversion, regardless of the reversioner's assent, and the tenant, after giving notice, as provided by the statute, to all persons interested in the reversion, may, it has been decided, file a bill in the nature of one for specific performance to obtain a conveyance of the reversion.¹⁰³

This legislation having been adopted as a matter of public policy, rather than for the benefit of particular individuals, any agreement or waiver intended to exclude its operation in a particular case has been decided to be nugatory,¹⁰⁴ nor can this be effected by the making of a lease for less than fifteen years with a provision for renewal for another period, when the sum of the two periods is over fifteen years.¹⁰⁵

These statutes apply to improved as well as unimproved property.¹⁰⁶ They do not, it has been held, apply to a lease made, since their enactment, merely in pursuance of a covenant in a lease made prior to their enactment, whereby the lessor agreed to make new leases for the purpose of apportioning the rent.¹⁰⁷

W. 306; *Hawralty v. Warren*, 18 N. J. Eq. (3 C. E. Green) 124; *Maughlin v. Perry*, 35 Md. 352; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Willard v. Tayloe*, 75 U. S. (8 Wall.) 557. See *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455.

¹⁰² Code Pub. Gen. Laws 1904, art. 21, §§ 88, 89; art. 53, § 1.

¹⁰³ *Plaenker v. Smith*, 95 Md. 389, 52 Atl. 606, 93 Am. St. Rep. 339.

¹⁰⁴ *Stewart v. Gorter*, 70 Md. 242, 16 Atl. 644, 2 L. R. A. 711.

¹⁰⁵ *Stewart v. Gorter*, 70 Md. 242, 16 Atl. 644, 2 L. R. A. 711.

¹⁰⁶ *Swan v. Kemp*, 97 Md. 686, 55 Atl. 441.

¹⁰⁷ *Flook v. Hunting*, 76 Md. 178, 24 Atl. 670. On somewhat the same theory, it was held that the legislation did not apply to a lease made in confirmation of a previous lease which was invalid because, at the time of its execution, the proposed lessee had not yet become a corporation. *Jones v. Linden Bldg. Ass'n*, 79 Md. 73, 29 Atl. 76.

CHAPTER XXVII.

PAYMENT BY LANDLORD FOR TENANT'S IMPROVEMENTS.

§ 270. In absence of stipulation.

271. Stipulation as to payment.

- a. As alternative to renewal.
- b. As dependent on sale of reversion.
- c. Election by lessor.
- d. Improvements within stipulation.
- e. Effect of renewal or extension.
- f. Effect of tenant's breach of covenant.
- g. Effect of forfeiture of leasehold.
- h. Change of parties to tenancy.
- i. Title to improvements.
- j. Valuation of improvements.
- k. Possession of premises pending payment.
- l. Enforcement of payment—Lien.

§ 270. In absence of stipulation.

The tenant cannot ordinarily, by erecting buildings or placing other improvements upon the land, impose upon the landlord any obligation to compensate him for such improvements, even though they are of such character and so annexed that the tenant has no right to remove them upon the termination of the tenancy.¹ And the same principle applies in case the tenant ex-

¹ Pilling v. Armitage, 12 Ves. Jr. Bldg. Co., 63 Ill. 308; Diederich v. 84; Kutter v. Smith, 69 U. S. (2 Rose, 238 Ill. 610, 81 N. E. 1140; Wall.) 491; Gay v. Joplin, 13 Fed. Wilkinson v. Nichols, 17 Ky. (1 T. 650; Jones v. Hoard, 59 Ark. 42, 26 B. Mon.) 36; Guthrie v. Guthrie, 25 S. W. 193, 43 Am. St. Rep. 17; Ky. Law Rep. 1701, 78 S. W. 474; Hughes v. Ford, 15 Colo. 330, 25 Pac. Leslie v. Smith, 32 Mich. 65; Cosgriff v. Foss, 65 Hun, 184, 19 N. Y. 555; Town of Milledgeville v. Thomas, 69 Ga. 535; Mull v. Graham, 7 Ind. App. 561, 35 N. E. 134; N. C. (1 Ired. Eq.) 65, 36 Am. Dec. Toledo, W. & W. R. Co. v. Depot 33; Critcher v. Watson, 146 N. C.

pends money or labor in other ways upon the land.² The tenant has no greater right to assert such a claim in an action for rent brought by the landlord than by independent suit,³ and ordinarily he cannot do so in equity to any greater extent than at law.⁴

The fact that the landlord does not object to the making of improvements by the tenant, although knowing thereof at the time, is immaterial,⁵ as is the fact that the landlord urges the making of the improvements.⁶ If, however, the landlord encourages the tenant to make improvements, by inducing him to believe that he will be granted a renewal or more extended lease, equity will, it seems, protect the tenant in his possession until compensated for the improvements.⁷ And it has been decided that if a tenant improves by permission of his landlord, under a promise to convey or devise to him, he may recover the cost of the improvements, on the nonfulfillment of the promise, even if he failed to secure himself by a written contract in accordance with the Statute of Frauds.⁸ There are even decisions that if the owner of land agrees orally that another shall have the premises for life, the owner cannot recover possession during the life, on the ground that there is no written lease, unless he pays for the improvements made by the tenant.⁹ And where a lease

150, 59 S. E. 544, 18 L. R. A. (N. S.) 270, 125 Am. St. Rep. 470; *Kline v. Jacobs*, 68 Pa. 57; *State v. McMinnville & M. R. Co.*, 74 Tenn. (6 Lea) 369; *Windem v. Stewart*, 43 W. Va. 711, 28 S. E. 776; *Hart v. Hart*, 117 Wis. 639, 94 N. W. 890.

² *Wilkerson v. Farnham*, 82 Mo. 672; *Guay v. Kehoe*, 70 N. H. 151, 46 Atl. 688; *Bullitt v. Musgrave*, 3 Gill (Md.) 31.

³ *Wilkerson v. Farnham*, 82 Mo. 672; *Randolph v. Mitchell* (Tex. Civ. App.) 51 S. W. 297.

⁴ *Pilling v. Armitage*, 12 Ves. Jr. 84; *Pomeroy v. Lambeth*, 36 N. C. (1 Ired. Eq.) 65, 36 Am. Dec. 33.

⁵ *Gocio v. Day*, 51 Ark. 46, 9 S. W. 433; *Woolley v. Osborne*, 39 N. J. Eq. (12 Stew.) 54; *Dunn v. Bagby*, 88 N. C. 91.

⁶ *Hopkins v. Ratliff*, 115 Ind. 213, 17 N. E. 288.

⁷ *Unity Joint Stock Mut. Banking Ass'n v. King*, 25 Beav. 72; *Millard v. Harvey*, 10 Jur. (N. S.) 1167; *Holls v. Edwards*, 1 Vern. 159 (semble). But the lessor is not liable for the improvements even in such case, it has been decided, if he allows the lessee to remain in possession and merely refuses to make the agreed lease. *Yates v. Bachley*, 33 Wis. 185.

⁸ *Freeman v. Headley*, 33 N. J. Law, 523, 97 Am. Dec. 737; *Smith v. Smith*, 28 N. J. Law (4 Dutch.) 208, 78 Am. Dec. 49; *Cornell v. Vanartsdalen*, 4 Pa. 364.

⁹ *Reed v. Lander*, 68 Ky. (5 Bush) 21; *O'Neal v. Orr*, 68 Ky. (5 Bush) 649. The case of *Allen v. Mansfield*,

was made for one hundred years, with a covenant that the lessee might retain possession so long as he might think proper thereafter, it was held that the lessee's successor in interest could be ousted after the one hundred years only upon payment by the landlord for his improvements.¹⁰

When a lease which is valid at law is set aside in equity, allowance will be made, it has been decided, for improvements made by the tenant.¹¹

The tenant does not acquire a right to compensation for improvements, it has been held, because, in making them, he acted under the mistaken impression that his lease would endure for a longer time than was actually the case,¹² nor because he had, at the time, an option to purchase the premises, which option he failed to exercise because of subsequently discovered defects in the lessor's title.¹³

§ 271. Stipulation as to payment.

a. **As alternative to renewal.** Occasionally a provision of the lease is so expressed as to give the lessor the option to take the improvements at the termination of the tenancy, upon payment therefor, without binding him so to do.¹⁴ And so the lessor is quite frequently given the option either to pay for the improvements or to give a renewal lease, the right of election being vested in the lessor and not in the lessee.¹⁵ In such a case, when the

82 Mo. 688, is apparently to the same effect, there the owner of the land having given what is called a "license" to use the land for a "permanent home," and it being held that the licensee could not be ousted without being paid for her improvements.

¹⁰ *Lewis v. Effinger*, 30 Pa. 281.

¹¹ *Attorney General v. Baliol College*, 9 Mod. 411; *Richmond v. Davis*, 103 Ind. 449, 3 N. E. 130.

¹² *Wildridge v. McKane*, 8 Ir. Eq. 231; *Haven v. Adams*, 90 Mass. (8 Allen) 363; *Dunn v. Bagby*, 88 N. C. 91.

¹³ *Walton v. Meeks*, 120 N. Y. 79, 23 N. E. 1115, 8 L. R. A. 79.

¹⁴ See *Toledo, W. & W. R. Co. v. Jacksonville Depot Bldg. Co.*, 63 Ill. 308; *Kelly v. Chicago, M. & St. P. R. Co.*, 93 Iowa, 436, 61 N. W. 957.

¹⁵ See *Kutter v. Smith*, 69 U. S. (2 Wall.) 491; *Bullock v. Grinstead*, 95 Ky. 261, 24 S. W. 867; *Smith v. St. Philip's Church*, 107 N. Y. 610, 14 N. E. 825; *In re Coatsworth*, 160 N. Y. 114, 54 N. E. 665; *Howe's Cave Ass'n v. Houck*, 66 Hun, 205, 21 N. Y. Supp. 40; *Conger v. Ensler*, 85 App. Div. 564, 83 N. Y. Supp. 419; *Crosby v. Meses*, 48 N. Y. Super. Ct. (16 Jones & S.) 146; *Hutchinson v. Boulton*, 3 Grant's Ch. 391; *Ward v. Hall*, 34 New Br. 600; *Ward v. City of Toronto*, 26 Ont. App. 225. See

lease provided that the lessor should pay for improvements "provided the said premises shall not be re-let to the lessee," it was held that the term "re-let" referred to a new letting for a fixed and definite period, and that the mere fact that the tenant held over, paying rent monthly, did not relieve the lessor from liability to pay for the improvements.¹⁶ Elsewhere it has been held that there was in effect a renewal, sufficient to relieve the lessor from all obligation to pay for the buildings, when the lessee continued in possession for the period of the renewal term, he having thereby waived a requirement of notice from the lessor of his election to renew.¹⁷ And a provision that, in case the "lease cannot be continued" after its term "by mutual agreement of the parties thereto," the improvements shall be purchased by the lessor, was regarded as inapplicable when the lessee continued in possession after the term, rent being paid and accepted as before.¹⁸

The fact that the lessor elects to renew rather than to pay for the improvements does not compel the lessee to accept the renewal,¹⁹ and in case of such refusal by him to accept the renewal the tenancy will come to an end, the lessee losing the value of his improvements,²⁰ unless this result is excluded by the language of the lease.²¹

If the period of the renewal is not named, the lessor must, it has been held, renew for a substantial term, as an alternative to buying the improvements.²² One renewal has been regarded as

Neiderstein v. Cusick, 178 N. Y. 543, 71 N. E. 100. As to the necessity of an express election by the lessor, see post, § 271 c.

¹⁶ *Moseley v. Allen*, 138 Mass. 81; *Franklin Land, Mill & Water Co. v. Card*, 84 Me. 528, 24 Atl. 960.

¹⁷ *Powell v. Pierce*, 103 Va. 526, 49 S. E. 666.

¹⁸ *Parker v. Page*, 41 Or. 579, 69 Pac. 822.

¹⁹ *Zorkowski v. Astor*, 156 N. Y. 393, 50 N. E. 983.

²⁰ See *Rutgers v. Hunter*, 6 Johns. Ch. (N. Y.) 215; *Pearce v. Colden*, 8 Barb. (N. Y.) 522.

²¹ In *Carpenter v. Pocasset Mfg.*

Co., 180 Mass. 131, 61 N. E. 816, it was decided that where the lessees were by the lease given the right of renewal for such rent as might be agreed on, "or, in case of a failure so to agree, the lessor shall purchase the improvements," the words "failure to agree" were held to embrace the case of a failure to renew because the lessees would not pay any rental, and they were regarded as entitled to compensation for improvements though they refused to take a renewal.

²² *Phillips v. Reynolds*, 20 Wash. 374, 55 Pac. 316, 72 Am. St. Rep. 107.

sufficient, so that the landlord need not pay for improvements upon his refusal to give a second renewal.²³

b. **As dependent on sale of reversion.** Occasionally there is a provision that the lessor shall pay the lessee for improvements in case the lessor sells the property.²⁴ A condemnation of the property for public use has been decided not to be a sale within such a provision.²⁵ It has, moreover, in one case, been decided not to apply when the lessee's rights were expressly protected by the terms of the sale,²⁶ but there is in another jurisdiction a contrary decision.²⁷

c. **Election by lessor.** It has been held that when the lessor had the option at the end of the term either to pay for the improvements or to renew the lease, the lessor's failure to make his election, on the day of the expiration of the term, to renew the lease, made him liable for the value of the improvements.²⁸ In another jurisdiction a different construction was placed on a provision that, if the lessee should give notice of a desire for a renewal, the lessor would renew or pay for the improvements, it being held that the fact that the lessor failed to make an election upon receipt of notice from the lessee did not compel him to pay for the improvements rather than to renew.²⁹ In one jurisdiction it has been decided that, when the lessor failed to make the election, the lessee might do so.³⁰

Where a lease provided that, unless the lessor gave notice, six months before the expiration of the term of fifteen years, of his election to take possession of the premises and to pay for the buildings to be erected by the lessee at their appraised value, the lease should be regarded as renewed and continued for a period of five years longer, it was held that a notice of the landlord's election to take possession "pursuant to the provisions of

²³ *Pierce v. Grice*, 92 Va. 763, 24 S. E. 392.

²⁴ As to compensation for improvements on termination of tenancy by sale or otherwise, under option in lease, see ante, § 12 e (5), at notes 240-244.

²⁵ *McAllister v. Reel*, 53 Mo. App. 81.

²⁶ *Chandler v. Oldham*, 55 Mo. App. 139.

²⁷ *Pintard v. Irwin*, 20 N. J. Law (Spencer) 497.

²⁸ *Bullock v. Grinstead*, 95 Ky. 261, 24 S. W. 867.

²⁹ *Ward v. City of Toronto*, 29 Ont. 729, 26 Ont. App. 225.

³⁰ *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161.

the said lease" was sufficient to terminate the lease, though it did not state that the lessor would pay for the improvements.³¹

It has been decided that, when the lessor agreed to pay the value of the improvements in one, two or three years from the expiration of the lease, or, at his election, to pay the same out of the rents, and the lessor assigned the reversion, since by such assignment he lost the power to pay out of the rents, the lessor's right of election was lost and he was bound to pay in one, two and three years.³² And it was held, without reference to any other provisions of the lease, that by a sale of the premises without expressly reserving the rights of the tenant, the lessor in effect converted the improvements to his own use, and consequently thereby elected to pay therefor under a clause giving the lessor the option either so to do or to permit their removal by the tenant.³³ Ordinarily, it seems, the right of election would in such case be regarded as passing to the transferee.³⁴

d. **Improvements within stipulation.** The question as to what particular improvements come within the terms of a particular covenant to pay for improvements is obviously one of the construction of the language used.³⁵ A covenant to pay for improvements erected by the lessee has been regarded as covering improvements erected by an assignee of the lessee,³⁶ and even

³¹ *In re Coatsworth*, 160 N. Y. 114, 54 N. E. 665.

³² *Bream v. Dickerson*, 21 Tenn. (2 Humph.) 126.

³³ *Smyth v. Stoddard*, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314.

³⁴ See post, at notes 74-76.

³⁵ A covenant to pay the value of "the buildings," following an agreement by the lessee to erect a building then being transported from another place, or, if this were lost, a similar one, was held not to cover a building of an entirely different class, erected in place of the one first set up on the destruction of the latter. *Woodward v. Payne*, 16 Cal. 444.

A covenant to pay for improvements was held to apply only to improvements of a character within

the contemplation of a previous clause authorizing the erection of a certain class of mill and machinery. *Berry v. Van Winkle*, 2 N. J. Eq. (1 H. W. Green) 390.

A contract to pay for "stalling and covering" erected on a barn foundation does not cover a pump used for watering the stock. *Smyth v. Stoddard*, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314.

Crib-work and earth-filling, made by the lessee of a water lot, have been held not to be within a covenant to pay for "buildings and erections." *Adamson v. Rogers*, 26 Can. Sup. Ct. 159.

³⁶ *Tuttle v. Leiter*, 82 Fed. 947; *Smith v. St. Philip's Church*, 107 N. Y. 610, 14 N. E. 825.

those erected by a sublessee.³⁷ And a covenant in a renewal lease, made to an assignee of the original lessee, to pay for improvements made by him, has been construed as entitling him to compensation for improvements made by the original lessee, the renewal lease expressly providing that the lessee should continue to be the owner of the buildings even though the lease was not again renewed, and securing to him the privilege of removing them.³⁸

An agreement to pay for a building, if a good and substantial building is erected, does not bind the lesser to pay for improvements to buildings already erected.³⁹ And an agreement to pay for "permanent improvements, such as cistern, privy, cellar and fencing," has been held not to bind him for grading, or for shrubbery and fruit trees, planted for the lessee's convenience.⁴⁰ Where a lease provided that the lessor might either have improvements appraised at the end of the term "without regard to the situation or value of the premises leased," and pay such value, or should renew, it was held that, on his refusal to renew, he was liable for the value of all improvements, and not merely of those removable by the tenant.⁴¹

The fact that by the lease the tenant is under the obligation to keep fencing in repair does not relieve the landlord from liability, under his covenant to pay for improvements, to pay the value of fencing placed around part of the premises not fenced at the time of the lease.⁴²

A covenant to pay for "all the buildings and improvements that may be made on said lands" has been said to include only such as are upon the premises at the end of the term.⁴³

It has been decided that, where the lessee covenanted to build a dwelling house, and the lessor covenanted that if the lessee performed such covenant he, the lessor, would either grant a renewal or pay the value of the house, the lessor was not bound by his

³⁷ Tuttle v. Leiter, 82 Fed. 947;
Wheeler v. Hill, 16 Me. 329.

³⁸ Wray v. Rhinelander, 52 Barb.
(N. Y.) 553.

³⁹ Smith v. Cooley, 5 Daly (N. Y.)
401.

⁴⁰ Deishler v. Golbaugh, 2 Ky.
Law Rep. 231.

⁴¹ Hopkins v. Gilman, 47 Wis. 581,
3 N. W. 382, 32 Am. Rep. 781.

⁴² Hazlewood v. Pennybacker (Tex.
Civ. App.) 50 S. W. 199.

⁴³ Van Rensselaer's Heirs v. Pen-
niman, 6 Wend. (N. Y.) 569.

covenant to renew or pay if the lessee erected a building of another character and not a dwelling house.⁴⁴ But a stipulation as to the character of the building to be erected by the lessee may be waived by the lessor, so as to make him liable to pay therefor under his covenant, though the building erected is different from that stipulated, and it was held that the lessor, by signing and accepting a written waiver of the lessee's option to take a renewal, which renewal was to be given only if the lessee had performed his covenants, thereby admitted performance of the lessee's covenant to erect a building according to certain specifications, and was consequently liable under his covenant to pay therefor.⁴⁵ In the same case, it was decided that if the lessee's covenant to erect a certain class of building goes to a part only of the consideration, and a breach thereof may be compensated in damages, the lessor cannot assert such breach as a ground for refusing to pay for the building as agreed.⁴⁶

When the lessee thus covenanted to erect a building, and the lessor covenanted to pay the fair value thereof at the end of the term, a release by the lessor of the lessee's covenant to build was held not necessarily to deprive him of the right to build, and it was decided that, if he did build voluntarily, the lessor was liable under his covenant for the value of the building.⁴⁷ The lessor, having agreed to pay the value of a building which the lessee is given permission to erect, cannot avoid liability under such agreement by notifying the lessee not to build it.⁴⁸

e. **Effect of renewal or extension.** The fact that the lease is

⁴⁴ *McIntosh v. St. Philip's Church*, 120 N. Y. 7, 23 N. E. 984. In *Fisher v. Fisher*, 1 Bradf. Sur. (N. Y.) 335, it was held that where the lessor covenanted to renew, or pay the value of "such buildings as should be erected in pursuance of the lease," he was not liable if he failed to have the buildings on the premises made fireproof as stipulated on his part in the instrument of lease.

⁴⁵ *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 59 N. E. 247.

⁴⁶ *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 59 N. E. 247. It

was accordingly there decided that a right in the lessee to be paid \$5,000 for its building at the end of the term was not defeated by the fact that the building was not finished exactly as provided in the lease, the lessor having received the rent, amounting to over \$100,000 during the ten years of the lease, and the building having cost over \$30,000.

⁴⁷ *Smith v. St. Philip's Church*, 107 N. Y. 610, 14 N. E. 825.

⁴⁸ *McVicker v. Dennison*, 45 Pa.

renewed or extended has been held not to deprive the lessee of the right to compensation as provided by the original lease.⁴⁹ And so it has been decided that, where a lease for fifteen years provided that the lessor might, six months before the end of the term, take possession and pay for improvements made by the lessee, and that in case of failure to give the notice the tenancy should be regarded as renewed for five years on the same terms and conditions, the lessee's right to payment for improvements existed at the end of any renewal term as well as at the end of the original term.⁵⁰ Elsewhere, however, it has been decided that when the lease provided for payment for improvements if it was not renewed, the lessee was not entitled to the value of improvements on the property at the end of a renewal term,⁵¹ and a like view was asserted even when the renewal was of the lease "with all its conditions unchanged and unimpaired."⁵² That the promise to pay for improvements is conditioned on the tenant's performance of his stipulations "during this term and the renewed term" does not exclude compensation because the lease is not renewed.⁵³

f. **Effect of tenant's breach of covenant.** In New York it has been decided that the lessor is under no obligation to pay the value of improvements under his covenant so to do, if the lessee has failed to perform covenants on his part to be performed at a time prior to such payment, such as covenants for the payment of taxes, water rates, or rent.⁵⁴ But in Missouri it was held that a provision that "the agreements in the lease being performed," the lessor will pay for improvements, did not make the lessor's liability for improvements dependent on the performance of the lessee's agreements.⁵⁵ And in Pennsylvania it was

⁴⁹ *Lane v. Moeder*, 1 Cab. & El. 548; *Livingston v. Sulzer*, 19 Hun (N. Y.) 375.

⁵⁰ *Schoellkopf v. Coatsworth*, 166 N. Y. 77, 59 N. E. 710.

⁵¹ *King v. Wilson*, 98 Va. 259, 35 S. E. 727.

⁵² *Kash v. Hunccheon*, 1 Ind. App. 361, 27 N. E. 645.

⁵³ *Butler v. Manny*, 52 Mo. 497.

⁵⁴ *Johnston v. Bates*, 48 N. Y. Super. Ct. (16 Jones & S.) 180;

People's Bank v. Mitchell, 73 N. Y. 406; *Glaser v. Cumisky*, 40 N. Y. St. Rep. 872, 16 N. Y. Supp. 89. In the second case cited it is decided that such breach of covenant by the tenant is not waived, for this purpose, by the fact that the lessor joins in procuring an appraisal of the improvements as provided by the lease, he being at the time ignorant of the breach.

⁵⁵ *Butler v. Manny*, 52 Mo. 497.

considered, apparently, that the tenant's breach of an agreement on his part to be performed justified the landlord's nonperformance of his promise to pay for improvements only when such agreement "was an essential part of the contract without which the lease would not have been signed."⁵⁶

g. Effect of forfeiture of leasehold. When the lease provides that payments for improvements shall be made at the expiration of the "term," the latter word, it has been decided, refers to the time named for the duration of the tenancy, and not to the leasehold interest, so that there is, in case of forfeiture, no right to immediate payment.⁵⁷

An agreement to pay for the tenant's improvements, if he loses possession before the expiration of the term, has been held to impose no liability in case of a forfeiture for the tenant's breach of condition.⁵⁸

A tenant, by disclaiming the title of his landlord, has been held thereby to lose the benefit of a provision of this character.⁵⁹ It does not appear to have been decided whether the benefit of such a provision is lost by a forfeiture for breach of an express condition of the lease. The decisions above referred to, that a right to immediate compensation does not exist,⁶⁰ might perhaps suggest that compensation may be claimed at the end of the term of the lease.⁶¹

h. Change of parties to tenancy. An agreement by the lessor

⁵⁶ *Cosgrave v. Hammill*, 173 Pa. 207, 33 Atl. 1045.

⁵⁷ *Lawrence v. Knight*, 11 Cal. 298, 70 Am. Dec. 779; *Finkelmeier v. Bates*, 92 N. Y. 172; *Johnston v. Bates*, 48 N. Y. Super. Ct. (16 Jones & S.) 180; *Glaser v. Cumisky*, 40 N. Y. St. Rep. 872, 16 N. Y. Supp. 89; *Lent v. Curtis*, 24 Ohio Cir. Ct. R. 592. In *Kutter v. Smith*, 69 U. S. (2 Wall.) 491, it was similarly decided, as to a stipulation to pay for improvements at a date named, that it did not involve any obligation to pay for them at an earlier date, upon the enforcement of a forfeiture,

⁵⁸ *Wilcoxon v. Hybarger*, 1 Ind. T. 138, 38 S. W. 669.

⁵⁹ *McQueen v. Chouteau's Heirs*, 20 Mo. 222, 64 Am. Dec. 178.

⁶⁰ See ante, note 57.

⁶¹ In *Lawrence v. Knight*, 11 Cal. 298, 70 Am. Dec. 779; *Finkelmeier v. Bates*, 92 N. Y. 172, the court expressly refrains from considering the rights of the tenant in this regard at the end of the term. In *Kutter v. Smith*, 69 U. S. (2 Wall.) 491, the language of the opinion appears to favor the view that all right of compensation is lost by forfeiture and re-entry. In *Lent v. Curtis*, 24 Ohio Cir. Ct. R. 592, the contrary view is clearly asserted.

to pay the lessee the value of improvements made by the latter is one which concerns the land, and therefore the benefit thereof may pass to the assignee of the lessee, as being within the statute of 32 Henry 8, c. 34.⁶² So far, however, as regards improvements consisting of new erections not existent at the time of the lease, the rule in *Spencer's Case*, that a covenant as to things not *in esse* at that time does not pass unless assigns are mentioned,^{62a} has occasionally been applied,⁶³ but this rule has been regarded as inapplicable in the case of improvements made upon buildings in existence at the time of the demise.⁶⁴ Since a sublease does not have the effect of placing the sublessee in privity with the lessor, the benefit of the covenant does not pass to the sublessee,⁶⁵ and it has apparently been decided that it does not pass to an assignee, if the intention appears to be that it shall not pass.⁶⁶ A mortgagee of the leasehold is, in jurisdictions where a mortgage passes the legal title, entitled to the benefit of the covenant to the same extent as an absolute assignee.⁶⁷ It seems that an assignee of the leasehold would be entitled to the benefit of the covenant, although the lease prohibits any assignment, such a prohibition not ordinarily affecting the validity of the assignment itself.⁶⁸ In one case, where there was such a prohibition of an assignment, it was decided that the assignee could not recover

⁶² See *Coffin v. Talman*, 8 N. Y. (4 Seld.) 465; *Stockett v. Howard*, 34 Md. 121; *Smith v. St. Philip's Church*, 107 N. Y. 610, 14 N. E. 825; *Lametti v. Anderson*, 6 Cow. (N. Y.) 308; *Thompson v. Rose*, 8 Cow. (N. Y.) 266; *Schoellkopf v. Coatsworth*, 166 N. Y. 71, 59 N. E. 710; *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910; *Hunt v. Danforth*, 2 Curt. 592, Fed. Cas. No. 6,887; *Conover v. Smith*, 17 N. J. Eq. (2 C. E. Green) 51, 86 Am. Dec. 247.

A stipulation for the valuation of improvements at the expiration of the term, and for a surrender of the premises upon the payment thereof, retaining a lien on the improvements for the amount of the valuation if not paid, "may be considered as an analagous to the usual

stipulation in favor of the lessee of the right to remove the improvements," which "would probably run with the land." *Anderson v. Ammonett*, 77 Tenn. (9 Lea) 1.

^{62a} See ante, § 149 b (4).

⁶³ *Coffin v. Talman*, 8 N. Y. (4 Seld.) 565; *Thompson v. Rose*, 8 Cow. (N. Y.) 266; *Cronin v. Watkins*, 1 Tenn. Ch. 119. See *Hollywood v. First Parish in Brockton*, 192 Mass. 269, 78 N. E. 124, 7 L. R. A. (N. S.) 621.

⁶⁴ *Conover v. Smith*, 17 N. J. Eq. (2 C. E. Green) 51, 86 Am. Dec. 247. See *Spencer's Case*, 5 Coke, 16.

⁶⁵ *Tuttle v. Leiter*, 82 Fed. 947.

⁶⁶ *Tuttle v. Leiter*, 82 Fed. 947.

⁶⁷ *Stockett v. Howard*, 34 Md. 121.

⁶⁸ See ante, § 152 j (2).

on the covenant,⁶⁹ but there the decision of the majority of the court was based on the ground that, as the term had expired at the time of the assignment, this was a transfer of the interest under an oral lease merely, and so not within the statute of 32 Henry 8, c. 34. Though the assignee is ordinarily entitled to the compensation rather than the lessee himself, he cannot assert any claim thereto as against the lessor, if the latter has paid such compensation to the original lessee without notice of the assignment.⁷⁰

The transfer by the lessee of all his right, title, and interest in and to the lease, has been held to transfer the right to the buildings and the alternative right to payment therefor.⁷¹ And an assignment of the lease will pass the benefit of a stipulation for a lien for the value of the improvements.⁷² It has been decided that though the lessee occupies the premises as a homestead and consequently cannot transfer his leasehold interest without the joinder of his wife, he may, without her joinder, assign his rights under the lessor's covenant to pay for improvements.⁷³

As upon an assignment of the leasehold interest the benefit of the agreement to pay for improvements may pass to the assignee, so upon a transfer of the reversion the burden of the agreement will pass to the lessor as a covenant running with the land, provided at least "assigns" are named in the covenant.⁷⁴ Ordinarily it has been held not to pass, so as to entitle the lessee to compensation as against a transferee, when "assigns" are not mentioned in the covenant or agreement,⁷⁵ though in some jurisdictions this

⁶⁹ *Elliott v. Johnson*, L. R. 2 Q. B. 120.

⁷⁰ *Cronin v. Watkins*, 1 Tenn. Ch. 119. The recent case of *Smyth v. Stoddard*, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314, ante, note 33, is apparently to the effect that the lessor has no right to transfer the reversion without reserving the improvements which the lessee has a right, by the terms of the lease, either to remove or claim compensation for.

⁷¹ California Annual Conference v. Seitz, 74 Cal. 287, 15 Pac. 839. See *Isman v. Hanscom*, 217 Pa. 133, 66 Atl. 329.

⁷² *Anderson v. Ammonett*, 77 Tenn. (9 Lea) 1.

⁷³ *Pelan v. DeBevard*, 13 Iowa, 53.

⁷⁴ That a devisee of the landlord for life, who is in receipt of the rents and profits, is the person subject to the liability, see *Mansel v. Norton*, 22 Ch. Div. 769.

⁷⁵ *Grey v. Cuthbertson*, 4 Doug. 351; *McClary v. Jackson*, 13 Ont. 310; *Etowah Min. Co. v. Wills Valley Min. & Mfg. Co.*, 121 Ala. 672, 25 So. 720; *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282; *Watson v. Gardner*, 119 Ill. 312, 10 N. E. 192; *Id.*, 18 Ill. App. (18 Bradw.) 386; *Coffin v. Talman*, 8 N. Y. (4 Seld.)

distinction is not recognized, and the transferee of the reversion is held liable although assigns are not named.⁷⁶ In perhaps two cases the fact that the lessee is under no obligation to make improvements, but has merely the right to make them, is regarded as rendering the covenant to pay for improvements personal merely to the lessor and not binding on his transferee.⁷⁷

A covenant of this character will not bind one to whom the land is conveyed after the termination of the lease and relinquishment of possession by the lessee, since the covenant has then been broken and turned into a right of action.⁷⁸

The heirs of the lessor stand in the same position as regards liability under such a covenant, as do the transferees by conveyance *inter vivos*.⁷⁹

A covenant by the lessor to make compensation for personalty brought on the land, but not affixed thereto, does not burden his transferee, this being in no sense a covenant running with the land.⁸⁰

465; *In re Henshaw*, 37 Misc. 536, 75 N. Y. Supp. 1047; *Bream & Co. v. Dickerson*, 21 Tenn. (2 Humph.) 126. See ante, § 149 b (2).

⁷⁶ *Frederick v. Callahan*, 40 Iowa, 311; *Ecke v. Fetzer*, 65 Wis. 55, 25 N. W. 266.

In *Schoellkopf v. Coatsworth*, 166 N. Y. 77, 59 N. E. 710, where the lease provided that the lease should be regarded as renewed for another five years unless the lessors notified the lessee, his executors, administrators or assigns, at least six months before the end of the term, of their election to pay for certain buildings to be erected by the lessee, and the transferee of the lessor gave such notice, and accordingly recovered possession at the end of the term from assignees of the lessee, it was decided that the lessee's assignee could recover against the lessor's transferee under the provision as to payment for buildings. There, though the transferee was held bound, the covenant did not in

terms bind "assigns." The decision is, however, in part, based upon the state of the pleadings.

In *Bell v. Bitner*, 33 Ind. App. 6, 70 N. E. 549, the lessee was not allowed to set off, in an action for rent by the lessor's transferees, a claim on account of a promise by the lessor to pay for improvements, the answer not alleging that the defendant "has any equitable or other lien on the rents due plaintiffs, nor that there is any personal liability on the part of plaintiffs for the amount claimed to be due defendant."

⁷⁷ *Etowah Min. Co. v. Wills Valley Min. & Mfg. Co.*, 121 Ala. 672, 25 So. 720; *Gardner v. Samuels*, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135.

⁷⁸ *Coffin v. Talman*, 8 N. Y. (4 Seld.) 465; *Gardner v. Samuels*, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135.

⁷⁹ *Hazlewood v. Pennybacker* (Tex. Civ. App.) 50 S. W. 199.

⁸⁰ *Etowah Min. Co. v. Wills Val-*

The tenant is entitled to the benefit of the lessor's covenant to pay for improvements, which was in terms conditioned upon the delivery of possession at the end of the term to the lessor, although the delivery of possession was to the lessor's transferee, such delivery being in effect authorized by the transfer of the reversion.⁸¹

i. **Title to improvements.** The fact that the lessor covenants to pay the lessee at the end of the term for improvements made by the latter should not, it seems, affect the title to the improvements erected by him.⁸² and so it occasionally has been decided that, in view of the character of a building erected by the lessee, for which the lessor was to make compensation, it belonged to the lessor immediately on its erection.⁸³ In another case, however, an agreement to pay for the building, in connection with other stipulations, was regarded as recognizing the title as being in the lessee.⁸⁴ And where the lease provided that the tenant might either remove the building erected by him or require the landlord to take it at a stipulated price, a notice by the tenant to the landlord to take the building was regarded as vesting the title to the building in the landlord, the title being thus, by implication, regarded as in the tenant till such election.⁸⁵ So when the lease contained a covenant by the lessor to purchase the buildings at a price to be fixed by appraisers, it was said that, upon the expiration of the term, "by operation of law they would become the property of the lessor without any conveyance or transfer."⁸⁶

Icy Min. & Mfg. Co., 121 Ala. 672, 25 So. 720; Gorton v. Gregory, 3 Best & S. 90.

⁸¹ Smyth v. Stoddard, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314, ante, notes 33, 70.

⁸² See, as to the title to fixtures annexed by the tenant, ante, chapter XXIII.

⁸³ Kutter v. Smith, 69 U. S. (2 Wall.) 491, 17 Law. Ed. 830; Bass v. Metropolitan West Side El. R. Co. (C. C. A.) 82 Fed. 857, 39 L. R. A. 711.

⁸⁴ Russell v. City of New Haven, 117, 1 Am. Rep. 89.

51 Conn. 259. In *Howe's Cave Ass'n v. Houck*, 66 Hun, 205, 21 N. Y. Supp. 40, it was decided that where the lease provided that, if the lessor refused to renew he should pay for the buildings then on the premises, and that such payment should pass title to the buildings, a renewal did not so pass title, or deprive the lessee of his right to remove the buildings as trade fixtures.

⁸⁵ Allen v. Gates, 73 Vt. 222, 50 Atl. 1092.

⁸⁶ Hood v. Hartshorn, 100 Mass.

j. **Valuation of improvements.** It has in one state been decided that, in the particular case, the lessor's covenant to pay the value of the improvements refers to the value at the time of the expiration of the tenancy,⁸⁷ and such seems the natural construction of a provision for appraisement. In another state a provision that the lessee should be allowed for "improvements and betterments" was held to require improvements to be paid for at their reasonable cost at the time at which they were made.⁸⁸ The value of repairs which the tenant was expressly required to pay was held to be their value as contained in the structure, and not the value of the material if removed,⁸⁹ and the same view appears to have been adopted as to improvements made by the tenant, although the lease provided for their appraisement "without regard to the situation or value of the premises leased."⁹⁰ When the contract is to pay what the improvements are worth at the expiration of the lease, their original cost and their subsequent deterioration from use and abuse are, it has been decided, not to be considered.⁹¹

The amount found due by appraisers named in accordance with the terms of the lease has been regarded as money due on an instrument of writing, within a statute authorizing the allowance of interest on money so due.⁹² In one jurisdiction it has been held that the lessee is entitled to interest from the date of the determination of the value of the improvements, even though he thereafter wrongfully retains possession of the premises.⁹³ There is elsewhere, however, a contrary decision.⁹⁴

When, as is frequently the case, the instrument of lease provides that the value of the improvements shall be determined by appraisers, the appraisement thus made, by appraisers named in accordance with the terms of the lease, is, ordinarily at least, bind-

⁸⁷ *Berry v. Van Winkle*, 2 N. J. Eq. (1 H. W. Green) 390; *Pintard v. Irwin*, 20 N. J. Law (Spencer) 497.

⁸⁸ *Wisehart v. Grose*, 71 Ind. 260.

⁸⁹ *See Ross v. Zuntz*, 36 La. Ann. 888.

⁹⁰ *Ladd v. Hawkes*, 41 Or. 247, 68 Pac. 422.

⁹¹ *Hopkins v. Gilman*, 47 Wis. 581, 3 N. W. 382, 32 Am. Rep. 781. See post, at note 121.

⁹² *Edwards v. Van Patten*, 46 Kan. 509, 26 Pac. 958.

⁹³ *Pearson v. Sanderson*, 128 Ill. 88, 21 N. E. 200. Compare *Shoolbred v. Elliott*, 1 Brev. (S. C.) 423.

⁹⁴ *Conger v. Ensler*, 85 App. Div. 564, 83 N. Y. Supp. 419.

ing on both parties.⁹⁵ The lease thus providing for the determination of the value of the improvements by individuals acting as appraisers, the landlord cannot demand that the appraisement be submitted for approval to the probate court, although his interest in the land is that of a guardian merely.⁹⁶ If the lease provides for an appraisement by three persons, a determination by a majority merely is not binding.⁹⁷

Such a provision for appraisement has usually not been regarded as constituting a submission to arbitration,⁹⁸ and consequently a notice to the parties, before making the appraisement, has been held to be unnecessary.⁹⁹ It has, however, occasionally been held that it does constitute a submission to arbitration,¹⁰⁰ and in one case it was explicitly decided that notice to the parties was necessary, the appraisement involving to some extent a construction of the language of the provision.¹⁰¹

If the lessor refuses to join in the naming of appraisers as provided by the lease, the lessee, it has been decided, may sue to recover the value of the improvements.¹⁰² But before he can so sue he must have done all in his power to procure an appraisement, and if one set of appraisers do not effectuate an appraisement, he must endeavor to procure others, and whether he has thus acted with diligence is a question for the jury.¹⁰³ If the parties cannot agree on appraisers, or the appraisers cannot agree on a valuation, the lessor, if not in fault, may proceed in equity to have the value of the improvements determined,¹⁰⁴ as may the lessee.¹⁰⁵

⁹⁵ See *Yeatman v. Clemens*, 6 Mo. App. 210; *Zorkowski v. Astor*, 13 Misc. 507, 34 N. Y. Supp. 948.

⁹⁶ *Nichols v. Sargent*, 125 Ill. 309, 17 N. E. 475, 8 Am. St. Rep. 378.

⁹⁷ *Lorenzo v. Derry*, 26 Hun (N. Y.) 447.

⁹⁸ *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839; *Pearson v. Sanderson*, 128 Ill. 88, 21 N. E. 200; *Pintard v. Irwin*, 20 N. J. Law (Spencer) 497; *Flint v. Pearce*, 11 R. I. 576.

⁹⁹ *Pearson v. Sanderson*, 128 Ill. 88, 21 N. E. 200. See ante, § 173 d, at note 234.

¹⁰⁰ *Van Cortlandt v. Underhill*, 17

Johns. (N. Y.) 405; *Janney Semple & Co. v. Goehringer*, 52 Minn. 428, 54 N. W. 481. This view is indicated in *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89.

¹⁰¹ *Janney Semple & Co. v. Goehringer*, 52 Minn. 428, 54 N. W. 481.

¹⁰² *Morton v. Weir*, 70 N. Y. 247, 26 Am. Rep. 583.

¹⁰³ *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89. See *Holliday v. Marshall*, 7 Johns. (N. Y.) 211.

¹⁰⁴ *Reformed Protestant Church v. Parkhurst*, 17 N. Y. Super. Ct. (4 Bosw.) 491; *Conger v. Ensler*, 85 App. Div. 564, 83 N. Y. Supp. 419.

¹⁰⁵ *Bales v. Gilbert*, 84 Mo. App.

In one case it was decided that, when the lease provided for the appointment of one appraiser by each party, these to appoint a third in case of disagreement, the lessor might, if the lessee refused to appoint one appraiser, himself appoint two, whose appraisal should be binding.¹⁰⁶ This, however, appears rather questionable.¹⁰⁷

k. **Possession of premises pending payment.** Upon the question whether, if the landlord fails to pay for the tenant's improvements at the end of the term as agreed, the tenant may retain possession of the premises until the payment is made, the decisions are not in accord. Since the right to compensation itself is purely the result of express contract, it might seem that the right so to retain possession could exist only by express stipulation to that effect, and it has been so decided in several cases.¹⁰⁸ In New York it has been decided that the provision of a lease that in case the lessors did not give six months' notice of their election to take possession of the premises at the end of the term, and to pay for the buildings then standing thereon at a value to be determined by appraisers to be appointed, they would renew the lease for a further term, did not require payment for the building as a condition precedent to the lessee's obligation to relinquish possession,¹⁰⁹ and the same view was taken in that state even when the lease provided for the lessee's relinquishment of possession at the end of the term "upon the lessor's payment for improvements."¹¹⁰ A right to retain possession till payment for improve-

675; *Hug v. Van Burkleo*, 58 Mo. Tenn. (2 Humph.) 126; *Hite v. 202; White Stone Quarry Co. v. Bel-Parks*, 2 Tenn. Ch. 373; *Swift v. knap & D. Stone Co.*, 13 Ky. Law Rep. Sheehy, §§ Fed. 924. And see cases 244, 16 S. W. 354, 17 S. W. 162; denying the existence of a lien for *Hopkins v. Gilman*, 22 Wis. 476. the value of the improvements, post, *See City of Providence v. Master of note 129.*
St. John's Lodge, 2 R. I. 46.

¹⁰⁶ *Conner v. Jones*, 28 Cal. 59.

¹⁰⁷ In *Smith v. St. Philip's Church*, 107 N. Y. 610, 14 N. E. 825, there was a provision in the lease that, if either party failed to name an appraiser, the one named by the other might name one to act with him.

¹⁰⁸ *Speers v. Flack*, 34 Mo. 101, 84 Am. Dec. 74; *Bream v. Dickerson*, 21

¹⁰⁹ *In re Coatsworth*, 160 N. Y. 114, 54 N. E. 665. But see the statement quoted from *Van Beuren v. Wotherspoon*, 164 N. Y. 368, 57 N. E. 623, at note 115, post.

¹¹⁰ *Tallman v. Coffin*, 4 N. Y. (4 Comst.) 134. This would rather seem to overrule *Van Rensselaer's Heirs v. Penniman*, 6 Wend. (N. Y.) 569, where there was a practically similar covenant, and the lessee was

ments was evidently not contemplated by a provision requiring the lessor to pay the appraised value within thirty days after appraisal and surrender of possession,¹¹¹ nor by a covenant for appraisement and payment of the appraised value in one, two and three years after the expiration of the term, the lease also containing a covenant by the lessee to relinquish possession at the end of the term.¹¹² Even though the lease expressly provides that the lessee shall retain possession till compensated for improvements, the lessor is entitled to recover possession upon tendering the full value of the improvements, it has been decided, though this is not accepted, and he need not proceed in equity to compel the acceptance of the tender.¹¹³

By some decisions the lessee is regarded as entitled to retain possession until the stipulated compensation is paid, although there is no express language giving him such a right, on the theory, apparently, that he has an equitable lien on the premises for the value of his improvements, and that for this reason equity will protect his possession till payment therefor.¹¹⁴ In New York, when the lessor's covenant was either to pay the value of the improvements or to grant a new lease, it was said that "the lessee at the expiration of the term is entitled to retain the possession until the covenant shall be performed by the lessor."¹¹⁵ In other states, likewise, such alternative provisions for a renewal or payment for improvements have been decided to give the lessee the right to retain possession till such payment is made,¹¹⁶ and it does

held to be entitled to retain possession till paid. This earlier case is, however, referred to with approval in *In re Coatsworth*, 160 N. Y. 114, 54 N. E. 665.

¹¹¹ *Bresler v. Darmstacter*, 57 Mich. 311, 23 N. W. 825.

¹¹² *Manigault v. Carroll*, 1 McCord Law (S. C.) 91.

¹¹³ *Fraer v. Washington*, 60 C. C. A. 194, 125 Fed. 280.

¹¹⁴ *Franklin Land, Mill & Water Co. v. Card*, 84 Me. 528, 24 Atl. 960; *Hopkins v. Gilman*, 22 Wis. 476; *Id.*, 47 Wis. 581, 3 N. W. 382, 32 Am. Rep. 781; *Ecke v. Fetzer*, 65 Wis. 55, 26 N. W. 266; *Haynes v. Union Inv.*

Co., 35 Neb. 766, 53 N. W. 979; *Mullen v. Pugh*, 16 Ind. App. 337, 45 N. E. 347.

¹¹⁵ *Van Beuren v. Wotherspoon*, 164 N. Y. 368, 57 N. E. 633. But see *In re Coatsworth*, 160 N. Y. 114, 54 N. E. 665, ante, note 109.

¹¹⁶ *Franklin Land, Mill & Water Co. v. Card*, 84 Me. 528, 24 Atl. 960; *Gray v. Cornwall*, 95 Ky. 566, 26 S. W. 1018; *Holsman v. Abrams*, 9 N. Y. Super. Ct. (2 Duer) 435; *Mullen v. Pugh*, 16 Ind. App. 337, 45 N. E. 347. In the case first cited, it is said that "the very terms of the lease imply" such an agreement.

not clearly appear that the decisions might not have been the same even had there been no alternative right of renewal.

A provision that the lessee shall give up possession when the value of the improvements is paid to him evidently contemplates a retention of possession till this is done.¹¹⁷ Occasionally the provision is for retention of possession till the value of the improvements is repaid to the lessee from the rents and profits.¹¹⁸ In one state it was held that, even though the lease expressly provided for retention of possession till payment of compensation, this did not enable the lessor to defer such payment indefinitely, allowing the lessee to retain possession, and that it was proper for equity to order a sale under the lien for the value of the improvements.¹¹⁹

If the lessee retains possession after the term, on account of nonpayment for improvements, and this is recognized as rightful, either by reason of the provisions of the lease or otherwise, he is, it has been decided, in the position of a mortgagee in possession, and so liable for the rents and profits of the premises,¹²⁰ while he is entitled, it has been decided, to interest on his claim for compensation, computed from the time at which this is ascertained.¹²¹ By other cases the tenant holding over for this cause is not regarded as a mortgagee in possession, but as holding under the lease, and so liable for rent at the rate named in the lease and for no more.¹²²

¹¹⁷ *Moshassuck Encampment v. In Hopkins v. Gilman*, 47 Wis. 581, 2 N. W. 382, 32 Am. Rep. 781, it is said that "under the circumstances, we are disposed to treat the plaintiff like a mortgagee in possession after condition broken, liable for the rent and the payment of the taxes stipulated in the lease, but that he is not entitled to interest on the value of his improvements."

¹¹⁸ *Batchelder v. Dean*, 16 N. H. 265.

¹¹⁹ *Gray v. Cornwall*, 95 Ky. 566, 26 S. W. 1018.

¹²⁰ *Scruggs v. Memphis & C. R. Co.*, 108 U. S. 368, 27 Law. Ed. 756, approved in *Franklin Land, Mill & Water Co. v. Card*, 84 Me. 528, 24 Atl. 960. And see *State v. Passmore*, 61 Ark. 363, 33 S. W. 214; *Moshassuck Encampment v. Arnold & Maine*, 25 R. I. 65, 54 Atl. 771.

¹²¹ *Scruggs v. Memphis & C. R. Co.*, 108 U. S. 368, 27 Law. Ed. 756. But see *Hopkins v. Gilman*, 47 Wis. 581, 3 N. W. 382, 32 Am. Rep. 781, quoted in last preceding note, and also notes 92-94, ante.

¹²² *Van Beuren v. Wotherspoon*, 164 N. Y. 368, 57 N. E. 633; *Hols-*

If the retention of possession is due to the fault of the tenant, as when he refuses to join in the appraisement of the improvements in accordance with the terms of the lease, he is then, it has been decided, liable for the value of the use and occupation,¹²³ and he should, it seems, be subject to the same liabilities, such as that for double value, as in any case of wrongful holding over.¹²⁴ It has also been decided that, for his occupation pending negotiations for a renewal, he can be charged only in the amount of the rent named in the lease.^{124a}

1. **Enforcement of payment—Lien.** In case of breach by the lessor of an agreement of this character, the lessee may no doubt bring an action at law for damages.¹²⁵ It has been said, however, that "cases of this sort are proper matters for the consideration of courts of equity, where specific performance may be required, or the rights of the parties may otherwise be determined as equitable principles may require."¹²⁶ And equity obviously has jurisdiction of a proceeding to enforce a lien for the value of the improvements, conceding that such a lien exists.¹²⁷

Though there are a number of cases to the effect that the landlord has a lien upon the premises for the value of the improvements,¹²⁸ there are also decisions to the contrary.¹²⁹ The exist-

man v. Abrams, 9 N. Y. Super. Ct. (2 Duer) 435.

¹²³ Conger v. Ensler, 85 App. Div. 564, 83 N. Y. Supp. 419.

¹²⁴ See ante, chapter XXI.

^{124a} Conger v. Ensler, 85 App. Div. 564, 83 N. Y. Supp. 419.

¹²⁵ See California Annual Conference v. Seitz, 74 Cal. 287, 15 Pac. 839; Pearson v. Sanderson, 128 Ill. 88, 21 N. E. 200; Frederick v. Callahan, 40 Iowa, 311; Edwards v. Van Patten, 46 Kan. 509, 26 Pac. 958; Duff v. Snider, 54 Miss. 245; Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Butler v. Manny, 52 Mo. 497; Morton v. Weir, 70 N. Y. 247, 26 Am. Rep. 583; Lametti v. Anderson, 6 Cow. (N. Y.) 302; Gorman v. Bellamy, 82 N. C. 496; Cosgrave v. Hammill, 173 Pa. 207, 33 Atl. 1045;

Canal Elevator Co. v. Brown, 36 Ohio St. 660.

¹²⁶ Franklin Land, Mill & Water Co. v. Card, 84 Me. 528, 24 Atl. 960.

¹²⁷ See Conover v. Smith, 17 N. J. Eq. (2 C. E. Green) 51, 86 Am. Dec. 247. And post, notes 128, 130-133.

¹²⁸ Berrie v. Woods, 12 Ont. 693; Bresler v. Darmstaetter, 57 Mich. 311, 22 N. W. 825; Copper v. Wells, 1 N. J. Eq. (Saxton) 10; Berry v. Van Winkle, 2 N. J. Eq. (1 H. W. Green) 330; Conover v. Smith, 17 N. J. Eq. (2 C. E. Green) 51, 86 Am. Dec. 247; Franklin Land, Mill & Water Co. v. Card, 84 Me. 528, 24 Atl. 960; Spielmann v. Kliest, 36 N. J. Eq. 199; Hopkins v. Gilman, 22 Wis. 476; Id., 47 Wis. 581, 3 N. W. 382; Ecke v. Fetzer, 65 Wis. 55, 26 N. W. 979; Gray v. Cornwall, 95 Ky.

ence of such a lien has been asserted upon the theory that it is in effect a vendor's lien for the price of the improvements.¹²⁹

It has been decided that such a lien, though otherwise nonexistent, is created by a provision that at the expiration of the term the lessor shall pay the appraised value of the improvements, and that he shall become the owner and entitled to the possession thereof "upon payment to the lessees of said sum."¹³¹ And where the lease and the covenant to pay for improvements were by trustees, who expressly made themselves liable only in their trust

566, 26 S. W. 1018. In *Scruggs v. Memphis & C. R. R. Co.*, 108 U. S. 368, 27 Law. Ed. 756, it is stated that the Supreme Court of Mississippi recognized the existence of a lien. Decisions to the effect that the tenant may retain possession until payment is made (ante, § 271 k) in effect give a lien.

¹²⁹ *The Confiscation Cases*, 1 Woods, 221, 6 Fed. Cas. No. 3,097; *Swift v. Sheehy*, 88 Fed. 924; *Gardner v. Samuels*, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135; *Speers v. Flack*, 34 Mo. 101, 84 Am. Dec. 74; *New York Dyeing & Print. Establishment v. DeWestenberg*, 46 Hun (N. Y.) 281; *Whitlock v. Duffield*, 2 Dickerson, 21 Tenn. (2 Humph.) 126; *Anderson v. Ammonett*, 77 Tenn. (9 Lea) 1; *Hite v. Parks*, 2 Tenn. Ch. 373; *Phillips v. Reynolds*, 20 Wash. 374, 55 Pac. 316, 72 Am. St. Rep. 107.

A sale of the improvements by the lessee to the lessor subsequent to the making of the lease has been held not to give the lessee a vendor's lien on the premises for the price of the improvements. *Mitchell v. Printup*, 48 Ga. 455.

Where the tenant made improvements under an agreement that they should operate as a payment of rent in advance, it was held that he

had no lien for their value on his wrongful eviction by the lessor. *Beck v. Birdsall*, 19 Kan. 550. But in *Brockway v. Thomas*, 36 Ark. 18, it was held that a tenant under an invalid oral lease who so makes improvements in payment of rent, cannot be expelled without being compensated for the improvements.

¹³⁰ "The principle upon which relief is given in such cases seems to be this, that inasmuch as a valuable addition is made to the estate of the lessor, by his authority and under his promise that he will make compensation therefor (which addition must, by force of law, pass to the lessor on the expiration of the term), it is just that the sum he has stipulated to pay should be regarded as the purchase money of the addition, and that the lessee should have a lien on the demised premises therefor, similar to that which the vendor of land has for unpaid purchase money. *Van Fleet v. C.*, in *Spielmann v. Kliet*, 36 N. J. Eq. 199. The assumption, however, in the statement quoted, that the improvement must necessarily pass to the lessor, is unfounded, as it may consist of a fixture removable by the tenant. See ante, § 240.

¹³¹ *Swift v. Sheehy*, 88 Fed. 924.

capacity, the claim for the value of the improvements was regarded as a lien on the premises leased, these being a part of the trust fund, and there being no liability enforceable at law.¹³² An agreement by the landlord that, in view of his inability to pay for improvements, as agreed, the tenant should collect the rents on the premises in his own interest, was held to be in effect an assignment of the rents and profits as security, creating an equitable lien on the premises for the value of the improvements.¹³³

Conceding the existence of the lien, the record of the instrument of lease, expressly providing for payment for improvements, has been regarded as notice of the lien as against a purchaser from the lessor.¹³⁴

¹³² *Fowler v. Mutual Life Ins. Co.*, 28 Hun (N. Y.) 195. See *Robinson v. Ketteltas*, 4 Edw. Ch. (N. Y.) 67. of rents and profits due, injuries to the building, and repairs thereto. see *Allen v. Gates*, 74 Vt. 376, 52 Atl. 963.

¹³³ *Allen v. Gates*, 73 Vt. 222, 50 Atl. 1092. For a subsequent decision, upon an accounting between the parties, determining the amount ¹³⁴ *Spielmann v. Kliest*, 36 N. J. Eq. 199.

CHAPTER XXVIII.

SUMMARY PROCEEDINGS.

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§ 272. General considerations.

In most jurisdictions there are statutes providing that a lessor, or his successor in interest, may, as against a person who entered on the land as his tenant, or as against one claiming under such person, recover the possession of the premises by a proceeding of a summary character, without the necessity of bringing an action of ejectment. The proceedings authorized by these statutes may be conveniently referred to as "summary proceedings." By some of the statutes they are so designated,¹ while a number of the statutes give them no specific designation.² In perhaps a majority of the states the statutory provisions authorizing proceedings of this character by a landlord against his tenant are found in connection with provisions authorizing summary proceedings to recover land by one who has been forcibly expelled or excluded therefrom by a stranger, they both being under the head of "forcible entry and detainer,"³ the tenant's retention of

¹ See *California* Code Civ. Proc. & Tenant," § 25; *South Carolina* Civ. pt. 3, c. 4; *Connecticut* Gen. St. 1902, Code 1902, § 2423; *Vermont*, Pub. c. 76 (Summary process); *Massachusetts* Rev. Laws 1902, c. 181

(Summary process); *Michigan*, 3 *Arkansas*, Kirby's Dig. St. 1904, c. Comp. Laws 1897, § 11, 164; *Montana* Code Civ. Proc. pt. 3, tit. 3, c. 4; c. 53; *District of Columbia* Code, § 29; *Idaho* Code Civ. Proc. § 3976; *Illinois*, Hard's Rev. St. 1905, c. 57; *Iowa* Code 1897, tit. 21, c. 3; *Kansas* Gen. St. 1905, c. §1, art. 13; *Kentucky* Civ. Code Prac. tit. 10, c. 8; *Maine* Rev. St. 1903, c. 93; *Minnesota* Rev. Laws 1905, c. 76; *Nebraska* Code Civ. Proc. tit. 30, c. 10; *North Dakota*, Justices' Code, c. 3, art. 6;

² See *Arizona* Rev. St. 1901, § 2693; *Florida* Gen. St. 1906, § 2227; *Georgia* Code 1895, § 4813; *Indiana*, Burns' Ann. St. 1901, § 7106; *Maryland* Pub. Gen. Laws 1904, art. 53, § 1; *Mississippi* Code 1906, § 2885; *Missouri* Rev. St. 1899, § 4131; *Nevada* Comp. Laws 1900, § 3841; *New Hampshire* Rev. St. 1901, c. 246, § 7; *New Jersey*, 2 Gen. St. p. 1918, § 12; p. 1922, § 30; *Pennsylvania*, *Pepper & Lewis' Dig. Laws*, "Landlord Div. 3, tit. 11, c. 19.

³ See *Alabama* Code 1907, c. 89; *Arkansas*, Kirby's Dig. St. 1904, c. 70; *Colorado*, Mills' Ann. St. 1891, c. 53; *District of Columbia* Code, § 29; *Idaho* Code Civ. Proc. § 3976; *Illinois*, Hard's Rev. St. 1905, c. 57; *Iowa* Code 1897, tit. 21, c. 3; *Kansas* Gen. St. 1905, c. §1, art. 13; *Kentucky* Civ. Code Prac. tit. 10, c. 8; *Maine* Rev. St. 1903, c. 93; *Minnesota* Rev. Laws 1905, c. 76; *Nebraska* Code Civ. Proc. tit. 30, c. 10; *North Dakota*, Justices' Code, c. 3, art. 6; *Ohio* Rev. St. 1906, pt. 3, tit. 3, c. 9; *Oklahoma* Rev. St. 1903, c. 67, art. 13; *Oregon*, Bell. & C. Codes, tit. 43, c. 18; *South Dakota*, Justices' Code, art. 5; *Tennessee*, Shannon's Code 1896, pt. 3, tit. 2, c. 4; *Texas* Rev. St. 1895, tit. 49; *Utah* Code Civ. Proc. c. 64; *Washington*, Ball. Ann. Codes & St. tit. 31, c. 2; *Wisconsin* Rev. St. 1898, c. 145; *Wyoming* Rev. St. Div. 3, tit. 11, c. 19.

possession being frequently stated to constitute "unlawful detainer."⁴ Any difference, however, in the titles applied to proceedings of this character has no relation to any difference in the proceedings themselves.

Even though the proceeding is known as one of "forcible detainer" in the particular jurisdiction, the wrongful holding need not be by force, it is said, in order to sustain the proceeding,⁵ or, as the same idea is otherwise expressed, the tenant is regarded as holding by constructive force.⁶ Were actual force, other than that involved in the mere physical retention of possession, regarded as a prerequisite to the proceeding, it would never lie, it is evident, unless the person entitled had endeavored to take possession and had been forcibly resisted. So far as it might, in any jurisdiction, be regarded as essential to a proceeding of unlawful detainer that the plaintiff shall show a prior possession, this requirement, it is said, is satisfied by the prior possession of the tenant under the lease, this being legally the possession of his landlord.⁷

Statutes conferring a remedy of this character, it has been said, are to be construed liberally, as being remedial in character.⁸ On the other hand, it has been said that the proceedings, being purely statutory, are to be conducted in strict accordance with the law.⁹

The statutes providing for summary proceedings by the landlord to recover possession of the premises do not preclude him

⁴ See *Alabama* Code 1907, § 4263; *Arkansas*, Kirby's Dig. St. § 3630; *California* Code Civ. Proc. § 1161; *Tennessee*, Shannon's Code, § 5093; *Utah* Comp. Laws 1908, § 3575; *Virginia* Code 1904, § 2716; *West Virginia* Code 1906, c. 89, § 1; *Washington*, Ball. Ann. Codes & St. 1897, § 5527; *Wisconsin* Rev. St. 1898, § 3358.

Colorado, Mills' Ann. St. 1891, § 1973; *Idaho* Code Civ. Proc. 1901, § 3976; *New Mexico* Comp. Laws 1897, § 3345; *Tennessee*, Shannon's Code, § 5093; *Utah* Comp. Laws 1908, § 3575; *Virginia* Code 1904, § 2716; *West Virginia* Code 1906, c. 89, § 1; *Washington*, Ball. Ann. Codes & St. 1897, § 5527; *Wisconsin* Rev. St. 1898, § 3358.

⁵ *Mason v. Finch*, 2 Ill. (1 Scam.) 495; *Wheeler v. Reitz*, 92 Ind. 379; *Gluck v. Elkan*, 36 Minn. 80, 30 N. W. 446.

⁶ *Hislop v. Moldenhauer*, 21 Or. 208. *Pac.* 1052; *Trousdale v. Darnell*, 14 Tenn. (6 Yerg.) 431. *Nicrosi v. Phillipi*, 91 Ala. 299, 8 So. 561.

⁷ *Lynde v. Noble*, 20 Johns. (N. Y.) 80; *Birdsall v. Phillips*, 17 Wend. (N. Y.) 464. *Miner v. Barling*, 32 Barb. (N. Y.) 540; *Farrington v. Morgan*, 20 Wend. (N. Y.) 207, 32 Am. Dec. 530; *McMullin v. McCreary*, 54 Pa. 230, 93 Am. Dec. 697; *Davis v. Davis*, 115 Pa. 261, 7 Atl. 746; *Burns v. Nash*, 23 Ill. App. 552; *French v. Willer*, 123 Ill. 611, 18 N. E. 811, 2 L. R. A. 717, 9 Am. St. Rep. 651.

⁸ *Lynde v. Noble*, 20 Johns. (N. Y.) 80; *Birdsall v. Phillips*, 17 Wend. (N. Y.) 464. *Miner v. Barling*, 32 Barb. (N. Y.) 540; *Farrington v. Morgan*, 20 Wend. (N. Y.) 207, 32 Am. Dec. 530; *McMullin v. McCreary*, 54 Pa. 230, 93 Am. Dec. 697; *Davis v. Davis*, 115 Pa. 261, 7 Atl. 746; *Burns v. Nash*, 23 Ill. App. 552; *French v. Willer*, 123 Ill. 611, 18 N. E. 811, 2 L. R. A. 717, 9 Am. St. Rep. 651.

⁹ *Lynde v. Noble*, 20 Johns. (N. Y.) 80; *Birdsall v. Phillips*, 17 Wend. (N. Y.) 464. *Miner v. Barling*, 32 Barb. (N. Y.) 540; *Farrington v. Morgan*, 20 Wend. (N. Y.) 207, 32 Am. Dec. 530; *McMullin v. McCreary*, 54 Pa. 230, 93 Am. Dec. 697; *Davis v. Davis*, 115 Pa. 261, 7 Atl. 746; *Burns v. Nash*, 23 Ill. App. 552; *French v. Willer*, 123 Ill. 611, 18 N. E. 811, 2 L. R. A. 717, 9 Am. St. Rep. 651.

from adopting for this purpose the action of ejectment or the statutory form of action corresponding thereto.¹⁰

It has been held that a wharf or pier, reclaimed from tidewater by an embankment or by raising the bottom with stone or earth, was a "tenement" within a statute authorizing the proceeding.¹¹

That personal chattels were included in the lease does not affect the landlord's right to maintain a summary proceeding to recover the land.¹²

A statutory provision that, in all actions before a justice, each party shall bring forward all demands which may be considered, provided that, after consolidation, they do not exceed a sum named, has been held to have no application to summary proceedings, and hence not to preclude two simultaneous proceedings by the same landlord against the same tenant to obtain possession of distinct tracts.¹³

§ 273. By and against whom proceedings maintainable.

a. **By landlord against tenant—(1) Necessity of relation of tenancy.** It has been frequently stated that the relation of landlord and tenant must exist between the parties to the proceeding.¹⁴ This statement should, however, it seems, be taken subject

¹⁰ See *Juneman v. Franklin*, 67 (Ind.) 222; *Blair v. Porter*, 12 Ind. App. 296, 38 N. E. 874, 40 N. E. 81; *Tex.* 411, 3 S. W. 562.

¹¹ *People v. Kelsey*, 14 Abb. Pr. (N. Y.) 372, 38 Barb. 269. *Colored Homestead & Bldg. Ass'n v. Harvey*, 23 Ky. Law Rep. 1009, 64 S. W. 676; *Powers v. Sutherland*, 62 Ky. (1 Duv.) 151; *Goldsberry v. Bishop*, 63 Ky. (2 Duv.) 143; *Stockbridge v. Nute*, 20 N. H. 271; *Gray v. Reynolds*, 67 N. J. Law, 169, 50 Atl. 670; *Schreiber v. Goldsmith*, 35 Misc. 45, 70 N. Y. Supp. 236; *Dodin v. Dodin*, 32 Misc. 208, 65 N. Y. Supp. 851; *Hughes v. Mason*, 84 N. C. 472; *Steel v. Thompson*, 3 Pen. & W. (Pa.) 34; *Gies v. Storz Brew. Co.*, 75 Neb. 698, 106 N. W. 775; *Seattle Operating Co. v. Cavanaugh*, 6 Wash. 325, 33 Pac. 356; *Hunter v. Maanum*, 78 Wis. 656, 48 N. W. 51, 23 Am. St. Rep. 443.

¹² *Swigley v. Jones*, 1 City Ct. R. (N. Y.) 127; *Armstrong v. Cummings*, 58 How. Pr. (N. Y.) 331, 20 Hun, 313.

¹³ *Schumann Piano Co. v. Mark*, 208 Ill. 282, 70 N. E. 226.

¹⁴ *Willis v. Eastern Trust Co.*, 169 U. S. 295, 42 Law. Ed. 752; *McCauley v. Hazlewood*, 8 C. C. A. 330, 59 Fed. 877; *Bradley v. Hume*, 18 Ark. 284; *Mason v. Delancey*, 44 Ark. 444; *Pico v. Cuyas*, 48 Cal. 639; *Walls v. Preston*, 28 Cal. 224; *Keller v. Klotter*, 3 Colo. 132; *Jennings v. Webb*, 20 D. C. 317; *Allread v. Harris*, 75 Ga. 687; *Watson v. Toliver*, 103 Ga. 123, 29 S. E. 614; *Hovey v. Blanchard*, 13 N. H. 145; *Avery v. Smith*, 8 Blackf. The occasional statement, or statutory provision, that the proceeding

to some qualification. In the first place, the question whether a summary proceeding can be brought by one who does not stand in the relation of landlord to the person in possession of the land, in order to recover possession thereof, depends entirely upon the provisions of the statute. In many, perhaps in most, of the states, a summary proceeding, similar to that maintainable against a tenant by his landlord, will lie in favor of one who has been forcibly deprived by a stranger of the possession of land, this being what is ordinarily known as a proceeding of "foreible entry and detainer," and in some states, by express provision of statute, such a proceeding will lie, under special circumstances, even in the absence of force, in favor of the owner of land against one who entered otherwise than as tenant.¹⁵ The statement referred to, indeed, would seem to amount to little more than an assertion that a statutory provision which, by express language or by inference, authorizes a summary proceeding by a landlord against his tenant, does not authorize such a proceeding when that relation is nonexistent. A question obviously might arise as to whether a particular clause of the statute is to be construed as authorizing the proceeding by a landlord only, but somewhat singularly, in making this statement, the courts do not ordinarily discuss the specific language of the statute, but assert this rather as a principle underlying all proceedings of this character.

The statutes specifically authorizing such a proceeding against a tenant under a lease do not always, on their face, bear out the statement that the relation of landlord and tenant must exist.¹⁶ While those of a number of states refer to the right of the "lessor" or "landlord" to maintain the proceeding against a "tenant,"¹⁷

lies only in case there is a lease, is, foreclosure. See *Illinois*, Hurd's Rev. St. 1905, c. 57, § 2; *Iowa* Code 1897, § 4208; *New York* Code Civ. Proc. § 2232; *Ohio* Rev. St. 1906, § 6600.

ties. See *Edmondson v. White*, 19 Ga. 534; *Wheeler v. Wheeler*, 77 Vt. 177, 59 Atl. 842.

¹⁵ As when it is authorized against one who enters under a contract of purchase and holds over after default, or against one retaining possession after a sale at execution or

¹⁶ It is occasionally stated that under a particular statute the relation is not necessary. See *Hightower v. Fitzpatrick's Heirs*, 42 Ala. 497; *Hanna v. Countryman*, 5 Ind. 272.

¹⁷ See *Arizona* Rev. St. 1901, § 2693; *Connecticut* Gen. St. 1902, § 1078 ("Lessor or owner"); *District*

others, while in terms making a "tenant" or "lessee" subject to the proceeding, do not specifically state that the lessor or landlord is the proper person to maintain the proceeding,¹⁸ it being perhaps open to inference in such case that the proper person to maintain the proceeding is the person entitled to possession, as in the ordinary case of a forcible entry or detainer.¹⁹ Occasionally the statute expressly names the person entitled to possession as the one to maintain the proceeding against a tenant.²⁰

Even conceding that one entitled to land which another wrongfully withholds from him is properly to be regarded as the landlord of the latter, if the latter's original entry was rightful and as tenant,²¹ it is to be observed that in a number of cases a right

of *Columbia* Code 1901, § 1225; *Georgia* Code 1895, § 4313 ("Owner"); *Indiana*, Burns' Ann. St. 1901, § 7106; *Maryland* Pub. Gen. Laws 1904, art. 53, § 1; *Mississippi* Code 1906, §§ 2557, 2558; *Missouri* Rev. St. 1899, §§ 4116, 4131; *Nevada* Comp. Laws 1900, § 3825; *New Hampshire* Pub. St. 1901, c. 246, § 7 ("Owner or lessor"); *New Jersey*, 2 Gen. St. pp. 1916, 1918, §§ 7, 8, 12; *New York* Code Civ. Proc. § 2235; *North Carolina* Revisal 1905, § 2002; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," §§ 25, 28, 34; *South Carolina* Civ. Code 1902, §§ 2421-2423; *Utah* Comp. Laws 1907, § 3575; *Virginia* Code 1904, §§ 2719, 2786.

¹⁸ See *California* Code Civ. Proc. § 1161; *Colorado*, Mills' Ann. St. 1891, § 1793; *Florida* Gen. St. 1906, § 2227; *Idaho* Code Civ. Proc. § 3976; *Iowa* Code 1897, § 4208; *Kansas* Gen. St. 1905, § 5841; *Montana* Rev. Codes 1907, § 7271; *Nebraska* Comp. St. 1905, § 7525; *New Mexico* Comp. Laws 1897, § 3345; *North Dakota* Rev. Codes 1905, § 8406; *Ohio* Rev. St. 1906, § 6600; *Oklahoma* Rev. St. 1903, § 5087; *Oregon*, Bell, & C. Codes, § 5755; *South Dakota*, Justic-

es' Code, § 44; *Tennessee*, Shannon's Code 1896, § 5093; *Washington*, Ball. Ann. Codes & St. 1897, § 5527; *Wisconsin* Rev. St. 1898, § 3358; *Wyoming* Rev. St. 1899, § 4186.

¹⁹ But the statutes of *California*, *Colorado*, *Florida*, *Montana*, and *Wisconsin*, in providing for the proceeding in case the tenant holds over "without the permission of the landlord," raise perhaps a strong inference that the landlord is the one to maintain the proceeding.

²⁰ See *Alabama* Code 1907, § 4263; *Arkansas*, Kirby's Dig. St. 1904, § 3630; *Illinois*, Hurds' Rev. St. 1905, c. 57, § 2; *Kentucky* Civ. Code Prac. § 454 (Person aggrieved); *Massachusetts* Rev. Laws 1902, c. 181, § 1; *Michigan* Comp. Laws 1897, § 11,164; *Minnesota* Rev. Laws 1905, § 4038; *Texas* Rev. St. 1895, art. 2519 ("Party aggrieved"); *Vermont* Pub. St. 1906, § 1870; *Virginia* Code 1904, § 2716; *West Virginia* Code 1906, § 3382.

²¹ That he is not, see ante, § 15 c. at notes 568-574. "The action must be based on the conventional relation of landlord and tenant, not that it must exist when the action is brought, for in the case of holding

of recovery in summary proceedings against one who was not a tenant of the person bringing the proceeding has been recognized, though without any suggestion that this involves an exception to a general rule that the relation of landlord and tenant is necessary. In the case, hereafter referred to,²² of a proceeding by one who is entitled to possession, as having a lease to take effect in possession upon the expiration of a previous lease, against one holding under the previous lease, the second lessee is clearly not the landlord of the first lessee, but he has a mere *interesse termini*.²³ In the case likewise of a proceeding by a landlord to recover possession from one claiming under his tenant, a subtenant,²⁴ the relation of landlord and tenant does not exist between the parties.

There are some other cases in which a right to maintain a proceeding under the statute giving the right to a landlord has been recognized, although, it would seem, the plaintiff was not the landlord of the defendant, or indeed of any person. In one case, for instance, it was held that a mortgagee was entitled to maintain the proceeding against one who entered as tenant under a lease made after the mortgage,²⁵ and in others such a right was recognized in a purchaser at a sale under a mortgage or deed of trust, as against one who entered under such a subsequent lease.²⁶ While a purchaser at a sale, under a mortgage or other lien, subsequent to the lease, evidently becomes the landlord in place of the former owner, to the same extent as if a voluntary conveyance had been made to him,²⁷ it is difficult to see how one claiming under a mortgage or other lien prior to the lease can be regarded as in any sense the landlord of the lessee. He enters under a title paramount to that of the lessor, and is, as regards the lessee, in the same position as if he had received an absolute

over it has ceased to exist by the termination of the tenancy, but it must have existed." Gillfillan, C. J., in *Judd v. Arnold*, 31 Minn. 430, 18 N. W. 151.

²² See post, at notes 115-117.

²³ See ante, § 37.

²⁴ See post, § 273 o, and also quotation ante, note 21.

²⁵ *Goodnow v. Pope*, 31 Misc. 475, 64 N. Y. Supp. 394.

²⁶ *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440; *Green v. Missouri Pac. R. Co.*, 82 Mo. 632; *Stewart v. Miles*, 166 Mo. 174, 65 S. W. 754; *Waples v. Jones*, 62 Mo. 440.

²⁷ See ante, § 146 e. In *Allen v. Shannon*, 74 Ind. 164, where the right of the purchaser to maintain the proceeding was recognized, the mortgage was apparently thus subsequent to the lease.

conveyance at the time at which his lien was created.²⁸ The cases above referred to may accordingly be regarded as adjudications not in accord with the statement that the proceeding must be instituted by one in the relation of landlord to the defendant.²⁹⁻³¹

In two cases it has been decided that a statute giving the person entitled to "the reversion or remainder" the right to maintain the proceeding authorized a proceeding by a remainderman against one holding under a lease made by the life tenant, since deceased.³² In such a case there is no relation of landlord and tenant.

(2) **Character of tenancy.** The character of the tenancy under which the defendant to the proceeding holds is, usually at least, immaterial. The statutes ordinarily use language applicable to any class of tenancy, as when they authorize proceedings against a tenant or lessee,³³ or against a person holding over after the end of his tenancy.³⁴ And sometimes the various classes of tenancy are named.³⁵ Occasionally the statute expressly

²⁸ See ante, § 73.

²⁹⁻³¹ But the decisions are based on the theory that the relation does exist in such case.

³² *Stinson v. Gosset*, 4 Ala. 170; *Peck v. Peck*, 35 Conn. 390. But that the persons entitled after the expiration of an estate by curtesy cannot maintain the proceeding against a lessee of the tenant by curtesy, for want of privity, see *Wolfe v. Angvine*, 57 Miss. 767; and that a remainderman cannot maintain the proceeding against the lessee of the life tenant even though the statute authorizes it by the person entitled to possession, see *Whitney v. Dart*, 117 Mass. 153, post, note 58.

³³ *Arizona* Rev. St. 1901, § 2693; *California* Code Civ. Proc. § 1161; *Idaho* Code Civ. Proc. 1901, § 3976; *Illinois*, Hurd's Rev. St. 1905, c. 57, § 2; *Indiana*, Burns' Ann. St. 1901, § 7106; *Iowa* Code 1897, § 4208; *Kansas* Gen. St. 1905, § 5841; *Kentucky*

Civ. Code Proc. § 451; *Maine* Rev. St. 1903, c. 96, § 1; *Maryland* Code Pub. Gen. Laws 1904, art. 53, § 1; *Massachusetts* Rev. Laws 1902, c. 181, § 1; *Missouri* Rev. St. 1899, §§ 4113, 4116; *Montana* Rev. Codes 1907, § 7271; *New Hampshire* Pub. St. 1901, c. 246, § 7; *New Mexico* Comp. Laws 1897, § 3345; *New York* Code Civ. Proc. § 2231; *North Carolina* Revisal 1905, § 2001; *North Dakota* Rev. Codes 1905, § 8406; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," § 25; *South Carolina* Civ. Code 1902, § 2421; *Tennessee*, Shannon's Code 1896, § 5093; *Utah* Comp. Laws 1907, § 3575; *Virginia* Code 1904, § 2719; *Washington*, Ball. Ann. Codes & St. 3332; *West Virginia* Code 1906, § 3332.

³⁴ *District of Columbia* Code 1901, § 20.

³⁵ *Colorado*, Mills' Ann. St. 1891, § 1973; *Florida* Gen. St. 1906, § 2227;

names a "tenant at will" as a proper subject for the proceeding,³⁶ but on the other hand some statutes use language not well adapted to the case of a tenancy at will, in providing that the proceeding may be maintained against a tenant holding over after the time or the term for which the premises were let,³⁷ or when the lease terminates by lapse of time³⁸ or by its own stipulations.³⁹

The statutes occasionally provide for the maintenance of the proceeding against a "tenant at sufferance."⁴⁰ Since a tenant at sufferance is ordinarily⁴¹ a tenant for years or at will wrongfully holding over, such a provision would seem to be approximately included in the provisions for the maintenance of the proceeding against tenants holding over.

A few of the statutes make specific provision for the maintenance of the proceeding against a periodic tenant,^{41a} and when the proceeding is authorized against a tenant or lessee without reference to a particular character of tenancy, a periodic tenant is evidently within the terms of the statute. When, however, several classes of tenancies are named, without naming a periodic tenancy, a question might arise as to whether such a tenancy is to be regarded as within the scope of the statute. It has been

Mississippi Code 1906, § 2885; *New Jersey*, 2 Gen. St. p. 1922, § 30; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," § 34; *Wisconsin Rev. St. 1898*, § 3358.

Rev. St. 1903, § 5087; *Texas Rev. St. 1895*, art. 2519; *Wyoming Rev. St. 1899*, § 4486.

³⁸ *Connecticut Gen. St. 1902*, § 1078.

³⁶ *California Code Civ. Proc.* § 1161; *Colorado*, Mills' Ann. St. 1891, § 1973; *Kentucky Civ. Code Proc.* § 451; *Minnesota Rev. Laws 1905*, § 4038; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," § 28; *South Carolina Civ. Code 1902*, § 243; *Texas Rev. St. 1895*, art. 2521; *Utah Comp. Laws 1907*, § 3575. And citations in last note.

³⁹ *Vermont Pub. St.* § 1870.

⁴⁰ *Colorado*, Mill's Ann. St. 1891, § 1973; *Florida Gen. St. 1906*, §§ 2227, 1751; *Georgia Code 1895*, § 4813; *Michigan Comp. Laws 1897*, § 11164; *Mississippi Code 1906*, § 2885; *New Jersey*, 2 Gen. St. 1902, § 30; *New York Code Civ. Proc.* § 2231; *Texas Rev. St. 1895*, art. 2521; *Wisconsin Rev. St. 1898*, § 3358.

⁴¹ See ante, § 15 a.

³⁷ *Arkansas*, Kirby's Dig. St. 1904, § 3630; *Georgia Code 1895*, § 4813; *Michigan Comp. Laws 1897*, § 11164; *Nevada Comp. Laws 1900*, § 3825; *Ohio Rev. St. 1906*, § 6600; *Oklahoma*

Maryland Code Pub. Gen. Laws 1904, art. 53, § 6; *Utah Comp. Laws 1907*, § 3575; *Washington, Ball. Ann. Codes & St.* § 5527 (2).

decided in one state that a provision for the maintenance of the proceeding against a tenant at will authorizes it against a tenant from year to year,⁴² and a statute authorizing the proceeding "where lands are leased for one or more years or at will" has been construed as including a lease from month to month or for a term less than a year.⁴³

A statute authorizing a proceeding against a tenant for one or more years has been held to authorize it against a tenant for a term less than a year.⁴⁴

It is sufficiently obvious that a statute in terms applicable when the relation of landlord and tenant exists is not excluded by the fact that the tenant holds under a lease for life.⁴⁵

In a number of cases it is asserted that not only must the relation of landlord and tenant exist, but that it must be the "conventional" relation of landlord and tenant, that is, it must be created by agreement.⁴⁶ This statement involves an assumption that the relation may arise without agreement, "by operation of law," an assumption the correctness of which is, as has been before indicated, open to most serious question.⁴⁷⁻⁴⁸ The cases in which this asserted rule has been actually applied have usually been cases in which the parties were regarded, or might have been regarded, as standing in another relation, as that of mortgagor and mortgagee,⁴⁹ master and servant,⁵⁰ or licensor and

⁴² *Prouty v. Prouty*, 5 How. Pr. 413, 45 N. W. 324. this rule was asserted and applied so as to preclude a proceeding against persons who had taken possession of their son's property under an agreement that they might live there during their lives. It is not stated what the relation was, if not that of landlord and tenant, and whatever it was, it would seem to have been strictly "conventional." See, also, *Maxham v. Stewart*, 133 Wis. 525, 113 N. W. 972.

⁴³ *Miller v. Johnson*, 6 D. C. 51.

⁴⁴ *Miller v. Johnson*, 6 D. C. 51; *Shaffer v. Sutton*, 5 Bin. (Pa.) 228. Compare the construction of the English act. *Doe d. Carter v. Roe*, 10 Mees. & W. 670.

⁴⁵ *Foss v. Stanton*, 76 Vt. 365, 57 Atl. 942.

⁴⁶ *Pico v. Cuyas*, 48 Cal. 639; *Sims v. Humphrey*, 4 Denio (N. Y.) 185; *Judd v. Arnold*, 31 Minn. 439, 18 N. W. 151. In *Buel v. Buel*, 76 Wis.

^{47, 48} See ante, § 17.

⁴⁹ *Steele v. Bond*, 28 Minn. 267, 9 N. W. 772; *Everton v. Sutton*, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217; *Hunter v. Maanum*, 78 Wis. 656, 48 N. W. 51, 23 Am. St. Rep. 443.

⁵⁰ *People v. Annis*, 45 Barb. (N.

licensee,⁵¹ or as standing in no legal relation whatever to one another.⁵²

It has been decided to be immaterial whether the tenant was or was not in possession before the making of the lease.⁵³ There is evidently no reason why such a consideration should be material.

(3) **Validity of lease.** That the lease was for some reason invalid or illegal, and so not enforceable, does not ordinarily exclude the summary proceeding to recover possession.⁵⁴ In one case, however, where the lease was invalid because made by a married woman without proper formalities, it was held that she could not recover possession by such a proceeding.⁵⁵ It would seem that, however invalid the actual lease might be in a particular case, the person purporting to enter thereunder should, as having entered by permission of the lessor, be regarded as his tenant, the invalidity of the lease operating only to preclude the tenant from

Y.) 304; *Russell v. Russell*, 32 How. Pr. (N. Y.) 400.

⁵¹ Such was apparently the relation which was under consideration in *Matthews v. Matthews*, 49 Hun. 346, 2 N. Y. Supp. 121, where the owner of land had requested persons to come to live with him, he to board with them, and this was done. If any tenancy existed in this case, it was clearly "conventional," as being based on agreement. The decision that a summary proceeding will not lie under such circumstances is followed in *Schreiber v. Goldsmith*, 35 Misc. 45, 70 N. Y. Supp. 236.

⁵² In *Benjamin v. Benjamin*, 5 N. Y. (1 Seld.) 383, it was held that the "conventional relation" did not arise where the owner's agent told a person already in possession without permission, that he might remain on certain terms, and the latter did not accept the proposition, although he remained. Such a person would seem to have been a mere

trespasser, and not a tenant of the owner in any sense.

⁵³ *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794.

⁵⁴ *Toby v. Schultz*, 51 Ill. App. 487 (lease for immoral purposes); *Bru-baker v. Poage*, 17 Ky. (1 T. B. Mon.) 123 (oral lease within statute of frauds); *Harrison v. Marshall*, 7 Ky. (4 Bibb) 524 (ditto); *Clarke v. Barnes*, 76 N. Y. 301, 32 Am. Rep. 306 (agricultural lease for prohibited period); *Murat v. Micand* (Tex. Civ. App.) 25 S. W. 312 (lease for immoral purposes). So the fact that the lessor was guilty of fraud in procuring the lessee to accept the lease was held to be no defense. *Simons v. Marshall*, 3 G. Greene (Iowa) 502. In *Smelling v. Valley*, 103 Mich. 580, 61 N. W. 878, the proceeding was based on the nonpayment of the rent, and it was held that it was no defense that the lease was invalid under the statute of frauds, the lessee having taken possession.

⁵⁵ *Keller v. Klopfer*, 3 Colo. 132.

asserting a right to continue possession by force thereof, and several of the decisions first above cited are to this effect.⁵⁶

b. **By person entitled to possession.** As above stated,⁵⁷ the statute not infrequently provides that the proceeding shall be instituted by the person entitled to possession. In Massachusetts, where the statute in terms so provides, it has been held that one claiming under a conveyance by which a life estate is reserved to the grantor cannot recover against a lessee of such life tenant, but that the defendant must have entered under some person with whom the plaintiff is in privity.⁵⁸ This statute has also been there held not to authorize a proceeding by a stranger, claiming title paramount to that of the lessor, merely because the person in possession entered as lessee.⁵⁹ But it does, it has been decided, authorize a proceeding against a tenant at will by one to whom the landlord had leased the premises for years before undertaking to create the tenancy at will.⁶⁰ It has also been stated, in that jurisdiction, that when the term of a lessee expires, the proceeding may be maintained by the lessor against a sublessee holding over.⁶¹

c. **By licensor against licensee.** A mere licensee of the owner, it is evident, does not enter under a lease, and is not within a statute subjecting a lessee or tenant to a summary proceeding,⁶² though a licensee of a tenant, may, it seems, be subject to removal by virtue of a proceeding by the landlord, as holding under the tenant.⁶³ A servant also cannot be proceeded against as a tenant by his master in order to effect his exclusion from the premises,⁶⁴ and this applies to one who is in possession as a mere

⁵⁶ *Robertson v. Birdie*, 107 N. Y. Supp. 75, is perhaps opposed to this view.

⁵⁷ See ante, at note 20.

⁵⁸ *Whitney v. Dart*, 117 Mass. 153.

⁵⁹ *Green v. Tourtellott*, 65 Mass. (11 Cush.) 227.

⁶⁰ *Hart v. Bouton*, 152 Mass. 440, 25 N. E. 714.

⁶¹ *Howard v. Merriam*, 59 Mass. (5 Cush.) 563.

⁶² *Henry v. Perry*, 110 Ga. 630, 36 S. E. 87; *People v. Cushman*, 1 Hun (N. Y.) 73; *Wheeler v. Wheeler*, 77 Vt. 177, 59 Atl. 842 (semble).

⁶³ See post, at note 137.

⁶⁴ *McQuade v. Emmons*, 38 N. J. Law, 397; *Jennings v. McCarthy*, 16 N. Y. Supp. 161; *Haywood v. Miller*, 3 Hill (N. Y.) 90. But *Morris Canal Co. v. Mitchell*, 31 N. J. Law, 99, seems to be contra. And the statute occasionally provides expressly for a proceeding by an employer against his employee. See *New York Code Civ. Proc.* § 2231; *South Carolina Civ. Code* 1902, § 243; *Virginia Code* 1904, § 2716.

"cropper,"⁶⁵ though if he is actually a tenant the fact that rent is paid by a division of the crops does not exclude the proceeding.⁶⁶

d. **By vendor against purchaser.** The courts have almost invariably held that a purchaser of land, who enters into possession of the land by permission of the vendor, before receiving a conveyance of the legal title, is not a tenant of the vendor, so as to authorize a summary proceeding by the latter to regain possession upon default by such purchaser in the performance of his contract,⁶⁷ and this has been decided to be so although it is expressly agreed at the time of sale that the purchaser shall hold as tenant of the vendor,⁶⁸ or that he shall so hold after default, with a liability to expulsion by summary proceedings.⁶⁹ A different view

⁶⁵ *Robson v. Cofield*, 113 Ga. 1153. *Neb.* 671, 24 N. W. 339; *People v. 39 S. E.* 472; *Gray v. Reynolds*, 67 N. J. Law, 169, 50 Atl. 670; *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 226. See *Russell v. Russell*, 32 How. Pr. (N. Y.) 400. But in *Wood v. Garrison*, 23 Ky. Law Rep. 295, 62 S. W. 728, it is assumed that the proceeding lies against a mere cropper.

⁶⁶ *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027 (semble).

It was held in *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 226, that the proceeding did not lie on account of the nonpayment of crop rent, when the statute authorized the proceeding on account of the nonpayment of rent only in case of insufficient goods to satisfy a distress, since such a rent could not be collected by distress.

⁶⁷ *Mason v. Delancy*, 44 Ark. 444; *Keller v. Klopfer*, 3 Colo. 132; *Brown v. Persons*, 48 Ga. 60; *Allread v. Harris*, 75 Ga. 687; *Griffith v. Collins*, 116 Ga. 420, 42 S. E. 743; *Dakin v. Allen*, 62 Mass. (8 Cush.) 33; *Lyon v. Cunningham*, 136 Mass. 532; *Kiernan v. Linnehan*, 151 Mass. 543, 24 N. E. 907; *Dawson v. Dawson*, 17

Neb. 671, 24 N. W. 339; *People v. Bigelow*, 11 How. Pr. (N. Y.) 84; *McCombs v. Wallace*, 66 N. C. 481; *Johnson v. Hauser*, 82 N. C. 375; *Chicago, B. & Q. R. Co. v. Skupa*, 16 Neb. 341, 20 N. W. 393; *Carlisle v. Prior*, 48 S. C. 183, 26 S. E. 244; *Buel v. Buel*, 76 Wis. 413, 45 N. W. 324; *Menominee River Lumber Co. v. Philbrook*, 78 Wis. 142, 47 N. W. 188; *Magham v. Stewart*, 133 Wis. 525, 113 N. W. 972. Contra, *Dobson v. Culpepper*, 23 Grat. (Va.) 352. In *Anderson v. Prindle*, 23 Wend. (N. Y.) 616, it was held that one holding under a contract for a lease was liable to the proceeding as a tenant at will or sufferance upon his refusal to accept a lease. It seems somewhat difficult to distinguish between the position of one in possession under a contract for a lease and one in possession under a contract for a conveyance in fee.

⁶⁸ *Davis v. Hemenway*, 27 Vt. 589; *Diggle v. Boulden*, 48 Wis. 477, 4 N. W. 678, 33 Am. Rep. 817.

⁶⁹ *Burkhart v. Tucker*, 27 Misc. 724, 59 N. Y. Supp. 711; *Hughes v. Mason*, 84 N. C. 472.

has, however, been asserted in regard to the effect of a provision for a tenancy in case of default.⁷⁰ It would seem clear that the parties may at any time entirely terminate the relation of vendor and purchaser, and enter upon the relation of landlord and tenant, so as to authorize the proceeding.⁷¹

The fact that a lease contains an agreement looking to the possible purchase of the premises by the lessee does not prevent the maintenance of a summary proceeding against him.⁷²

e. **By grantee against grantor.** A grantor in fee who is, by agreement, to retain possession for a specified time after the conveyance, has been regarded as a tenant of the grantee, and so subject to a summary proceeding if he retains possession beyond that time.⁷³ A contrary view has, however, been asserted.⁷⁴ One who retains possession, after making a conveyance, without any right thereto, would seem not to be a tenant of the grantee for any purpose,⁷⁵ nor in the position of one who has entered under a lease, so as to be liable to a summary proceeding by the grantee.^{75a} There are decisions, however, that he is so liable,⁷⁶

⁷⁰ *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440; *Patterson v. Folmar*, 125 Ala. 130, 28 So. 450; *Raynor v. Haggard*, 18 Mich. 72, 100 Am. Dec. 146.

⁷¹ It is so decided in *Riley v. Jordan*, 75 N. C. 180. But it was held otherwise where the vendee, after default by him, agreed to hold at a certain rent, the rent payments to be applied on the purchase price. *Hughes v. Mason*, 84 N. C. 472. Compare ante, § 43 b, c.

⁷² *Norton v. Sturla*, 83 Cal. 559, 23 Pac. 527; *Middlebury College v. Lawton*, 23 Vt. 688; *Brauchle v. Nothhelfer*, 107 Wis. 457, 83 N. W. 653. See ante, § 257.

⁷³ *Prichard v. Tabor*, 104 Ga. 64, 30 S. E. 415. That he is properly a tenant of the grantee, see ante, § 44.

⁷⁴ *Sims v. Humphrey*, 4 Denio (N. Y.) 185.

⁷⁵ See ante, § 44.

^{75a} The statutes authorizing a proceeding against a tenant holding

over have been held not to authorize it against one who, after making a lease, wrongfully excludes the lessee from possession. *Goodwine v. Barnett*, 2 Ind. App. 16, 28 N. E. 115; *Krumweide v. Schroeder*, 56 Iowa, 190, 9 N. W. 107; *Freeborn v. La Londe*, 118 Mich. 66, 77 N. W. 269. There appears to be no more reason for regarding a grantor in fee, who wrongfully retains possession, as a tenant of the grantee, and as such subject to the proceeding, than for so regarding a grantor for years, that is, a lessor.

One who claims the present right of possession under a conveyance from the complainant, by which conveyance, however, a life estate was reserved in favor of the complainant, is not subject to expulsion by such a proceeding, as being a tenant of the complainant. *Sharpe v. Mathews*, 123 Ga. 794, 51 S. E. 706.

⁷⁶ It is so decided in *Pitkin v.*

it being held in one case that he is so liable as being a tenant at sufferance of the grantee.⁷⁷

f. **By mortgagee against mortgagor.** The decisions are in substantial unison to the effect that a mortgagor, though retaining possession by agreement, is not the tenant of the mortgagee, in such a sense as to authorize a summary proceeding against him to recover possession upon his default.⁷⁸ The fact even that there is actually a formal lease has been regarded as not authorizing the proceeding, if the lease is merely part of a transaction intended to secure the repayment of money,⁷⁹ as when the borrower conveys by absolute deed to the lender and the latter makes a lease to the former at a rent equal to the interest on the loan, with a covenant to convey the premises to the borrower on payment of a sum equal to the amount of the loan.⁸⁰ But in any jurisdictions where such a conveyance and lease back is a recognized mode of securing the repayment of a loan, the lessor would presumably be regarded as entitled to the same remedies to re-

Burch, 48 Vt. 521; *Bennett v. Robinson*, 27 Mich. 26. And see dictum in *McCombs v. Wallace*, 66 N. C. 481.

⁷⁷ *Bennett v. Robinson*, 27 Mich. 26.

⁷⁸ *Willis v. Eastern Trust & B. Co.*, 169 U. S. 295, 42 Law. Ed. 752; *Necklace v. West*, 33 Ark. 682; *Reed v. Elwell*, 46 Me. 270; *Larned v. Clarke*, 62 Mass. (8 Cush.) 29; *Hastings v. Pratt*, 62 Mass. (8 Cush.) 121; *Evertson v. Sutton*, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217; *Roach v. Cosine*, 8 Wend. (N. Y.) 228; *McCombs v. Wallace*, 66 N. C. 481; *Davis v. Hemenway*, 27 Vt. 589; *Nightingale v. Barrens*, 47 Wis. 389, 2 N. W. 767; *Hunter v. Maanum*, 78 Wis. 656, 48 N. W. 51, 23 Am. St. Rep. 443. The view that the mortgagor in possession by the mortgagee's consent is not the latter's tenant is considered ante, § 45 a. In *Hunt v. Comstock*, 15 Wend. (N. Y.) 665, 30 Am. Dec. 82, it having been agreed that a

creditor should occupy the debtor's land for one year and until the debt was paid, the relation of landlord and tenant was held to be created, so that the debtor, on paying the debt, could maintain the proceeding. *Hunt v. Comstock*, 15 Wend. (N. Y.) 665.

⁷⁹ *Roach v. Cosine*, 9 Wend. (N. Y.) 227; *Greer v. Wilbar*, 72 N. C. 592; *Davis v. Hemenway*, 27 Vt. 589; *Plato v. Roc*, 14 Wis. 453; *Ragan v. Simpson*, 27 Wis. 355; *Nightingale v. Batens*, 47 Wis. 389, 2 N. W. 767. But see *Dougherty v. Thompson*, 7 Blackf. (Ind.) 277, contra. In *People v. Howlett*, 76 N. Y. 574, it was decided that the proceeding would not lie when the absolute deed and lease back were cloaks for usury. It is not stated whether, in the absence of usury, the proceeding would have been maintainable.

⁸⁰ *Steele v. Bond*, 28 Minn., 267, 9 N. W. 772.

cover possession as in the case of a lease not made for such a purpose.^{80a}

g. **By foreclosure purchaser against mortgagor.** A mortgagor who refuses to yield possession in favor of a purchaser of the premises at foreclosure sale is, it would seem clear, not subject to a summary proceeding by the latter as being a tenant or lessee under him, and it has been so decided.⁸¹ There is, however, at least one decision that the mortgagor so retaining possession is liable to the proceeding as a "tenant at sufferance,"⁸² and occasionally such proceeding might be upheld against him by reason of an express provision in the mortgage that he should be a tenant of the purchaser.⁸³

h. **By joint lessor or lessors.** The fact that the owners in severalty of separate tracts of land joined in a lease which included both tracts does not, it has been held, prevent either owner from maintaining a proceeding to recover his tract.⁸⁴ And it has been held that, by analogy to the rule which authorizes a joint owner to maintain ejectment,⁸⁵ one of two joint lessors may maintain the proceeding in behalf of all and recover possession of

^{80a} See ante, § 45 d, at note 92.

⁸¹ *Necklace v. West*, 33 Ark. 682; *McCombs v. Wallace*, 66 N. C. 481.

That it does not lie in favor of the purchaser against one in possession under the mortgagor, see *Goodgion v. Latimer*, 26 S. C. 208, 2 S. E. 1. But that it does lie in his favor against one holding under a lease by the mortgagor subsequent to the mortgage, see the *Arkansas* and *Missouri* cases cited ante, note 26.

⁸² *Kinsley v. Ames*, 43 Mass. (2 Metc.) 29.

⁸³ See *Griffith v. Brackman*, 97 Tenn. 387, 37 S. W. 273, 49 L. R. A. 338; *Hamilton Bldg. & Loan Ass'n v. Patton*, 105 Tenn. 407, 58 S. W. 482. And see ante, § 47. In *Chapin v. Billings*, 91 Ill. 539, it is held that a proceeding of forcible entry and detainer may be brought by the purchaser against the maker of the

trust deed, when in such deed the latter acknowledged himself the tenant of the trustees, and expressly authorized such a proceeding against him on behalf of the purchaser.

An execution debtor does not stand in the relation of tenant to the purchaser at execution sale, so as to be subject to such a proceeding on the part of the latter under a statute authorizing proceedings against a tenant. *Cummings v. Kilpatrick*, 23 Miss. 106. But he may of course be made subject to such a proceeding by express statute. See *Spraker v. Cook*, 16 N. Y. 567.

⁸⁴ *New York & N. J. Tel. Co. v. De Gray*, 65 N. J. Law, 156, 46 Atl. 651. That they might sue jointly in such case, see *Oakes v. Munroe*, 62 Mass. (8 Cush.) 282.

⁸⁵ See *Adams, Ejectment*, 210; *Freeman, Cotenancy*, §§ 339, 340.

the whole premises.⁸⁶ Two joint owners of the land who made to one person separate leases of their undivided interests, at different times and on different terms, and who, on expiration of the leases, made separate demands for possession, cannot, it has been held, join in a proceeding for possession.⁸⁷

i. **By personal representative.** The person entitled to possession of the land as against the tenant, upon the death of a landlord, is in most jurisdictions the heir or devisee, though in some the personal representative is given the possession for the purpose of settling the estate. Consequently the personal representative is, it seems, in most jurisdictions, not entitled to maintain the proceeding⁸⁸ if the reversion is of a freehold nature. Occasionally a proceeding by him has been sustained.⁸⁹

A proceeding by the devisee and the personal representative, jointly, has been supported in a case where the lease by testator covered both his freehold and leasehold property.⁹⁰

An executor who has himself made the lease under a statutory power has been regarded as entitled to maintain the proceeding.⁹¹

j. **By guardian.** A proceeding by a guardian of an infant entitled to the property has been sustained,⁹² as has one by a "con-

⁸⁶ Mullone v. Klein, 55 N. J. Law, 479, 27 Atl. 902; Rabe v. Fyler, 18 Miss. (10 Smedes & M.) 440, 48 Am. Dec. 763; Mason v. Bascom, 42 Ky. (3 B. Mon.) 269, 38 Am. Dec. 186, are to the effect that the grantee of an undivided interest may maintain the proceeding. But King v. Dickerman, 77 Mass. (11 Gray) 480, seems contra.

The widow of the lessor, entitled to dower, though this had not been assigned, has been held to be entitled to institute the proceeding on her own behalf and on behalf of the heirs of the lessor, whose guardian she was. Moody v. Seaman, 46 Mich. 74, 8 N. W. 711.

⁸⁷ Ware v. Warwick, 48 Ala. 295.

⁸⁸ That he is not so entitled, see Carlisle v. Prior, 48 S. C. 183, 26 S. E. 244.

⁸⁹ See Sweeney v. Mines, 31 Mo. 240. In Moody v. Ronaldson, 38 Ga. 652, it is said that since the statute authorizes a maintenance of the proceeding by the owner, his agent or attorney, it in effect authorizes it by his administrator, since the latter is the legal owner for the purpose of paying debts and distributing the estate.

Occasionally the statute authorizes the "legal representative" of the landlord or person entitled to possession to file the complaint. See Mississippi Code 1906, § 2886; New Jersey, 2 Gen. St. p. 1918, § 18; New York Code Civ. Proc. § 2235. This probably includes the personal representative.

⁹⁰ People v. Dudley, 58 N. Y. 323.

⁹¹ Spear v. Lomax, 42 Ala. 576.

⁹² In Gallagher v. David Steven-

servator," who has by statute charge of and power to manage the estate of the ward.⁹³

k. **By receiver.** It has been decided that a receiver, appointed under the general equity power of the court, to lease property and collect rents, during the pendency of an action, has no power to institute the proceeding in his own name against one holding under a lease from one of the parties.⁹⁴

l. **By agent or attorney.** A number of the statutes provide that the complaint of affidavit by which the summary proceeding is commenced may be made by the landlord or owner, "or his agent" or "his attorney."⁹⁵ Whether this would ordinarily be construed to mean that the proceeding may be instituted in the name of the agent or attorney does not clearly appear. In one state it has been decided that it may be so instituted.⁹⁶

m. **Effect of transfer of reversion.** Some of the statutes expressly give to one claiming under the lessor as assignee or transferee the same right to maintain the proceeding as has the lessor himself. But apart from any such express provision, it would seem clear that if the statute gives the right to the "landlord" or to the person "entitled to possession," one to whom the reversion has passed, either by voluntary act or by act of the law, may main-

son Brew. Co., 13 Misc. 40, 34 N. Y. Supp. 94, it is held that a guardian who made the lease may maintain the proceeding. In *People v. Ingersoll*, 20 Hun (N. Y.) 316, 58 How. Pr. 351, it is held that, though the lease was made by the guardian, the ward may maintain the proceeding after attaining his majority. See, also, *Moody v. Seaman*, 46 Mich. 74, 8 N. W. 711, ante, note 86.

⁹³ *Palmer v. Cheeseboro*, 55 Conn. 114, 10 Atl. 508, 3 Am. St. Rep. 40. In *Dorschele v. Burkly*, 18 Misc. 240, 41 N. Y. Supp. 389, it was held that where the guardian of an infant remainderman, after the life tenant's death, permitted a tenant of the latter to remain in possession, paying rent, until the infant's majority, and the latter then demanded rent,

the "conventional" relation of landlord and tenant arose, enabling the infant to maintain the proceeding.

⁹⁴ *King v. Cutts*, 24 Wis. 627.

⁹⁵ *Georgia Code* 1897, § 4813 (See *Johnson v. Thrower*, 117 Ga. 1007, 44 S. E. 846); *Indiana*, Burns' Ann. St. 1901, § 7196; *Michigan Comp. Laws* 1897, § 11165; *Mississippi Code* 1903, § 2886; *New Jersey*, 2 Gen. St. p. 1918, § 18; *New York Code Civ. Proc.* § 2235; *North Carolina Revisal* 1905, § 2092; *South Carolina Civ. Code* 1902, § 243; *Texas Rev. St.* 1895, art. 2523; *Wisconsin Rev. St.* 1898, § 3362.

⁹⁶ *Case v. Porterfield*, 54 App. Div. 109, 66 N. Y. Supp. 337; *Powers v. De O*, 64 App. Div. 373, 72 N. Y. Supp. 103.

tain the proceeding, since he is the "landlord" as well as the person "entitled to possession." That such transferee may maintain the proceeding has been generally recognized,⁹⁷ but there are in some jurisdictions decisions that he cannot do so in the absence of a statute expressly so providing, this view being based mainly on the theory that otherwise an inquiry into title would be involved,⁹⁸ in violation of the express provision of the statute.⁹⁹ In one decision, in which this view is asserted, it is stated that the proceeding is properly brought in the name of the lessor for the use of his transferee.¹⁰⁰

So far as, in any jurisdiction, an attornment might be necessary in order to make a transferee of the reversion the landlord of the tenant, he would not, in the absence of attornment, be able

- ⁹⁷ *Bradley v. Hume*, 18 Ark. 284; assign); *Barton v. Learned*, 26 Vt. *Brockway v. Thomas*, 36 Ark. 518; 192, 62 Am. Dec. 364; *McKeon v. Johnson v. West*, 41 Ark. 535; *Morrow v. Sawyer*, 82 Ga. 226, 8 S. E. 51; *Prichard v. Tabor*, 104 Ga. 64, 30 S. E. 415; *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794; *Dudley v. Lee*, 39 Ill. 339; *Herndon v. Bascom*, 39 Ky. (8 Dana) 113; *Thomason v. McLaughlin* (Ind. T.) 103 S. W. 595; *Sacket v. Wheaton*, 34 Mass. (17 Pick.) 103 (grantee of lessor's devise); *Marsters v. Cling*, 163 Mass. 477, 40 N. E. 763 (execution purchaser); *Smith v. Kaiser*, 17 Neb. 184, 22 N. W. 368; *McGuffie v. Carter*, 42 Mich. 497, 4 N. W. 211; *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. 454; *Watson v. Idler*, 54 N. J. Law, 467, 24 Atl. 554; *Binder v. Azzaro*, 74 N. J. Law, 328, 65 Atl. 819; *Rabe v. Fyler*, 18 Miss. (10 Smedes & M.) 440, 48 Am. Dec. 763; *Birdsall v. Phillips*, 17 Wend. (N. Y.) 464; *Lang v. Everling*, 3 Misc. 530, 23 N. Y. Supp. 329 (purchaser at foreclosure); *Griffin v. Barton*, 22 Misc. 228, 49 N. Y. Supp. 1021; *Wetterer v. Soubirous*, 22 Misc. 739, 49 N. Y. Supp. 1043; *Duff v. Fitzwater*, 54 Pa. 224, 93 Am. Dec. 691 (assign of
- King*, 9 Pa. 213 (execution purchaser); *Capital Brew. Co. v. Crosby*, 22 Wash. 269, 60 Pac. 652; *Barton v. Learned*, 26 Vt. 192, 62 Am. Dec. 364; *Foss v. Stanton*, 76 Vt. 365, 57 Atl. 942.
- That the heir of the lessor may maintain the proceeding, see *Kellum v. Balkum*, 93 Ala. 317, 9 So. 463; *Compton v. Ivey*, 59 Ind. 352; *Turly v. Foster*, 9 Ky. (2 A. K. Marsh.) 204; *Roberts v. McPherson*, 62 N. J. Law, 165, 40 Atl. 630.
- In *May v. Kendall*, 8 Phila. (Pa.) 244, it was held that where the statute authorized a proceeding by the lessor "or his heirs or assigns," a residuary devisee could not maintain it. A different view might well have been adopted, it would seem.
- ⁹⁸ *Dwine v. Brown*, 35 Ala. 596; *Reay v. Cotter*, 29 Cal. 168; *Picot v. Masterson*, 12 Mo. 303; *Youngs v. Freeman*, 15 N. J. Law (3 J. S. Green) 30.
- ⁹⁹ See post, note 393.
- ¹⁰⁰ *Cooper v. Gambill*, 146 Ala. 184, 40 So. 827.

to proceed as landlord, unless the statute contains a provision expressly conferring the right upon the transferee.¹⁰¹ But, as before stated, the requirement as to attornment is abrogated in most, if not all, jurisdictions,¹⁰² and that no attornment is necessary, in order to enable the transferee to maintain the proceeding, has been expressly decided.¹⁰³

One to whom the equitable title only to the reversion has been transferred, as for instance, one holding a bond for title from the lessor, or a contract for a conveyance, cannot bring the proceeding,¹⁰⁴ unless at least there is an express stipulation giving him the right of possession. But it has been decided that where one having merely an equitable title made a lease, and subsequently transferred all his rights and title in the land, the transferee could maintain the proceeding.¹⁰⁵

It has been decided that, under a statute giving the remedy to the assigns of the lessor, the grantee of the reversion in part of the leased premises may bring the proceeding to recover possession of such part,¹⁰⁶ but in another jurisdiction there is perhaps a decision to the contrary.¹⁰⁷ It has also been decided that the grantee of an undivided interest in the land may maintain the proceeding, the possession so recovered by him to be regarded as in behalf of himself and the other joint owners.¹⁰⁸ But an

¹⁰¹ That no attornment is necessary if a proceeding by the transferee is expressly authorized by the statute, see *Thomasson v. Wilson*, 146 Ill. 384, 34 N. E. 432; *Ray v. Blackman*, 120 Mo. App. 497, 97 S. W. 212.

¹⁰² See ante, § 146 f.

¹⁰³ *Marsters v. Cling*, 163 Mass. 477, 40 N. E. 763; *Wetterer v. Soubirous*, 22 Misc. 739, 49 N. Y. Supp. 1043; *Tilford v. Fleming*, 64 Pa. 300. But in *Duke v. Compton*, 49 Mo. App. 304, it is stated that the proceeding does not lie in favor of a transferee, unless expressly authorized by statute, in the absence of attornment, and there is a suggestion to the effect that attornment is necessary in *Gunn v. Sinclair*, 52 Mo. 327. In *McMurtry v. Adams*, 66 Ky. (3 Bush) 70, the right of one who obtained the title of the lessor by decretal sale to maintain the proceeding was in terms based on the fact that the tenant had attorned to him.

¹⁰⁴ *Sullivan v. Enders*, 33 Ky. (3 Dana) 66; *Harrison v. Middleton*, 11 Grat. (Va.) 527.

¹⁰⁵ *Goodlet v. Cleaveland*, 51 Ky. (12 B. Mon.) 430.

¹⁰⁶ *De Coursey v. Guarantee Trust Co.*, 81 Pa. 217.

¹⁰⁷ *Abeel v. Hubbell*, 52 Mich. 37, 17 N. W. 231, 50 Am. Rep. 240.

¹⁰⁸ *Rabe v. Fryer*, 18 Miss. (10 Smedes & M.) 440, 48 Am. Dec. 763; *Mason v. Bascom*, 42 Ky. (3 B. Mon.)

apparently contrary decision is found in another jurisdiction.¹⁰⁹

Since, after the transfer by the lessor of the reversion, he ceases to be landlord and so ceases to have any right to the possession upon the termination of the tenancy, it would seem to follow that he has no longer any right to maintain the proceeding, and it has been so decided.¹¹⁰ So long, however, as he retains the legal title, though he has parted with the equitable interest, he is the person to maintain such proceeding.¹¹¹ Occasionally it has been decided that the lessor may maintain it even after transferring the reversion.¹¹²

One to whom the lessor has transferred merely the rent alone,¹¹³ as when he in terms transfers the "lease,"¹¹⁴ has no right to maintain the proceeding, he not having thereby acquired any interest in the reversion or any right to possession.

n. Effect of subsequent lease. In case the owner of the re-

¹⁰⁹ King v. Dickerman, 77 Ky. (11 Gray) 480.

¹¹⁰ Purdy v. Rakestraw, 13 Ill. App. (13 Bradw.) 480; McGuffie v. Carter, 42 Mich. 497, 4 N. W. 211; Pentz v. Kuester, 41 Mo. 447; Boyd v. Sametz, 17 Misc. 728, 40 N. Y. Supp. 1070. In Holliday v. Chism, 25 Ind. App. 1, 57 N. E. 563, the denial of the right of the grantor to maintain the proceeding is based on the statutory provisions that every action must be prosecuted in the name of the real party in interest, and that any person entitled to recover possession of land may do so in his own name. In this case the grantor had agreed that he would obtain the possession for the grantee.

¹¹¹ Miller v. Levi, 44 N. Y. 492; Harrison v. Middleton, 11 Grat. (Va.) 527.

¹¹² See White v. Bailey, 14 Conn. 271, to this effect, and it is so decided in Logan v. Woolwine, 56 Mo. App. 453, on the ground that the lessor had agreed to put his grantee in possession. The latter case is fol-

lowed in Tucker v. McClenney, 103 Mo. App. 318, 77 S. W. 151, where it was stipulated by the deed of conveyance that the right of possession should remain in the lessor until he recovered the actual possession. A different view is taken in Boyd v. Sametz, 17 Misc. 728, 40 N. Y. Supp. 1070; and Holliday v. Chism, 25 Ind. App. 1, 57 N. E. 563, as to the effect of a covenant to put the grantee in possession. In Cooper v. Gambill, 146 Ala. 184, 40 So. 827, it is said that the proceeding could not be maintained by "the purchaser," who was apparently also the legal grantee, but that it was proper for the lessor to institute the suit for the use of the purchaser, the real party in interest.

¹¹³ Kelly v. Smith, 41 N. Y. St. Rep. 620, 16 N. Y. Supp. 521.

¹¹⁴ Markin v. Whitaker, 26 Ind. App. 211, 58 N. E. 542. But see Drew v. Mosbarger, 104 Ill. App. 635, where the assignment of the "lease" appears to be regarded as making the assignee the landlord for this purpose. Compare ante, § 146 b.

version makes a lease to commence in possession upon the termination of the former lease, such second lessee, it has been usually considered, may, as being entitled to possession, maintain the proceeding against the first lessee, in case the latter holds over his term.¹¹⁵ Such second lessee, it has occasionally been said, is an "assignee" within the meaning of a statute giving the benefit of the proceeding to the "assignee" of the lessor.¹¹⁶ In some cases, however, the right of the second lessee to maintain the proceeding has been denied.¹¹⁷

The lessor has sometimes been regarded as retaining, in such case, the right to maintain the proceeding, the first lessee being thus apparently subject to a proceeding by either the lessor or the second lessee,¹¹⁸ and occasionally this right in the lessor has

¹¹⁵ *Field v. Herrick*, 101 Ill. 110; *James Hanley Brew. Co.*, 23 R. I. 343, *Webb v. Hyman*, 40 Ill. App. 335; 50 Atl. 392 (ejectment); *Twiss v. Ball v. Chadwick*, 46 Ill. 28; *Gazzolo v. Chambers*, 73 Ill. 75; *Beidler v. Fish*, 14 Ill. App. (14 Bradw.) 29; *Boyce v. Graham*, 91 Ind. 420; *Burton v. Rohrbeck*, 30 Minn. 393, 15 N. W. 678; *Russo v. Yuzolino*, 19 Misc. 28, 42 N. Y. Supp. 482; *Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549. See *Rieger v. Welles*, 110 Mo. App. 166, 84 S. W. 1136. In *Capital Brew. Co. v. Crosbie*, 22 Wash. 269, 60 Pac. 652, this view is based on the statutory provision that every action shall be prosecuted in the name of the real party in interest.

¹¹⁶ *Kelly v. Clancy*, 15 Mo. App. 519; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330, 38 Am. Dec. 637; *Ball v. Chadwick*, 46 Ill. 28; *White v. Arthurs*, 24 Pa. 96.

¹¹⁷ *Hardy v. Ketchum*, 14 C. C. A. 398, 67 Fed. 282; *Imbert v. Hallock*, 23 How. Pr. (N. Y.) 456; *Rothman v. Kosower*, 48 Misc. 538, 96 N. Y. Supp. 268; *Spalding v. Hall*, 6 D. C. 123 (though statute gave right of action to person "entitled to the premises"); *Hammond v. Jones*, 41 Ind. App. 32, 83 N. E. 257; *Maher v.*

James Hanley Brew. Co., 23 R. I. 343, 50 Atl. 392 (ejectment); *Twiss v. Boehmer*, 39 Or. 359, 65 Pac. 18 (semble). See *King v. Reynolds*, 67 Ala. 229, 42 Am. Rep. 107.

¹¹⁸ *Goelet v. Roe*, 14 Misc. 28, 35 N. Y. Supp. 145; *Davidson v. Hammerstein*, 28 Misc. 529, 59 N. Y. Supp. 563; *Imbert v. Hallock*, 23 How. Pr. (N. Y.) 456; *Vatuone v. Cannobio*, 4 Cal. App. 422, 88 Pac. 374; *Gelston v. Sigmund*, 27 Md. 345; *Hammond v. Jones*, 41 Ind. App. 32, 83 N. E. 257. In *Yosemite Valley Com'rs v. Barnard*, 98 Cal. 199, 32 Pac. 322, it is decided that it is no defense to a proceeding by the lessor that he has made a subsequent lease, for the reason that this would involve the assertion of an outstanding title as a defense. There is, however, in such case, no outstanding title paramount to that created by the original lease.

In *Mageon v. Aikire*, 41 Colo. 338, 92 Pac. 720, it is said, quoting *Thomasson v. Wilson*, 146 Ill. 384, 34 N. E. 432, that in such case the landlord may sue for unlawful detainer and the second lessee for forcible entry. In the Illinois case the facts were en-

been based upon the fact that he is under an obligation to put the second lessee in possession.¹¹⁹ In other cases the right of the second lessee to maintain the proceeding has been regarded as excluding a proceeding by the lessor.¹²⁰

On the same principle as that on which a subsequent lessee has been allowed to maintain the proceeding, it has been upheld in favor of a lessee for years against a prior tenant at will, whose tenancy has been terminated, either by the making of the lease for years, or otherwise.¹²¹

One to whom property is leased subject to an existing lease, that is, one to whom a "concurrent lease"¹²² is made, being a transferee of the reversion, would ordinarily have the right to institute the proceeding.^{122a}

o. Against persons claiming under lessee—Assignees and sub-tenants. The language of the statutes is, almost invariably, it would seem, sufficient to support a proceeding against one who is in possession as an assignee of the lease, they sometimes in terms authorizing proceedings against a tenant,¹²³ which such assignee

tirely different, there being but one lessee cannot maintain the proceeding without first notifying the tenant at will of such lease. *Furlong*

¹¹⁹ *Vincent v. Defield*, 98 Mich. 84, 56 N. W. 1104, distinguished in *But* *aliter* when the landlord has previously terminated the tenancy at will, under the statute, for non-payment of rent. *Hildreth v. Conant*, 51 Mass. (10 Metc.) 298. One to whom two out of three tenants in common have made such a lease for years has been regarded as entitled to maintain the proceeding against the prior tenant at will. *Grundy v. Martin*, 143 Mass. 279, 9 N. E. 647.

¹²⁰ *Allen v. Webster*, 56 Ill. 393; *Beidler v. Fish*, 14 Ill. App. (14 Bradw.) 29. In *L'Hussier v. Zallee*, 24 Mo. 13, it is decided that the lessor cannot recover possession unless the first lessee has elected to hold the lessor in damages for nondelivery of possession.

¹²¹ *Hayden v. Ahearn*, 75 Mass. (9 Gray) 438; *Alexander v. Carew*, 95 Mass. (13 Allen) 70; *Casey v. King*, 98 Mass. 503; *Barton v. Learned*, 26 Vt. 192, 62 Am. Dec. 364.

It has been decided that if the tenancy at will is terminated by the making of the subsequent lease, the

¹²² See ante, § 146 d.

^{122a} *Hendrickson v. Beeson*, 21 Neb. 61, 31 N. W. 266; *McDonald v. Hanlon*, 79 Cal. 442, 21 Pac. 861. The decision in *Schlaich v. Blum*, 42 Misc. 225, 85 N. Y. Supp. 335, appears to be to the effect that in such a case the original lessor cannot maintain the proceeding.

¹²³ *Arizona Rev. St.* 1901, § 2693;

clearly is, and sometimes authorizing proceedings against persons holding "under" the lease,¹²⁴ and sometimes against the person in possession.¹²⁵ Occasionally "assigns" are specifically mentioned.¹²⁶ Even though a particular statute authorizes proceedings against a "lessee" only,¹²⁷ this will presumably be construed as authorizing proceedings against an assignee of the lessee, immediate or remote.

The assignee of a tenant at will, who has taken possession by reason of the assignment, has been regarded as a person holding under the lessee within the statute, though the assignment is nugatory as against the landlord.¹²⁸

The widow of a tenant in possession has been regarded as *prima facie* his assignee and so subject to expulsion by a proceeding of this character.¹²⁹ And the widow and heirs of the

California Code Civ. Proc. § 1161; *Ill.* App. 134; *Hasbrouck v. Stokes*, *Colorado*, Mill's Ann. St. § 1973; *Dis-* 13 N. Y. Supp. 333.

trict of Columbia Code 1901, §§ 20, ¹²⁵ *Maryland* Code Pub. Gen. Laws 1225; *Florida* Gen. St. 1906, § 2227; 1904, art. 53, § 1 (Tenant or person actually in possession); *Missouri* Burns' Ann. St. 1901, § 7106; *Kansas* Rev. St. 1899, § 3321 (Any person continuing in possession); *New Hampshire* Pub. St. 1901, c. 246, § 7 (Lessee or occupant); *Texas* Rev. Codes, § 7271; *Nebraska* Comp. St. 1905, § 7525; *Nevada* Comp. Laws 1900, § 3825; *New Mexico* Comp. Laws 1897, § 3345; *Ohio* Rev. St. 1906, § 6600; *Oklahoma* Rev. St. 1903, § 5087; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," §§ 25, 28; *South Carolina* Civ. Code 1902, § 2421.

¹²⁶ *Florida* Gen. St. 1906, § 2227; *Mississippi* Code 1906, § 2385; *New Jersey*, 2 Gen. St. p. 1922, § 30; *New York* Code Civ. Proc. § 2231; *North Carolina* Revisal 1905, § 2002; *Tennessee*, Shannon's Code 1896, § 5093. ¹²⁷ E. g., *Iowa* Code 1897, § 4208; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," § 34. So *North Dakota* (Rev. Codes 1905, § 8406) and *South Dakota* (Justices' Code, § 44) authorize the proceeding only against a lessee who in person or by subtenant holds over.

¹²⁸ *Hart v. Bouton*, 152 Mass. 440, 25 N. E. 714.

That the proceeding will lie against the lessee's assignee for creditors, see *Reynolds v. Fuller*, 64 How. Pr. (N. Y.) 464. ¹²⁹ *Michenfelder v. Gunther*, 66

tenant have been regarded as within the operation of such a statute.¹³⁰

One holding under a sublease is, it seems clear, included in the description of "tenants," or of persons holding "under" the lessee, as well as of persons "in possession."¹³¹ And occasionally the language of the statute specifies subtenants as persons who may be expelled by proceedings of this character.¹³²

One who obtains possession by collusion with the tenant or subtenant, although he asserts a right of possession under a title adverse to that of the lessor, is subject to expulsion by such proceedings, since he is, as regards the lessor, in no better position than a subtenant.¹³³ But one who enters during the tenancy, without any privity with the tenant, cannot be ousted by the landlord as if he had entered under the tenant,¹³⁴ even though he declares to the landlord that he did so enter.¹³⁵ There may, however, be a local statute under which proceedings may be instituted against him by the landlord after the end of the tenancy.¹³⁶

A licensee of a tenant is liable to be proceeded against by the landlord, it appears, to the same extent as a subtenant.¹³⁷

¹³⁰ *Brubaker v. Poage*, 17 Ky. (1 B. Mon.) 123; *Fogle v. Chaney*, 51 Ky. (12 B. Mon.) 138.

¹³¹ See *Giddens v. Bolling*, 92 Ala. 586, 9 So. 274; *Winkler v. Massengill*, 66 Ark. 145, 49 S. W. 494; *Haase v. Schickner*, 29 Ky. Law Rep. 87, 92 S. W. 949; *Fogle v. Chaney*, 51 Ky. (12 B. Mon.) 138; *Elms v. Randall*, 32 Ky. (2 Dana) 100; *Stewart v. Miles*, 166 Mo. 174, 65 S. W. 754; *Bird v. Fannon*, 40 Tenn. (3 Head) 12.

¹³² *California* Code Civ. Proc. § 1161 (When tenant continues in possession in person or by subtenant); *Florida* Gen. St. 1906, § 2227; *Idaho* Code Civ. Proc. § 3974; *Mississippi* Code 1906, § 2885; *Montana* Rev. Codes, § 7271; *New Jersey*, 2 Gen. St. p. 1922, § 30; *New York* Code Civ. Proc. § 2231; *North Dakota* Rev. Codes 1905, § 8406; *South Dakota*, Justices' Code, § 44; *Tennessee*, Shannon's Code 1896, § 5093. See

Reed v. Hawley, 45 Ill. 40; *Blachford v. Frenzer*, 44 Neb. 829, 62 N. W. 1101; *Ward v. Burgher*, 90 Hun, 540, 35 N. Y. Supp. 961.

¹³³ *Giddens v. Bolling*, 92 Ala. 586, 9 So. 274; *Winkler v. Massengill*, 66 Ark. 145, 49 S. W. 494; *Ballance v. Fortier*, 8 Ill. (3 Gilm.) 291; *Doty v. Burdick*, 83 Ill. 43; *Stewart v. Miles*, 166 Mo. 174, 65 S. W. 754; *Russell v. Van Fleet*, 24 Ky. Law Rep. 232, 68 S. W. 396.

¹³⁴ *Colt v. Eves*, 12 Conn. 243; *Blackman v. Welsh*, 44 Mo. 41.

¹³⁵ *People v. Hovey*, 4 Lans. (N. Y.) 86.

¹³⁶ See *Thomasson v. Wilson*, 146 Ill. 384, 34 N. E. 432.

¹³⁷ See *Stewart v. Miles*, 166 Mo. 174, 65 S. W. 754; and cases cited post, note 140.

There are several decisions to the effect that, in order that the proceeding be effective as against a subtenant, so as to justify his expulsion thereunder, he must be a party to the proceeding,¹³⁸ unless the sublease was made to him *pendente lite*.¹³⁹ Such a rule does not apply to persons who are not, technically speaking, in possession of the premises, but are there merely as members of the tenant's family, or as guests or servants, and they may be expelled under the process issued on the judgment in the proceeding, although not parties thereto.¹⁴⁰ Conceding

¹³⁸ *Leindecker v. Waldron*, 52 Ill. 283; *Moses v. Loomis*, 55 Ill. App. 342; *Bagley v. Sternberg*, 34 Minn. 470, 26 N. W. 602; *Hill v. Stocking*, 6 Hill (N. Y.) 314, 41 Am. Dec. 748; *Sims v. Humphrey*, 4 Denio (N. Y.) 185; *Starkweather v. Seeley*, 45 Barb. (N. Y.) 164; *Croft v. King*, 1 City Ct. R. (N. Y.) 157, 8 Daly, 265. On the other hand, in *Stewart v. Jackson*, 181 Pa. 549, 37 Atl. 518, it is asserted that a subtenant can be ejected on a judgment against the tenant under whom he claims. And it is so decided in *Synod of Toronto v. Fisk*, 29 Ont. 738. In *Danforth v. Stratton*, 77 Me. 200, it was held that one in possession as *cestui que trust*, the tenant being trustee, could be removed under an order of restitution against the tenant, and this also, perhaps, involves a view contrary to that stated in the text, since a *cestui que trust* in possession is frequently to be regarded as a tenant of the trustee (ante, § 42).

¹³⁹ That the original lessee wrongfully holding over cannot defend on the ground that he has subleased parts of the land and that the sublessees are not parties, see *Tucker v. McClenney*, 103 Mo. App. 318, 77 S. W. 151.

¹⁴⁰ *Leindecker v. Waldron*, 52 Ill. 283; *Bagley v. Sternberg*, 34 Minn. 470, 26 N. W. 602.

That a receiver is appointed in a suit to foreclose a mortgage on the household does not affect the validity of a subsequent judgment in a summary proceeding previously instituted, though no notice is served on the receiver. *Woodward v. Winchill*, 14 Wash. 234, 44 Pac. 860.

¹⁴¹ *Bagley v. Sternberg*, 34 Minn. 470, 26 N. W. 602; *Ennis v. Lamb*, 10 Ill. App. (10 Bradw.) 447; *Croft v. King*, 1 City Ct. R. (N. Y.) 157, 8 Daly, 265. In *Miller v. White*, 80 Ill. 580, it was held that one who was living on the premises with the lessee, apparently as a member of his household, could not assert that she should have been a party to the proceeding as being a sublessee, the landlord having no means of knowing of the sublease, which, if it existed at all, was absolutely secret.

It was held, under the New York statute, that a person claiming possession as subtenant could intervene and answer. *Kiernan v. Cashin*, 92 N. Y. Supp. 255.

In *Butterfield v. Kirtley*, 114 Iowa, 520, 87 N. W. 407, it was in effect decided that, though the complainant alleged a lease to all the defendants, he could recover against all on evi-

that a subtenant is a necessary party, a principal tenant who is not the original lessee, that is, one to whom the leasehold has been assigned, is *a fortiori* not affected by the proceeding, if not a party thereto.¹⁴¹

The question whether the original lessee is a necessary party when he is not in possession, or entitled to possession, he having made a sublease to another, has apparently not been decided,¹⁴² but that he is a proper codefendant along with his subtenant has been explicitly decided in one or two cases,¹⁴³ and assumed in others,¹⁴⁴ and it is no doubt the usual practice to make him a party to the proceeding, although he has subleased. If the summons is directed to the lessee as well as to the subtenant, it should, it has been said, be served on both.¹⁴⁵ One who has assigned the leasehold and relinquished possession to his assignee is, it seems, not a necessary, nor, indeed, a proper, party.¹⁴⁶

Since the proceeding involves only the question whether the defendant's right of possession under the lease has come to an end,

¹⁴¹ An assignee not in possession statute. In *Emerick v. Tavener*, 9 Grat. (Va.) 220, 58 Am. Dec. 217, a decision to this effect is based on the rule recognized at common law in ejectment proceedings (*Adams v. Ejectment*, 120, 235; *Roe v. Wiggs*, 2 Bos. & P. [N. R.] 330; *Pleasant v. Benson*, 14 East, 234), which was based on the ground that the landlord should be able to subject the original tenant to the costs of the proceeding for possession in case he sublets to a pauper.

¹⁴² In *Rehm v. Halverson*, 197 Ill. 378, 64 N. E. 388, it was held that the lessee having made a surrender of his interest, he was not a necessary party to a proceeding to expel his lessee, the subtenant, although the statute expressly authorizes the joinder of such parties as defendants.

¹⁴³ It is so asserted without discussion in *Fletcher v. Fletcher*, 123 Ga. 470, 51 S. E. 418. In *Espen v. Hinchliffe*, 131 Ill. 468, 23 N. E. 592, it is so decided, on a construction of the

¹⁴⁴ *Leindecker v. Waldron*, 52 Ill. 283; *Judd v. Arnold*, 31 Minn. 430, 18 N. W. 151; *Middlebury College v. Lawton*, 23 Vt. 688; *Iburg v. Fitch*, 57 Cal. 189; *Pardee v. Gray*, 66 Cal. 524, 6 Pac. 389. See post, at notes 163, 164.

¹⁴⁵ *Matter of Glenn*, 1 How. Pr. (N. Y.) 213.

¹⁴⁶ See *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, 75 Pac. 332.

persons under whom the alleged tenant may claim possession, as having a paramount title, are not proper parties defendant.¹⁴⁷

p. **Against corporation.** A statute authorizing a proceeding against "any person" has been held to authorize it against a municipal corporation.¹⁴⁸ And it has been held that the fact that the statute provides for personal service on the tenant, or for substituted service in case of absence from his "residence," does not preclude a proceeding against a corporation, public or private.¹⁴⁹

§ 274. Grounds for proceeding.

a. **Holding over by tenant—(1) After expiration of tenancy.** Under the statutes of most jurisdictions a summary proceeding lies in case one who entered under a lease wrongfully remains in possession after the expiration of the term or tenancy. If he remains by permission of the person under whom he previously held, under an extension or renewal of the lease, his possession is obviously rightful, and the proceeding will not lie.¹⁵⁰ He may also show in defense that he holds under a third person to whom a lease was made to commence at the expiration of his own lease.¹⁵¹

The acceptance by the landlord of rent accruing subsequently to the expiration of the original term would ordinarily show, as against him, an extension of the tenancy as a periodic holding,¹⁵² and preclude the maintenance of the proceeding, but no such in-

¹⁴⁷ *Grizzard v. Roberts*, 110 Ga. 41, 35 S. E. 291.

¹⁴⁸ *Rains v. City of Oshkosh*, 14 Wis. 372.

¹⁴⁹ *Facts Pub. Co. v. Felton*, 52 N. J. Law, 161, 19 Atl. 123; *Brown v. City of New York*, 66 N. Y. 385. That the proceeding may be maintained against a quasi public corporation engaged in supplying electricity, see *Bodwell Water Power Co. v. Old Town Elec. Co.*, 96 Me. 117, 51 Atl. 802. And that it may be maintained against a city is assumed in *City of Bay St. Louis v. Hancock County*, 80 Miss. 364, 32 So. 54.

¹⁵⁰ *Uridas v. Morrell*, 25 Ca. 31; *Sloat v. Roundtree*, 87 Ga. 470, 13 S. E. 637; *Hamline v. Engle*, 14 Ind. App. 685, 42 N. E. 760, 43 N. E. 463; *Judd v. Arnold*, 31 Minn. 430, 18 N. W. 151. That this may be shown under a general denial, see *Hamline v. Engle*, 14 Ind. App. 685, 42 N. E. 760, 43 N. E. 463. But *Perine v. Teague*, 66 Cal. 446, 6 Pac. 84, is contra.

¹⁵¹ *Dickson v. Lehnen*, 37 Fed. 319.

¹⁵² See ante, § 210 a.

ference is to be drawn, it has been decided, from the acceptance of rent for the time during which the tenant may retain possession by reason of his having given a bond for appeal from a judgment of dispossession,¹⁵³ or by reason of an injunction against the enforcement of such judgment.¹⁵⁴

The proceeding cannot be maintained, as against a tenant holding over, if the tenant relinquishes possession after the tenancy has come to an end, and thereafter wrongfully resumes possession.¹⁵⁵

The burden is on the plaintiff to show the character of the tenancy as originally created, and that it has come to an end.¹⁵⁶ After he does this, it is for the defendant to show that, by reason of a renewal or otherwise, he has a right to continue in possession after the expiration of the original tenancy.¹⁵⁷

It has been decided in one state that a mere covenant to renew, even though a renewal has been requested by the tenant and refused, does not give the tenant any right or interest in the premises beyond the term, which will constitute a defense to a proceeding to recover possession.¹⁵⁸ But a different view has been taken in states where equitable defenses are allowed,¹⁵⁹ as it would be, presumably, in states where the courts show a tendency to regard such a covenant as in itself effecting a renewal or extension of the lease.¹⁶⁰ In Illinois it has been held that the lessor's refusal to sign a renewal lease, in accordance with his covenant to renew, constitutes a defense to a proceeding brought under a statute allowing the proceeding against a lessee who holds possession "without right" after termination of the tenancy.¹⁶¹

That the lease provides that the landlord shall, at the expira-

¹⁵³ Hopkins v. Holland, 84 Md. 84, 35 Atl. 11.

¹⁵⁴ Curd v. Farrar, 47 Iowa, 504, 29 Am. Rep. 492.

¹⁵⁵ Harrington v. Watson, 11 Or. 143, 3 Pac. 173, 50 Am. Rep. 465. See Walls v. Preston, 28 Cal. 224.

¹⁵⁶ Miller v. Lowe, 14 Ann. Cas. 343, 86 N. Y. Supp. 16; Gossett v. Fox, 90 N. Y. Supp. 477; Weinbauer v. Eastern Brew. Co., 85 N. Y. Supp. 354; Seidel v. Sperry, 26 Pa. Super. Ct. 649.

¹⁵⁷ Brown v. Keller, 32 Ill. 151, 83 Am. Dec. 258; Jefferson v. Ummelmann, 56 Mo. App. 440; Weinhandler v. Eastern Brew. Co., 46 Misc.

584, 92 N. Y. Supp. 792; Lutz v. Wainwright, 193 Pa. 541, 44 Atl. 565.

¹⁵⁸ Platt v. Cutler, 75 Conn. 183, 52 Atl. 819.

¹⁵⁹ See post, note 385.

¹⁶⁰ See ante, § 218, at note 4.

¹⁶¹ Holt v. Nixon, 73 C. C. A. 268, 141 Fed. 952.

tion of the term, either buy or allow the removal of the tenant's property, has been held not to extend the time of the expiration of the term for this purpose.¹⁶²

It has been decided to be no defense to a proceeding to recover possession after the expiration of the term that the lessee, without the lessor's consent, sublet parts of the premises to third persons, who were not made parties to the proceeding.¹⁶³ But it has been held that a tenant is not liable to a judgment against him in such a proceeding if, after the expiration of the term, he puts a stranger in possession, there being no concerted action between them to wrongfully withhold the property from the landlord.¹⁶⁴

In one state the statute provides for a proceeding against a tenant holding over only if there was a "certain" rent reserved,¹⁶⁵ and there have been several decisions as to what constitutes certainty for this purpose.¹⁶⁶

The expiration of the tenancy by reason of a special limitation will justify the institution of a proceeding of this character to recover possession,¹⁶⁷ but, by the weight of authority, the breach of a condition subsequent does not terminate the tenancy, so as to bring the case within the operation of the statute.¹⁶⁸

(2) **After surrender.** There are a number of cases in which it appears to have been assumed that a statute, authorizing the proceeding against a tenant after the expiration of his term, authorizes it in case of the destruction of his term by a surrender made by him to the landlord.^{169,170}

¹⁶² *Bodwell Water Power Co. v. Shaffer v. Sutton*, 5 Bin. (Pa.) Old Town Elec. Co., 96 Me. 117, 51 228. In another case it was held that an agreement to render services

¹⁶³ *Tucker v. McClenney*, 103 Mo. App. 318, 77 S. W. 151. as "foresinger and organist" did not constitute an agreement for a "certain" rent.

¹⁶⁴ *St. Louis Brew. Ass'n v. Niederluecke*, 102 Mo. App. 303, 76 S. W. 645. *Hohly v. German Reformed Soc.*, 2 Pa. 293. A demise

¹⁶⁵ *Pennsylvania Act March 21, 1772*. See *Blashford v. Duncan*, 2 Serg. & R. (Pa.) 480; *McGee v. Fessler*, 1 Pa. 126; *Graver v. Fehr*, 89 Pa. 460. "at the yearly rent of the interest and taxes accruing thereon" did not reserve a certain rent, it not being stated what the interest was to be calculated on. *Davis v. Davis*, 115 Pa. 261, 7 Atl. 746.

¹⁶⁶ It was held that rent was certain within the act though it was payable in "taxes and daubing and chinking" the house on the prem-

¹⁶⁷ See post, at note 217.

¹⁶⁸ See post, at note 216.

^{169,170} *Kower v. Gluck*, 33 Cal. 401; *Elliott v. Round Mountain Coal &*

(3) **Notice to quit as prerequisite—(a) Distinguished from notice terminating tenancy.** The statute frequently requires a notice to quit or a demand for possession as a prerequisite to a proceeding to recover possession against a tenant holding over. Such a notice to quit, constituting a prerequisite to a proceeding of this character, is to be distinguished from that which is necessary, at common law, to terminate a periodic tenancy,¹⁷¹ or, under the statutes of a number of states, to terminate a tenancy at will.¹⁷² In some states, however, the statutes fail to make this distinction, providing as a prerequisite to a summary proceeding against a periodic tenant or a tenant at will, as distinct from a tenant for a term, that a notice to quit of a certain length of time shall be given.¹⁷³ That is, in naming the prerequisites to a summary proceeding against one who holds over after the termination of his tenancy, they include a statement of the notice necessary in order to terminate the tenancy, and the question might arise whether such a provision as to notice applies in case the landlord, instead of bringing a summary proceeding to obtain possession, brings an action of ejectment. The distinction referred to, between the notice necessary to terminate the tenancy and that to lay a foundation for the summary proceeding, has ordinarily, however, been fully recognized by the courts, and it has been expressly decided that the giving of a notice of the former class does not dispense with the necessity of one of the latter class.¹⁷⁴ In one state, however, the notice terminating the

Iron Co., 108 Ala. 640, 18 So. 689 ton, 28 Cal. 224. And see *Rehm v. ("Cancellation of lease" by mutual Halverson, 197 Ill. 378, 64 N. E. 388, consent); Clator v. Otto, 38 W. Va. ante, note 142.*

89, 18 S. E. 378; *Mundy v. Warner*, 61 ¹⁷¹ See ante, § 196 c.

N. J. Law, 395, 39 Atl. 697; *McClelland v. Wiggins*, 109 Iowa, 673, 81 ¹⁷² See ante, § 196 b.

N. W. 156. Compare *Doe d. Tindal v. Roe*, 2 Barn. & Adol. 922. ¹⁷³ *New York Laws* 1889, c. 357 (See ante, § 196 c, note 54); *Utah Comp. Laws* 1907, § 3575 (Fifteen

After the tenant has relinquished possession, which is accepted by the landlord, a surrender by operation of law being thus effected, and the relation of landlord and tenant being thereby terminated, the proceeding will not lie against the tenant because he thereafter re-enters ¹⁷⁴ *McDevitt v. Lambert*, 80 Ala. 536, 2 So. 438; *Ross v. Gray Eagle*

tenancy is regarded as a sufficient compliance with the statute requiring a demand for possession as a prerequisite to a summary proceeding.¹⁷⁵

A requirement of a notice of a certain time in order to terminate a tenancy by reason of a default by the tenant has no application when the tenancy is terminated by reason of the lessor's sale of the property, in accordance with a stipulation of the lease that upon a sale the lessee will relinquish possession.¹⁷⁶

(b) **Statutory requirements.** The statutes of a number of states omit any requirement of a notice to quit or demand for possession as a prerequisite to a proceeding to recover possession on the termination of the tenancy,¹⁷⁷ and, in the absence of any such statutory requirement, none is recognized by the courts.¹⁷⁸

Coal Co. (Ala.) 46 So. 564; King v. Connolly, 51 Cal. 181; Martin v. Splivals, 56 Cal. 28; Dutton v. Colby, 35 Me. 505.

¹⁷⁵ Morris Canal & Banking Co. v. Mitchell, 31 N. J. Law, 99; Wartman v. Richards, 54 N. J. Law, 525, 24 Atl. 576; Quidort v. Bullitt, 60 N. J. Law, 119, 36 Atl. 881.

In *Wolfer v. Hurst*, 47 Or. 156, 80 Pac. 419, 82 Pac. 20, it was held that, in view of other statutes bearing on the matter, the notice to quit named in a statutory provision declaring that "a continuance in possession after notice to quit at the expiration of the time limited in a lease shall constitute an unlawful holding by force" was required as a means of terminating the tenancy, and not as a part of the procedure for forcible detainer.

¹⁷⁶ *Buhman v. Nickels & Brown Bros.*, 1 Cal. App. 266, 82 Pac. 85.

¹⁷⁷ The necessity for this purpose of a demand or notice is expressly dispensed with by some statutes. See *Illinois*, Hurd's Rev. St. 1905, c. 80, § 7 (When tenancy terminated by notice); *Maine* Rev. St. 1903, §§ 1, 2; *Tennessee*, Shannon's Code 1896, § 5100.

¹⁷⁸ *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729; *Earl Orchard Co. v. Fava*, 138 Cal. 76, 70 Pac. 1073; *Harrison v. Marshall*, 7 Ky. (4 Bibb.) 524; *Andrews v. Erwin*, 25 Ky. Law Rep. 1791, 78 S. W. 902; *Webb v. Heyman*, 40 Ill. App. 335; *Young v. Smith*, 28 Mo. 65, 75 Am. Dec. 109; *Leahy v. Lubman*, 67 Mo. App. 191; *Hollis v. Pool*, 44 Mass. (3 Mete.) 356; *McFarland v. Chase*, 73 Mass. (7 Gray) 462; *Bierkenkamp v. Bierkenkamp*, 88 Mo. App. 445; *Ray v. Blackman*, 120 Mo. App. 497, 97 S. W. 212; *Moore v. Smith*, 56 N. J. Law, 446, 29 Atl. 159; *Young v. Smith*, 28 Mo. 65, 75 Am. Dec. 109; *Hendrick v. Cannon*, 5 Tex. 248; *Morris v. Healy Lumber Co.*, 33 Wash. 451, 74 Pac. 662.

If the statute authorizes a proceeding only upon the tenant's refusal to deliver possession, a demand is evidently necessary. See *Allison v. Thompson*, 11 Ky. (1 Litt.) 31; *Ewing v. Bowling*, 9 Ky. (2 A. K. Marsh.) 35; *Den d. Puelp v. Long*, 31 N. C. (9 Ired. Law) 226; *Shepherd v. Thompson*, 65 Ky. (2 Bush) 176. But the assertion of a claim to hold adversely to the landlord was regarded as sufficient evi-

Some statutes require a demand of possession, without naming any number of days,¹⁷⁹ and others require a notice to quit of a certain number of days.¹⁸⁰

(c) **Time and length of notice.** Occasionally the statutes have been construed as requiring that the notice to quit, necessary as a prerequisite to a summary proceeding against a tenant holding over, be given after the end of the term,¹⁸¹ it being said in one case that no one should be put in the wrong by a demand which another had no right to make, of a thing which he had no right to receive or possess.¹⁸² Other statutes, requiring a notice to quit

dence of such refusal. *Hoskins v. Helm*, 14 Ky. (4 Litt.) 309, 14 Am. Dec. 133. served three days before proceeding commenced); *Oklahoma Rev. St.* 1903, § 5089 (Notice to leave served three days before proceeding commenced); *Oregon*, Bell. & C. Codes, § 5755 (Notice to quit served ten days before proceeding commenced, or ninety days in case of agricultural tenancy); *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," §§ 25, 28 (Three months' notice of intention to resume possession); *South Dakota*, Justices' Code, § 44 (Three days' notice to quit); *Wisconsin* Rev. St. 1898, § 2358 (Three days' notice to deliver possession); *Wyoming* Rev. St. 1899, § 4487 (Notice to leave served three days before proceeding commenced).

Though no notice is necessary, the landlord cannot, it seems, notify the tenant to leave on a certain day, and bring the proceeding without waiting till the expiration of that day. *Decker v. McManus*, 101 Mass. 63.

¹⁷⁹ *Alabama* Code 1907, § 4263; *Arkansas*, Kirby's Dig. St. 1904, § 3630; *Georgia* Code 1895, § 4813; *South Carolina* Civ. Code 1902, § 2423; *Texas* Rev. St. 1895, arts. 2519, 2521. See *Durie v. McLish*, 2 Ind. T. 610, 53 S. W. 437, so construing a particular statute in this respect.

¹⁸⁰ *Connecticut* Gen. St. 1902, §§ 1078, 1079 (Notice of at least ten days before end of lease or time named for quitting, unless waived in lease); *Iowa* Code 1897, § 4208 (Three days' notice in writing. See *Kellogg v. Groves*, 53 Iowa, 95, 5 N. W. 517); *Kansas* Gen. St. 1905, § 5843 (Notice to quit to be given three days before commencement of proceeding); *Maryland* Code Pub. Gen. Laws 1904, art. 53, § 1; *Nebraska* Comp. St. 1905, § 7529 (Notice to quit to be given three days before proceeding commenced); *North Dakota* Rev. Codes 1905, § 8407 (Three days' notice to quit); *Ohio* Rev. St. 1906, § 6602 (Notice to leave

¹⁸¹ *Rogers v. Hackett*, 49 Cal. 121; *Miller v. Lampson*, 66 Conn. 432, 34 Atl. 79; *Prickett v. Ritter*, 16 Ill. 96; *Doran v. Gillespie*, 54 Ill. 366; *Clapp v. Paine*, 18 Me. 264.

¹⁸² *Prickett v. Ritter*, 16 Ill. 96. But such a statement is evidently out of harmony with the common-law requirement of notice to terminate a periodic tenancy. The tenant is not, as a matter of fact, put in the wrong by the demand or notice in either case. He puts himself in the wrong. The demand is for delivery of the possession only

as a prerequisite to the proceeding, have been regarded as satisfied by a notice given before the expiration of the term,¹⁸³ this view being in one case based on the theory that the legislature cannot be presumed to have intended to make any change in the common-law notice to quit;¹⁸⁴ while in another case it is said that the object of the statute is to provide merely for notification to the tenant of the expiration of the lease and the landlord's demand for possession, so that he may have the time named for the running of the notice in which to make preparations to vacate.¹⁸⁵

In at least two states the statute expressly requires the landlord, in order to be able to maintain the proceeding against one holding over after the term, to have given a notice to quit a prescribed period before the end of the term.¹⁸⁶ And under such a provision the notice must, it has been held, require the tenant to leave at the end of the term.¹⁸⁷

The fact that the notice given is longer than that named in the statute is immaterial,¹⁸⁸ but a notice given before the end of the term and requiring the tenant to leave forthwith has been held insufficient, it not apprising the tenant of the grounds of the landlord's claim to possession.¹⁸⁹ The fact that the notice in terms required the tenant to quit within a period less than that

when the person making it becomes again and repossess such demised entitled to the possession. premises, having given three

¹⁸³ *Townly v. Rutan*, 20 N. J. Law, 604; *Drain v. Jacks*, 77 Iowa, 629, 42 N. W. 460; *Hawley v. Robeson*, 14 Neb. 435, 16 N. W. 438; *Leutzey v. Herchelrode*, 20 Ohio St. 334.

¹⁸⁴ *Hazeltine v. Colburn*, 31 N. H. 466.

¹⁸⁵ *McLain v. Calkins*, 77 Iowa, 468, 42 N. W. 373.

¹⁸⁶ *Maryland* Code Pub. Gen. Laws 1904, art. 53, § 1 (Where the lessor or his assigns "shall give notice in writing one month before the expiration of said term"); *Pennsylvania*, *Pepper & Lewis' Dig. Laws*, "Landlord & Tenant," § 28 (If the lessor "shall be desirous, upon the

determination of said lease, to have again and repossess such demised premises, having given three months' notice of such intention to his lessee," etc.). See *Rich v. Keyser*, 54 Pa. 86, 93 Am. Dec. 675.

¹⁸⁷ *Borough of Phoenixville v. Walters*, 29 Wkly. Notes Cas. (Pa.) 483. If the notice in terms so requires, the fact that a mistake is made in naming the date of the end of the term has been regarded as immaterial. *Wenger v. Raymond*, 104 Pa. 33; *Jalass v. Young*, 3 Pa. Super. Ct. 422, 40 Wkly. Notes Cas. 41.

¹⁸⁸ *Shuver v. Klinkenberg*, 67 Iowa, 544, 25 N. W. 770; *Olds v. Conger*, 1 Okl. 232, 32 Pac. 337.

¹⁸⁹ *Connell v. Chambers*, 22 Neb. 302, 34 N. W. 636.

named in the statute for the notice has been regarded as immaterial, when the statutory period was allowed to elapse before the bringing of suit for possession.¹⁹⁰

The question whether the period named in the statute has elapsed between the giving of the notice and the commencement of the proceeding, or the end of the term, as the case may be, is one of the computation of time, to be determined, it seems, by the same rules as apply in the case of a notice to quit intended to terminate a periodic tenancy.^{191,192}

(d) **Form of notice.** Unless the statute expressly provides for a written notice or demand, a verbal notice is sufficient.¹⁹³ A requirement of a written demand is not satisfied by reading a written demand to the tenant, the intention of the statute being that he shall have a writing to which he can refer.¹⁹⁴ In the absence of any statutory provision as to the form of the notice, no particular form would ordinarily be required.¹⁹⁵

The notice sufficiently describes the premises if it informs the recipient of what premises possession is demanded.¹⁹⁶

(e) **Person to give notice.** The notice must be given by the landlord or by one having authority to act for him in that regard,¹⁹⁷ and if required to be in writing should be signed by the person giving it.¹⁹⁸ If the notice is given by a person acting without authority, it cannot afterwards be ratified by the landlord so as to be effective against the tenant,¹⁹⁹ the rule in this respect

¹⁹⁰ Chamberlin v. Brown, 2 Doug. (Mich.) 120. sufficient, though the first floor of the building on the lots was occupied by others.

^{191, 192} See ante, § 201.

¹⁹³ Thamm v. Hamberg, 2 Brewst. (Pa.) 528.

¹⁹⁴ Seem v. McLees, 24 Ill. 192. ¹⁹⁷ See Nixon v. Noble, 70 Ill. 32; Brahn v. Jersey City Forge Co., 38 N. J. Law, 74 (Notice by corporate officer).

See Jenkins v. Jenkins, 63 Ind. 415, 30 Am. Rep. 229.

¹⁹⁵ See Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073. ¹⁹⁸ Ball v. Peck, 43 Ill. 482. Compare ante, § 199, at note 130. A notice signed "for C. M. H. by W. C. P., an authorized agent," was held sufficient, though it would be better, it was said, to say "authorized agent." Reed v. H., 45 Ill. 40.

¹⁹⁶ Whipple v. Shewalter, 91 Ind. 114; Cummings v. Winters, 19 Neb. 719, 28 N. W. 302. In Dimmett v. Appleton, 20 Neb. 208, 29 N. W. 474, it was held that a notice describing the property demanded by giving the numbers of the lots was ¹⁹⁹ Ball v. Peck, 43 Ill. 482; Brahn v. Jersey City Forge Co., 38 N. J. Law, 74.

being the same as that which applies to a notice intended to end the tenancy.²⁰⁰

It has been said that, when the property was sold by a contract giving the vendees the right of possession, a notice to quit was properly signed and caused to be served by one only of the two vendees.²⁰¹

It has been decided in one state that the landlord may, even though he has conveyed the reversion, give notice to quit on behalf of his grantee.²⁰² In that jurisdiction, no doubt, a notice given by the person who is landlord at the time of the giving of the notice would support a proceeding by one to whom he subsequently transfers the reversion. Whether that would be the case in other jurisdictions does not appear.

(f) **Service of notice.** The statutes of a number of states contain specific provisions, more or less elaborate, as to the mode of serving the notice which is prerequisite to a proceeding for possession.²⁰³

The notice or demand may be served, it has been held, by leaving it with the tenant's wife at his residence,²⁰⁴ or by posting it on the door of the demised premises, when these have been abandoned by the tenant.²⁰⁵ A notice served upon one of two colessees upon the premises has been held to be sufficient as to both.²⁰⁶

The notice need not be filed with the justice unless the statute so requires.²⁰⁷

Service of such a notice is no doubt to be proven as would other notices in that jurisdiction. Unless the statute provides for proof

²⁰⁰ See ante, § 198, at note 95.

²⁰¹ *Willis v. Weeks*, 129 Iowa, 525, 105 N. W. 1012. The vendor, in whom was apparently the legal fee simple title, also signed the notice.

²⁰² *Glenn v. Thompson*, 75 Pa. 389. And see cases cited ante, notes 100, 112.

²⁰³ *California* Code Civ. Proc. § 1162; *Idaho* Code Civ. Proc. § 3977; *Kansas* Gen. St. 1905, § 5397; *Montana* Rev. Codes Civ. Proc. 1907, § 7272; *Nebraska* Comp. St. 1905, § 7527; *New York* Code Civ. Proc. §§ 2231, 2240; *Ohio* Rev. St. 1906, § 6602; *Oklahoma* Rev. St. 1903, § 5089;

Utah Comp. Laws 1907, § 3578; *Washington*, Ball. Ann. Codes & St. § 5529; *Wisconsin* Rev. St. 1898, § 3358; *Wyoming* Rev. St. 1899, § 4487.

²⁰⁴ *Earl Orchard Co. v. Fava*, 138 Cal. 76, 70 Pac. 1073; *Beiler v. Devoll*, 40 Mo. App. 251; *Hazeltine v. Colburn*, 31 N. H. 466. And see ante, § 203. Compare *Doran v. Gillespie*, 54 Ill. 366.

²⁰⁵ *Consolidated Coal Co. v. Schaefer*, 135 Ill. 210, 25 N. E. 788.

²⁰⁶ *Grundy v. Martin*, 143 Mass. 279, 9 N. E. 647.

²⁰⁷ *McLain v. Nurnberg*, 16 N. D. 144, 112 N. W. 243.

by a return, it would ordinarily be proven by the testimony of the person making the service.²⁰⁸ In one jurisdiction it is held that secondary evidence of the contents of a written notice is not admissible unless notice to produce has been given.²⁰⁹

(g) **Waiver of notice.** It has occasionally been decided that the tenant may waive the giving of the statutory notice, either by a provision to that effect in the lease or otherwise,²¹⁰ but in one state a contrary view has been asserted.²¹¹

The rule which applies in the case of a notice necessary to terminate a tenancy, that it is waived by the tenant's disclaimer of the tenancy,²¹² has been decided to apply to such a notice as is here under discussion.²¹³ But the contrary has also been decided,²¹⁴ and it seems somewhat difficult to justify the application of a rule, based on the theory that one denying the tenancy cannot claim a notice as tenant, to the case of a notice based on the theory that the tenancy has ceased to exist.

A notice given by the landlord is not, it has been held, in effect withdrawn by him, because he allows a year to elapse without instituting the proceeding.²¹⁵

b. **Breach of condition.** There are in several states decisions that a statute authorizing a summary proceeding upon the "expiration" of the lease or term does not authorize it for the purpose of enforcing a right of forfeiture by the lessor for the breach

²⁰⁸ Ball v. Peck, 43 Ill. 482; Chung Yow v. Hop Chong, 11 Or. 220, 4 Pac. 326.

²⁰⁹ King v. Bolling, 77 Ala. 594, 54 Am. Rep. 80. Compare ante, § 199, at notes 148-151; § 203, at notes 228-229a.

²¹⁰ Hutchinson v. Potter, 11 Pa. 472 (Waiver in lease, dictum); Wilke v. Campbell, 5 Pa. Super. Ct. 618; Gault v. Neal, 6 Phila. (Pa.) 61; Mill Creek Coal Co. v. Andrukus, 12 Pa. Co. Ct. R. 314. And see cases cited post, note 212. In Seem v. McLees, 24 Ill. 192, it is decided that the landlord's failure to make the statutory demand for possession is not waived by the tenant's appearance.

In Clapp v. Paine, 18 Me. 264, it is said that if the tenant forcibly resists the landlord's attempt to enter on the expiration of the lease, no notice is necessary, provided such resistance was before the institution of the proceeding.

²¹¹ Wolfer v. Hurst, 47 Or. 156, 82 Pac. 20.

²¹² See ante, § 192.

²¹³ Brown v. Keller, 32 Ill. 151, 83 Am. Dec. 258; Harrison v. Marshall, 7 Ky. (4 Bibb.) 524; Rabe v. Fyler, 18 Miss. (10 Smeeds & M.) 440, 48 Am. Dec. 763.

²¹⁴ Doss v. Craig, 1 Colo. 177, 91 Am. Dec. 711.

²¹⁵ Boggs v. Black, 1 Bin. (Pa.) 333.

of an express condition, it being considered that the word "expiration" can refer only to the termination of the term or tenancy by its own limitation, and without the intervention of the landlord.²¹⁶ Even in these jurisdictions, however, the proceeding will lie if the tenancy comes to an end upon the exercise of an express option by the landlord to terminate the tenancy, the lease being limited to expire upon the exercise of such option,²¹⁷ the distinction being that before referred to, between a condition and a limitation.²¹⁸ It seems, however, that if the option is exercisable by the landlord only upon a default by the tenant, the provision should be regarded as a condition and not a limitation,²¹⁹ so that the proceeding will not lie.²²⁰ In two states, where the rule as stated in the cases first above cited was recognized, the statute has been amended so as to allow such a proceeding to enforce a

²¹⁶ *Silva v. Campbell*, 84 Cal. 420, 22 N. E. 786; *Ronginsky v. Grantz*, 24 Pac. 316; *State v. Burr*, 29 Minn. 39 Misc. 347, 79 N. Y. Supp. 839.

432, 13 N. W. 676; *Smith v. Sinclair*, ²¹⁸ See ante, § 194 c.

59 N. J. Law, 84, 34 Atl. 943; *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 88. ²¹⁹ See ante, § 194 c, at notes 87,

226; *Kramer v. Amberg*, 15 Daly, ²²⁰ See *Beach v. Nixon*, 9 N. Y. (5 Seld.) 35; *Kramer v. Amberg*, 15 205, 4 N. Y. Supp. 613; *Id.*, 115 N. Y. 655, 21 N. E. 1119; *Bixby v. Casino Co.*, 14 Misc. 346, 35 N. Y. Supp. 677; *N. Y. 655, 21 N. E. 1119; In re Guaranty Bldg. Co.*, 52 App. Div. 100, 64 N. Y. Supp. 1040; *In re Guaranty Bldg. Co.*, 52 App. Div. 140, 64 N. Y. Supp. 1056; *Penoyer v. Brown*, 13 Abb. N. C. (N. Y.) 82. that the language of the lease may create a limitation terminating the tenancy on the default of the tenant,

A special stipulation for summary proceedings in such case has been decided to be ineffective. *Beach v. Nixon*, 9 N. Y. (5 Seld.) 35. In *Bixby v. Casino Co.*, 14 Misc. 346, 35 N. Y. Supp. 677, and *McMahon v. Howe*, 40 Misc. 546, 82 N. Y. Supp. 984, it is decided that the word "re-enter," in a clause allowing the landlord to re-enter on default, entitles him to maintain ejectment, but not a summary proceeding. so as to authorize the proceeding, see *Estelle v. Dinsbeer*, 9 Misc. 487, 30 N. Y. Supp. 243; *Cottle v. Sullivan*, 8 Misc. 184; *Martin v. Crossley*, 46 Misc. 254, 91 N. Y. Supp. 712. The case of *Estelle v. Dinsbeer*, 9 Misc. 487, 30 N. Y. Supp. 243, *supra*, might perhaps be distinguished upon the ground that the default which was to render the lease "null and void" was in the performance of a stipulation not connected with the enjoyment of the premises, that is, the payment for furniture sold by the lessor to the lessee.

²¹⁷ *Miller v. Levi*, 44 N. Y. 489, 4 Am. Rep. 705; *Manhattan Life Ins. Co. v. Gosford*, 3 Misc. 509, 23 N. Y. Supp. 7; *Scott v. Willis*, 122 Ind. 1,

forfeiture.²²¹ In some jurisdictions the view above referred to has not been adopted, and a statute authorizing the proceeding upon the termination or expiration of the lease has been held to authorize it to enforce the right of re-entry on breach of an express condition.²²² In others there are cases in which it is assumed that the proceeding will lie for such purpose.²²³ In one state it has been held to lie to enforce a forfeiture by reason of a disclaimer of the tenancy.²²⁴

c. **Illegal use of premises.** As before stated, in many states

²²¹ In Connecticut, formerly, the statute provided for the proceeding "on expiration of the lease," against a tenant "holding over after the term of the lease," and it was held that it would not lie on breach of condition. *Du Bouchet v. Wharton*, 12 Conn. 533. But subsequently the statute was amended so as to authorize the proceeding in case the lease should "terminate by lapse of time or by reason of any express stipulation thereof," and the proceeding was held to lie for breach of condition. *Lang v. Young*, 34 Conn. 526; *Schroeder v. Tomlinson*, 70 Conn. 348, 39 Atl. 484. In Massachusetts, also, it was held that the proceeding would not lie for breach of condition under a statute authorizing it "after the determination of the lease, either by its own limitation or notice to quit." *Fifty Associates v. Howland*, 52 Mass. (11 Metc.) 99. But the statute was subsequently amended by adding the words "or otherwise" after "notice to quit," and the proceeding was assumed to lie on breach of condition. *Whitwell v. Harris*, 106 Mass. 532. See remarks of Mr. Justice Gray in *Willis v. Eastern Trust & Banking Co.*, 169 U. S. 295, 306, 42 Law. Ed. 752. The effect of the decisions holding that the statutes as amended authorize the proceeding upon the

breach of an express condition is to authorize the proceeding before, and not upon, or after, the termination of the lease or term, since the mere breach of condition in itself does not terminate the lease.

²²² *Ellis v. Fitzpatrick*, 55 C. C. A. 260, 118 Fed. 430; *Follin v. Coogan*, 12 Rich Law (S. C.) 44; *Quinn v. McCarty*, 81 Pa. 475; *Preston v. Stover*, 70 Neb. 632, 97 N. W. 812.

²²³ *Walker v. Dowling*, 24 Ky. Law Rep. 179, 68 S. W. 135; *Andrews v. Erwin*, 25 Ky. Law Rep. 1791, 78 S. W. 902; *Dietz v. Barnard*, 32 Ky. Law Rep. 1130, 107 S. W. 766; *Leduke v. Barnett*, 47 Mich. 158, 10 N. W. 182; *Witte v. Quinn*, 38 Mo. App. 681; *Cochran v. Philadelphia Mortg. & Trust Co.*, 70 Neb. 100, 96 N. W. 1051; *Parks v. Hays*, 92 Tenn. 161, 22 S. W. 3; *Johnston v. Hargrove*, 81 Va. 118.

In *Lane v. Brooks*, 120 Ill. App. 501, it is decided that a clause authorizing the lessor, upon default in rent, "at his election, without notice or demand of rent, to declare said term ended and to re-enter," did not authorize him to maintain the proceeding without previous notice of election to terminate the lease.

²²⁴ *Fortier v. Ballance*, 10 Ill. (5 Gilm.) 41; *Fusselman v. Worthington*, 14 Ill. 135.

the use of the premises by the tenant, for any illegal purpose, or for some particular illegal purpose specified in the statute, has the effect of forfeiting the tenant's interest.²²⁵ Quite frequently the statute expressly provides that in such case the landlord may bring a summary proceeding to recover possession, or, which is the same thing, may proceed in the same manner as when the tenant holds over his term.²²⁶ A summary proceeding has, in one state at least, been regarded as a proper method of enforcing the forfeiture even though it is not so expressly provided.²²⁷ But a statute authorizing a summary proceeding against a tenant holding over after the expiration of his term would presumably not apply to such a case in any jurisdiction in which such a statute has been held not to apply in case of the breach of an express condition.²²⁸

It has been decided that no notice to quit was necessary, before bringing a proceeding under the statute on account of an illegal use of the premises, when the statute did not specifically so provide, and the owner of premises so used was required, under severe penalties, to eject the occupant responsible for the illegal use.²²⁹

Under a statute authorizing the proceeding in case of illegal use, such use of part of the demised premises by a subtenant, with the knowledge of the original tenant, will, it has been held, justify the recovery of the whole premises by the landlord in chief.²³⁰ If the business carried on upon the premises is unlawful, it is said, the landlord has the right to recover possession, though the carrying on of such business is not an indictable offense.²³¹

²²⁵ See ante, § 193 b.

²²⁶ See *Connecticut* Gen. St. 1902, § 1085; *Iowa* Code 1897, §§ 2426, 4990; *Kansas* Gen. St. 1905, §§ 2331, 2497; *Maine* Rev. St. 1903, c. 22, § 4; *Massachusetts* Rev. Laws 1902, c. 101, § 10; *Michigan* Comp. Laws 1897, § 5398; *New Jersey*, 2 Gen. St. p. 1923, § 34; *New York* Code Civ. Proc. § 2231 (5); *Tennessee*, Shannon's Code 1896, § 6769; *Utah* Comp. Laws 1907, § 3575; *Washington*, Ball. Ann. Codes & St. § 5527 (5).

²²⁷ *Justice v. Lowe*, 26 Ohio St.

372; *McGarvey v. Puckett*, 27 Ohio St. 669. Compare *Ryan v. Kirkpatrick*, 1 Ohio Wkly. Law Bul. 303, 7 Ohio Dec. 219.

²²⁸ See ante, at note 216.

²²⁹ *Prescott v. Kyle*, 103 Mass. 381.

²³⁰ *People v. Bennett*, 14 Hun (N. Y.) 63; *People v. McCarty*, 62 How. Pr. (N. Y.) 152.

²³¹ *People v. McCarty*, 62 How. Pr. (N. Y.) 152.

As to the effect of the discontinuance of the illegal use prior to the institution of the proceeding, see

It has been held in New York that a proceeding to oust the tenant is maintainable under the statute, by reason of the illegal use of the premises by a subtenant, though such illegal use has ceased, if the subtenant is still in possession.²³²

d. **Nonpayment of rent**—(1) **Statutory provisions.** The statutes of many of the states authorize a proceeding to recover possession of the premises upon failure to pay the agreed rent,²³³ without reference to whether the lease contains an express stipulation for forfeiture on such nonpayment.²³⁴ But summary proceedings, being based purely on the statute, will not lie on account of the nonpayment of rent, in the absence at least of an express stipulation for forfeiture,²³⁵ unless the statute expressly names this as a ground for the proceeding.²³⁶

Occasionally the statute authorizes the proceeding to recover possession for nonpayment of rent only if there is not sufficient property on the premises to enable the landlord to realize the arrears of rent by distress.²³⁷

Shaw v. McCarty, 11 Daly (N. Y.) 150, 63 How. Pr. 286, 2 Civ. Proc. R. 49, distinguished in *Stearns v. Hemmens*, 21 Abb. N. C. 312, 14 Daly, 501, 1 N. Y. Supp. 52.

That parties coming on the premises for the purpose of doing business with the tenant are guilty of disorderly conduct is not sufficient to justify the expulsion of the tenant, it has been held, under a statute authorizing the expulsion of a tenant keeping a disorderly house. *Moench v. Yung*, 16 Daly, 143, 9 N. Y. Supp. 637. As to evidence admissible in regard to the past illegal use of the premises, see *Goelet v. Lawlor*, 16 Misc. 59, 37 N. Y. Supp. 691.

²³² *Stearns v. Hemmens*, 1 N. Y. Supp. 52; *Conforti v. Romano*, 50 Misc. 148, 98 N. Y. Supp. 194, distinguishing *Shaw v. McCarty*, 2 Civ. Proc. R. 49, where the subtenant was no longer in possession. Compare preceding note.

²³³ See statutes cited post, notes 256, 276-280.

²³⁴ See *Parker v. Geary*, 57 Ark. 301, 21 S. W. 472; *Chadwick v. Parker*, 44 Ill. 326; *Leary v. Pattison*, 66 Ill. 203; *Hunter v. Porter*, 10 Idaho, 72, 86, 77 Pac. 434; *Suchanek v. Smith*, 45 Minn. 26, 47 N. W. 397; *Seeger v. Smith*, 74 Minn. 279, 77 N. W. 3; *Pollock v. Whipple*, 33 Neb. 752, 51 N. W. 130; *Fleishauer v. Bell*, 44 Misc. 240, 88 N. Y. Supp. 922; *Dakota Hot Springs Co. v. Young*, 9 S. D. 577, 70 N. W. 842; *People v. Bennett*, 14 Hun (N. Y.) 58 (semble).

²³⁵ See ante, § 274 b.

²³⁶ *Bauer v. Knoble*, 51 Minn. 358, 53 N. W. 805; *Meroney v. Wright*, 81 N. C. 390. And see post, at note 350.

²³⁷ *Mississippi Code* 1906, § 2884; *New Jersey*, 2 Gen. St. 1922, § 30; *Pennsylvania*, *Pepper & Lewis' Dig. Laws*, "Landlord & Tenant," § 34. That payment of rent cannot be obtained by distress may be shown by affidavit without any actual distress. See *Rogers v. Lynds*, 14 Wend. (N. Y.) 172.

(2) **Applicability of the statutes.** It has been held that a summary proceeding does not lie, under a statute authorizing it for nonpayment of rent if there is no sufficient distress on the premises, when the rent is to consist of a named portion of the crops, since the rent is not then certain.²³⁸ The tenant's failure to pay taxes,²³⁹ or to pay for repairs,²⁴⁰ as agreed, does not authorize summary proceedings as for nonpayment of rent, but it has been decided that if the lease provides that the tenant shall pay the water rents, and that on his failure so to do the landlord may enforce payment thereof to him as part of the rent, a summary proceeding will lie on account of their nonpayment.²⁴¹

The fact that personal property is leased with the land at a gross rent does not preclude a summary proceeding on its nonpayment, it issuing, in the eye of the law, entirely out of the land.²⁴²

If it is agreed that double rent shall be paid by the tenant in case of a breach by him of a covenant in the lease, the proceeding, it has been decided, will lie on nonpayment of such double rent.²⁴³

It has been decided that if the tenant holds over the term with the landlord's assent, the latter may maintain a summary proceeding on account of the nonpayment of rent accruing during the original term, the entire holding constituting one continuous tenancy.²⁴⁴ If the tenant has ceased to hold as tenant, and has entered into an agreement of purchase, under which he is holding, he cannot, it has been decided, be dispossessed for nonpayment of rent which accrued when he was tenant.²⁴⁵

²³⁸ *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 226.

In *Ricketts v. Richardson*, 85 Ind. 508, it is said, without any discussion, that "if land be leased for cultivation, and a house with it, in the same contract, and the land is to be paid for by half the crop, and the house to be paid for by \$25, payable six months before the expiration of the lease, the nonpayment of the \$25 will not authorize the landlord to determine the entire lease by a ten days' notice to quit." It was left undecided whether the house alone could be recovered.

²³⁹ *People v. Swayze*, 15 Abb. Pr. (N. Y.) 432.

²⁴⁰ *Bien v. Bixby*, 18 Misc. 415, 18 N. Y. Supp. 433; *Simonelli v. Di Ericco*, 59 Misc. 485, 110 N. Y. Supp. 1044.

²⁴¹ *Cochran v. Reich*, 20 Misc. 623, 45 N. Y. Supp. 443.

²⁴² *Welch v. Ashby*, 88 Mo. App. 400; *Armstrong v. Cummings*, 20 Hun (N. Y.) 313, 58 How. Pr. 331.

²⁴³ *People v. Bennett*, 14 Hun (N. Y.) 58.

²⁴⁴ *People v. Paulding*, 22 Hun (N. Y.) 91.

²⁴⁵ *Burnett v. Scribner*, 16 Barb. (N. Y.) 621.

There is a decision that an executor of a tenant, who defaults in payment of rent, is not within a statute providing a summary proceeding where a tenant continues in possession "in person or by subtenant" after such default.²⁴⁶ It might have been decided that an executor who accepts the leasehold²⁴⁷ is subject to the proceeding as a tenant, continuing in possession in person.

If the proceeding is instituted against the lessee's assignee on account of the nonpayment of rent, he cannot defend by showing that he has paid all that accrued during his holding, but he must also pay whatever arrears may have become due during the tenancy of his predecessor in interest.²⁴⁸

If the tenant fails to pay the rent reserved under the lease, a subtenant may be dispossessed on account of such nonpayment, since the subtenant's holding rests entirely on the original lease.²⁴⁹

That the tenant has given security for the payment of the rent does not affect the landlord's right to maintain the proceeding in case of nonpayment,²⁵⁰ but if the tenant gives a note for the rent, the proceeding will not lie, it has been held, till the maturity of the note.^{251, 252}

The fact that a personal action to recover the rent has been previously instituted,²⁵³ or even that there has been a judgment therein,²⁵⁴ has been held not to constitute a bar to a summary proceeding to recover possession for nonpayment.

(3) **Demand for rent as prerequisite.** At common law, as is stated elsewhere,²⁵⁵ a demand for the rent on the day on which it is due, at a certain time of such day, and upon the premises, is necessary in order that the landlord may enforce an express condition of forfeiture for nonpayment. None of the statutes in regard to summary proceedings assert the necessity of any such

²⁴⁶ *Martel v. Meehan*, 63 Cal. 47.

²⁴⁷ See ante, § 158 h.

²⁴⁸ *Collender v. Smith*, 20 Misc. 612, 45 N. Y. Supp. 1130.

²⁴⁹ *Patchell v. Johnston*, 64 Ill. 305.

²⁵⁰ *People v. McAdam*, 59 How. Pr. (N. Y.) 19. See *Brainard v. Hudson*, 1 City Ct. R. (N. Y.) 448.

^{251, 252} *Spiro v. Barkin*, 30 Misc. 87, 61 N. Y. Supp. 870.

²⁵³ *Schuman Piano Co. v. Mark*, 208 Ill. 282, 70 N. E. 226.

²⁵⁴ *Durant Land Imp. Co. v. Thomson Houston Elec. Co.*, 2 Misc. 182, 21 N. Y. Supp. 764. It was also there decided that the fact that an undertaking was given by the tenant on appealing from the judgment did not affect the right to maintain the proceeding.

²⁵⁵ See ante, § 194 f (1).

formal demand, though occasionally they provide that a proceeding to recover possession for nonpayment of rent shall be instituted only after a demand for the rent,²⁵⁶ and sometimes they provide for a demand for the rent as a part of a notice to quit, that is, for a demand in the alternative for rent or for possession.²⁵⁷ More frequently, however, there is no provision for a demand for the rent, but the purpose of a demand is fulfilled by the notice to quit which the statute requires,²⁵⁸ the tenant ordinarily having the option of paying the rent during the running of the notice and of thus preventing the forfeiture.²⁵⁹ That no demand for rent is necessary in the absence of an express requirement has been several times judicially recognized.²⁶⁰

In New York the statute provides that the proceeding may be instituted after a demand for rent "or" three days' notice requiring payment of rent or possession.²⁶¹ The demand for rent

²⁵⁶ *Arizona* Rev. St. 1901, § 2693 (Provides that no "formal demand" is necessary); *Illinois*, Hurd's Rev. St. 1905, c. 80, § 8 (See *Cone v. Woodward*, 65 Ill. 477); *Missouri* Rev. St. 1899, § 4131 (Section 4135 provides that any demand is good when made at any time after rent becomes due); *Nevada* Comp. Laws 1900, § 3825 (Section 3826 provides that it may be made at any time).

²⁵⁷ See post, at note 279.

²⁵⁸ See post, § 274 d (4).

²⁵⁹ See post, § 274 d (7).

²⁶⁰ *Woods v. Soucy*, 166 Ill. 407, 47 N. E. 67; *Ingalls v. Bissot*, 25 Ind. App. 130, 57 N. E. 723; *Union Scale Co. v. Iowa Mach. & Supply Co.*, 136 Iowa, 171, 113 N. W. 762, 125 Am. St. Rep. 250; *Kimball v. Rowland*, 72 Mass. (6 Gray) 224; *Borden v. Sackett*, 113 Mass. 214; *Gibbens v. Thompson*, 21 Minn. 398; *Spooner v. French*, 22 Minn. 37; *Dakota Hot Springs Co. v. Young*, 9 S. D. 577, 70 N. W. 842; *Johnston v. Hargrove*, 81 Va. 118 (semble); *Hendrickson v. Beeson*, 21 Neb. 61, 31 N. W. 266; *Haynes v. Union Inv. Co.*, 35 Neb.

766, 53 N. W. 979; *Horan v. Thomas*, 60 Vt. 325, 13 Atl. 567. Contra, *Clark v. Everly*, 2 Clark (Pa.) 219. In *Judd v. Fairs*, 53 Mich. 518, 19 N. W. 266, reference is made to the fact that in the particular case demand for rent was made, in addition to giving the statutory notice to quit.

In *Parks v. Hays*, 92 Tenn. 161, 22 S. W. 3; *Johnston v. Hargrove*, 81 Va. 118, it is decided that a demand is necessary where the proceeding is brought to enforce an express right of re-entry. To the same effect, apparently, is *Cole v. Johnson*, 120 Iowa, 667, 94 N. W. 1113. This latter case is, in *Union Scale Co. v. Iowa Mach. & Supply Co.*, 136 Iowa, 171, 113 N. W. 762, 125 Am. St. Rep. 250, supra, stated to be based on the fact that the amount of rent, as well as the place of payment, was uncertain.

²⁶¹ Code Civ. Proc. § 2231 (2). See *Rogers v. Lynds*, 14 Wend. (N. Y.) 172; *Tolman v. Heading*, 11 App. Div. 264, 42 N. Y. Supp. 217; *Boyd v. Milone*, 24 Misc. 734, 53 N. Y. Supp. 785; *Heinrich v. Mack*, 25 Misc.

necessary, under this statute, to avoid the necessity of the three days' notice, must be made personally upon the tenant,²⁶² and a demand made on an under tenant,²⁶³ or by mail,²⁶⁴ has been decided to be insufficient. But it may be made on one of two joint lessees.²⁶⁵ The demand may be made by an authorized agent of the landlord as well as by the landlord himself,²⁶⁶ or by one of two joint lessors.²⁶⁷

The demand, it has been said, need not be made, as at common law, upon the premises or at the place where payable.²⁶⁸ But in one state a different view was taken of a statute providing for a summary proceeding after a demand for rent.²⁶⁹

The demand is sufficient, it has been decided, though it is for only part of the rent then due.²⁷⁰ But it is presumably not good, in some jurisdictions at least, if it is for more than the rent due,²⁷¹ since the tenant is justified in refusing such a demand. A demand in terms for the amount due, without naming the amount, has been adjudged to be a sufficient compliance with the statutory

597, 56 N. Y. Supp. 155; McMahon v. Howe, 40 Misc. 546, 82 N. Y. Supp. 984; Glanz v. Schaefer, 102 N. Y. Supp. 518.

²⁶² See *People v. Gross*, 50 Barb. (N. Y.) 231; *Tolman v. Heading*, 11 App. Div. 264, 42 N. Y. Supp. 217; *Boyd v. Milone*, 24 Misc. 734, 53 N. Y. Supp. 785.

²⁶³ *People v. Platt*, 43 Barb. (N. Y.) 116.

²⁶⁴ *Zinsser v. Herrman*, 23 Misc. 645, 52 N. Y. Supp. 107.

²⁶⁵ *Geisler v. Acosta*, 9 N. Y. (5 Seld.) 227.

²⁶⁶ *People v. Stuyvesant*, 1 Hun (N. Y.) 102.

²⁶⁷ *Griffin v. Clark*, 33 Barb. (N. Y.) 46.

²⁶⁸ *Cockerline v. Fisher*, 140 Mich. 95, 103 N. W. 522, 12 Det. Leg. N. 55; *Wolcott v. Schenk*, 16 How. Pr. (N. Y.) 449.

²⁶⁹ *Gage v. Bates*, 40 Cal. 384. And see *Nowell v. Wentworth*, 58 N. H. 319, referred to *infra*, note 271.

²⁷⁰ *Mooers v. Martin*, 99 Mo. 94, 12 S. W. 522; *Sheldon v. Testera*, 21 Misc. 477, 47 N. Y. Supp. 653, in which latter case it is stated that the payment of such part prevents the issue of the precept till the tenant is again put in default by a demand.

²⁷¹ It is so decided in *Nowell v. Wentworth*, 58 N. H. 319, as regards the demand there required as a prerequisite to a summary proceeding, it being said that the common-law rule applies except as changed by statute. But in New York a demand for more than is due seems to be regarded as good. See *Durant Land Imp. Co. v. East River Elec. Co.*, 15 Daly, 337, 6 N. Y. Supp. 659; *Sheldon v. Testera*, 21 Misc. 477, 47 N. Y. Supp. 653; 3 *McAdam, Landl. & Ten.* (3d Ed.) 97. There the demand is not bad because interest is included. *People v. Dudley*, 58 N. Y. 323.

requirement.²⁷² A demand is obviously ineffective if the rent demanded is not due at the time of demand.²⁷³

That the act of the landlord be effective as a demand, it must, it has been said, be intended as such by the landlord, and so understood by both parties.²⁷⁴

The statutory requirement of a demand for the rent as a prerequisite to the proceeding may, it has been decided, be dispensed with by express agreement.²⁷⁵

(4) **Notice to quit as prerequisite**—(a) **Statutory provisions.** Some of the statutes authorize the proceeding immediately upon default in the payment of rent,²⁷⁶ and some after a prescribed number of days.²⁷⁷ Some provide that the landlord or person entitled to possession must make demand for possession or give a notice to quit of a prescribed number of days before instituting proceedings.²⁷⁸ Others require that he first give notice of a cer-

²⁷² *Durant Land Imp. Co. v. Thomson-Houston Elec. Co.*, 2 Misc. 182, 1 N. Y. Supp. 764; *McLean v. Spratt*, 20 Fla. 515. Compare *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; *Byrnett v. Gardner*, 35 Wash. 668, 77 Pac. 1048.

²⁷³ *Parker v. Gortatowsky*, 129 Ga. 623, 59 S. E. 286.

²⁷⁴ *Norris v. Morrill*, 40 N. H. 395, 43 N. H. 213.

²⁷⁵ *Espen v. Hinchcliffe*, 131 Ill. 468, 23 N. E. 592.

²⁷⁶ *Georgia Code* 1895, § 4813 (After demand for possession); *Minnesota Rev. Laws* 1905, § 4038; *Missouri Rev. St.* 1899, § 4131 (After demand for rent); *Nevada Comp. Laws* 1900, § 3825 (After demand for rent); *New York Code Civ. Proc.* § 2231 (After demand of rent, or three days' notice requiring payment of rent or possession); *Oregon, Bell. & C. Codes*, § 5745 (Semble, after demand for possession. See *Hislop v. Moldenhauer*, 21 Or. 208, 27 Pac. 1052); *South Carolina Civ. Code*, § 2423 (Demand for possession requisite. See *State v. Marshall*, 24 S. C.

507; *Keller v. Pagan*, 54 S. C. 255, 32 S. E. 353).

²⁷⁷ *Arizona Rev. St.* 1901, § 2693 (Five days); *Rhode Island Gen. Laws* 1896, c. 269, § 7 (If rent overdue fifteen days).

²⁷⁸ *Arkansas, Kirby's Dig. St.* 1904, § 3630 (After three days' notice to quit and demand made in writing for possession); *Connecticut Gen. St.* 1902, § 1078 (Ten days' notice, to be given after nine days from default in rent under parol lease); *Indiana, Burns' Ann. St.* 1901, §§ 7092, 7094 (After ten days' notice to quit, lease to determine unless rent paid within the ten days, but if rent payable in advance, no notice to quit necessary); *Iowa Code* 1897, § 4208 (After three days' notice to quit); *Kansas Gen. St.* 1905, §§ 4057, 4058 (If tenancy for three months or more, ten days' notice to quit shall terminate lease, unless rent paid within ten days, and if tenancy for less time, five days' notice, and it shall be stated in notice that proceeding will be instituted. See section 5843); *Massachusetts Rev. Laws*

tain number of days, usually three, requiring in the alternative payment of rent or possession of the premises;²⁷⁹ while one at least provides for a notice to the effect that the tenancy will terminate unless the rent is paid within a specified number of days.²⁸⁰ Occasionally the statute has required both a notice to terminate the tenancy for nonpayment of rent, and a subsequent notice as a preliminary to a possessory proceeding.²⁸¹

No notice to quit is necessary if the statute does not expressly require it,²⁸² and the fact that the lease authorizes the lessor to declare a forfeiture for nonpayment, after a notice of intention to do so, does not render such a notice necessary when the proceeding is brought under the statute, without reference to such provision for forfeiture.²⁸³

A provision for the termination of the tenancy and the re-

1902, c. 129, §§ 11, 12 (After fourteen days' notice to quit); *Michigan*, 3 Comp. Laws 1897, § 11164 (After demand of possession and tenant's non-compliance for seven days); *Nebraska* Comp. St. 1905, § 7527 (After notice to leave, to be served three days before commencing action); *New Hampshire* Pub. St. 1901, c. 24 b, § 3 (After seven days' notice, if tenant neglects or refuses to pay the rent on demand); *New Mexico* Comp. Laws, §§ 3345, 3347; *North Dakota* Rev. Codes 1905, §§ 8406, 8407 (After nonpayment for three days and three days' notice to quit); *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," § 34 (After notice to quit within fifteen or thirty days, according to time of year); *South Dakota*. Justices' Code, §§ 44, 45 (After nonpayment for three days and three days' notice to quit); *Wyoming* Rev. St. 1899, §§ 4486, 4487 (After nonpayment for three days and three days' notice to quit).

²⁷⁹ *California* Code Civ. Proc. § 1161; *Colorado*, Mills' Ann. St. 1891, § 1973; *Florida* Gen. St. 1906, § 2227; *Idaho* Code Civ. Proc. § 3974; *Mississippi*

Code 1906, § 2885; *Montana* Rev. Codes 1907, § 7271; *New Jersey*, 2 Gen. St. 1902, § 30; *New York* Code Civ. Proc. § 2231; *Utah* Comp. Laws 1907, § 3575; *Virginia* Code 1904, § 2719 (Default continued five days after such alternative notice); *Washington*, Ball. Ann. Codes & St. § 5527; *Wisconsin* Rev. St. 1898, § 3358.

²⁸⁰ *Illinois*, Hurd's Rev. St. 1905, c. 80, § 8 (Notice that if not paid within time named, at least five days, tenancy to terminate).

²⁸¹ See *Douglass v. Parker*, 32 Kan. 593, 5 Pac. 178; *Smith v. Rowe*, 31 Me. 212.

²⁸² *Caley v. Rogers*, 72 Minn. 100, 75 N. W. 114. Or when the statute expressly so provides. *Ingalls v. Bissot*, 25 Ind. App. 130, 57 N. E. 723; *Thomas v. Walmer*, 18 Ind. App. 112, 46 N. E. 695. See, also, *Dietz v. Barnard*, 32 Ky. Law Rep. 1120, 107 S. W. 766, where the lease provided for a forfeiture and recovery of possession thereon without demand.

²⁸³ *Rogers v. Grote Paint Co.*, 118 Mo. App. 334, 94 S. W. 549.

covery of possession after giving a notice to quit of a prescribed number of days does not cause the tenancy to terminate immediately upon the giving of the notice, but it does so only after the expiration thereof.²⁸⁴ The suit for possession cannot be instituted until after the last day upon which the rent may, by the terms of the notice, be paid.²⁸⁵

(b) **Form of notice.** A statutory requirement of three days' notice to quit is not satisfied by a written demand for the rent followed by an interval of three days before action,²⁸⁶ and a requirement of a notice to quit of a certain number of days has been held not to be satisfied by a notice to the tenant, "being in arrears of rent," to deliver up the premises "forthwith,"²⁸⁷ it being said that the notice should either state with accuracy the time at which by law the tenant is required to leave the premises, or in some other way refer him to his legal rights under the statute.²⁸⁸ A demand for possession, without naming any time for quitting, would seem ordinarily to be insufficient,²⁸⁹ but the requirement of a notice to quit has been regarded as not requiring a statement in the notice that it is on account of the nonpayment of rent.²⁹⁰

The requirement, found in a number of states,^{290a} of a notice in the alternative, requiring either the payment of rent or the delivery of possession within a certain time, would seem to involve a statement in the notice that the rent is in arrear and a demand thereof,²⁹¹ but it has in one state, apparently, been regarded as

²⁸⁴ *Frazier v. Caruthers*, 44 Ill. App. 61; *Douglass v. Parker*, 32 Kan. 593, 5 Pac. 178; *Brooks v. Allen*, 146 Mass. 201, 15 N. E. 584; *Wray-Austin Mach. Co. v. Flower*, 140 Mich. 452, 103 N. W. 873, 12 Det. Leg. N. 214.

²⁸⁵ *Cheek v. Preston*, 34 Ind. App. 343, 72 N. E. 1048, a case involving the computation of the time named.

²⁸⁶ *Conley v. Conley*, 78 Wis. 665, 47 N. W. 950.

²⁸⁷ *Oakes v. Munroe*, 62 Mass. (8 Cush.) 282; *Elliott v. Stone*, 66 Mass. (12 Cush.) 174.

²⁸⁸ See *Granger v. Brown*, 65 Mass. (11 Cush.) 191.

²⁸⁹ See *Currier v. Barker*, 68 Mass. (2 Gray) 224.

²⁹⁰ *Granger v. Brown*, 65 Mass. (11 Cush.) 191. And see *Judd v. Fairs*, 53 Mich. 518, 19 N. W. 266, which seems to assume this, there having been, however, a demand for the rent previous to the notice. An objection to the notice on this ground must, it has been held, be made before trial. *McLain v. Nurnberg*, 16 N. D. 144, 112 N. W. 243.

^{290a} See ante, at note 279.

²⁹¹ A notice demanding possession for failure to pay rent, and notifying the tenant that unless the rent is paid, or possession delivered within

satisfied by an oral demand for the rent, followed by a written notice to quit.²⁹² A demand for payment of the rent, without the alternative demand for possession within the prescribed time, as provided by the statute, is not sufficient.²⁹³

A statement in the notice that the rent was due and unpaid on a certain day, without naming the amount, has been regarded as sufficiently designating the sum due, by reason of the tenant's knowledge of the amount of rent then becoming due.²⁹⁴

A statute requiring a notice that, unless payment is made within a period named, the lease will be terminated, has been regarded as complied with by a demand for immediate payment, coupled with a demand for possession within the prescribed number of days if the rent is not paid.²⁹⁵ A notice "to leave" for nonpayment of rent is a sufficient compliance with a statute requiring a notice to quit.²⁹⁶

The notice should describe the premises with sufficient certainty to enable the tenant to identify them.²⁹⁷ It has been regarded as defective when, though correctly describing the premises, it wrongfully describes the lease as made by the person instituting the proceeding instead of by his grantor.²⁹⁸

An obvious clerical mistake in the notice, such as the substitution of "me" for "you" or *vice versa*, will not, it has been decided, invalidate the notice.²⁹⁹

three days, proceedings for possession would be begun, was regarded as sufficiently notifying the tenant that if he paid the rent he need not deliver possession. *Brauchle v. Nothelfer*, 107 Wis. 457, 83 N. W. 653. In *Mullone v. Klein*, 55 N. J. Law, 479, 27 Atl. 902, it is said that the notice must be given to the tenant from whom the rent is due by the person entitled to receive the rent, or his agent, that it must be a demand for rent, and must state the amount due and for what premises it is due, and that it must show who is the landlord and require payment to him within three days of its service.

²⁹² *Judd v. Fairs*, 53 Mich. 518, 19 N. W. 266.

²⁹³ *People v. Gross*, 50 Barb. (N. Y.) 231. As to the computation of the statutory period, see *Bristed v. Harrell*, 20 Misc. 348, 45 N. Y. Supp. 918.

²⁹⁴ *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760, citing *McLean v. Spratt*, 20 Fla. 515, ante, note 272.

²⁹⁵ *Howland v. White*, 48 Ill. App. 236; *Farnam v. Hohman*, 90 Ill. 312.

²⁹⁶ *Douglass v. Anderson*, 32 Kan. 350, 4 Pac. 257.

²⁹⁷ *Farnam v. Hohman*, 90 Ill. 312; *Whipple v. Shewalter*, 91 Ind. 114.

²⁹⁸ *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 35 Law Ed. 332.

²⁹⁹ *Lacrabere v. Wise* (Cal.) 71 Pac. 175.

(c) **Person to give notice.** The person to give the notice to quit is undoubtedly, in the ordinary case, the person to whom the rent is due, and who is instituting the proceeding.

A notice to quit for nonpayment of rent has been treated as sufficient when signed by but one of the executors who instituted the proceeding.³⁰⁰ A notice, followed by a proceeding, by one of two joint lessors, was upheld.³⁰¹

A notice signed by the agent of the landlord was held to be sufficient when the statute provided for the removal of the tenant for nonpayment of rent after service on him of three days' notice "in behalf of" the person entitled to the rent, and authorized an agent to make the application for the tenant's removal.³⁰²

(d) **Waiver of requirement.** There are decisions to the effect that the statutory requirement of a notice to quit may be waived by the person in possession.³⁰³ In some jurisdictions, such a notice might be regarded as jurisdictional, and not susceptible of waiver.³⁰⁴

³⁰⁰ *Gilmore v. H. W. Baker Co.*, 12 Wash. 468, 41 Pac. 124.

³⁰¹ *Mullone v. Klein*, 55 N. J. Law, 479, 27 Atl. 902, ante, note 291. See *Griffin v. Clark*, 33 Barb. (N. Y.) 46.

³⁰² *Powers v. De O*, 64 App. Div. 373, 72 N. Y. Supp. 103.

A demand for rent, required by a local statute, as a preliminary to the proceeding, may be made by an employee of the lessor's agent, this being a class of duty which may be delegated by an agent. *Neiner v. Altemeyer*, 68 Mo. App. 243.

³⁰³ *Belinski v. Brand*, 76 Ill. App. 404, which is based on *Espen v. Hinchliffe*, 131 Ill. 468, 23 N. E. 592, where there is a strong dictum to that effect, which is in turn based upon authorities adjudging that the common-law demand as a prerequisite for breach of an express condition may be waived. The same is assumed in *Woodward v. Cone*, 73 Ill. 241. In *Kenyon v. Manley*, 125 Ill. App. 615, it is held that a waiver in

terms of "notice to terminate the tenancy" dispenses with the notice required by the statute in order to terminate a tenancy for nonpayment of rent. *Eichart v. Bargas*, 51 Ky. (12 B. Mon.) 462, is also to the effect that the parties may by agreement dispense with the requirement of notice.

³⁰⁴ See *Wolfer v. Hurst*, 47 Or. 156, 80 Pac. 419, 82 Pac. 20. In Pennsylvania there is one decision that the parties cannot, by stipulation, fix a time for notice less than that named in the statute. *McCloud v. Jagers*, 3 Phila. 304. The contrary seems to be assumed in *Hopkins v. McClelland*, 8 Phila. 302, and presumably the courts of that state would follow the same rule in this regard as that which they have adopted as to the notice to quit as a prerequisite to a proceeding against a tenant holding over, that it may be waived. See ante, note 210.

(e) **Service of notice.** The statutes of several states contain provisions as to the mode of service of the notice in case the tenant is not found, or the premises are vacant,³⁰⁵ but it has apparently been decided that, even without any express provision to that effect, the notice to pay the rent or deliver up possession may be served by delivery on the premises to a member of the tenant's family of suitable age and discretion.³⁰⁶ And it has been held that, where a notice to quit for nonpayment of rent was left at the tenant's residence, not on the demised premises, and another person, whose attention was called to it, notified the tenant thereof the following day, the period of notice prescribed by the statute began to run from the receipt of the notice by the tenant.³⁰⁷ Where the statute provided that the notice might be served by delivery to the tenant or by leaving it with some person residing on or in possession of the premises, it was held to be sufficient that it was delivered to the father of the tenant, and the same day handed by him to the tenant, though the father was neither residing on or in possession of the premises.³⁰⁸

A requirement that the notice be "delivered" to the tenant is not satisfied by merely reading it to him.³⁰⁹

The service of the notice need not be by an officer, in the absence of a specific requirement to that effect.³¹⁰

The burden is on plaintiff to show that the service was in compliance with the statute.³¹¹ There is no sufficient proof of service of the demand or notice when the complainant merely produces a copy of a letter containing the demand or notice, which letter is alleged by him to have been mailed to the tenant, and also a registered letter receipt signed by the name of the tenant "per" a third person, it not being shown what relation such person bore to the tenant, nor why personal service was not made.³¹²

³⁰⁵ *California* Code Civ. Proc. § 1162; *Florida* Gen. St. 1906, § 2227; *Idaho* Code Civ. Proc. 1901, § 3977; *Montana* Rev. Codes 1907, § 7272; *Nebraska* Comp. St. 1905, § 7527; *New York* Code Civ. Proc. §§ 2231, 2240 (see *Posson v. Dean*, 8 Civ. Proc. R. 177); *Utah* Comp. Laws 1907, § 3578; *Washington*, Ball. Ann. Codes & St. § 5529; *Wisconsin* Rev. St. 1898, § 3358; *Wyoming* Rev. St. 1899, § 4487.

³⁰⁶ *McSloy v. Ryan*, 27 Mich. 110. And see *Hazeltine v. Colburn*, 31 N. H. 466, and ante, § 274 a (3) (f).

³⁰⁷ *Hodgkins v. Price*, 137 Mass. 13.

³⁰⁸ *Farnam v. Hohman*, 90 Ill. 312.

³⁰⁹ *Jenkins v. Jenkins*, 63 Ind. 415.

³¹⁰ *Farnam v. Hohman*, 90 Ill. 312.

³¹¹ *Tolman v. Heading*, 11 App. Div. 264, 42 N. Y. Supp. 217.

³¹² *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 35 Law. Ed. 332. It does not appear clearly from

It has been held that service of the notice cannot be proven by affidavit of the person making it.³¹³

(f) **Waiver of notice given.** A notice was regarded as insufficient to support a proceeding for possession when the statute provided for a notice to quit the premises "for which the action is about to be brought," and nearly a year was allowed to elapse after the notice before the beginning of the action.³¹⁴ But sixty days' delay in instituting the proceeding has been held not to involve a waiver of the notice.³¹⁵ It is said that a notice given by the landlord is "waived" by him if, after giving it, he accepts the personal agreement of a third person to be surety for the rent.³¹⁶ The tenant's continuance in possession after the time named for quitting, and the landlord's conduct in allowing it, have been regarded, in connection with the continued payment and acceptance of rent, as evidence of a waiver proper for the consideration of a jury.^{316a}

(5) **Counterclaim as defense.** In a summary proceeding to recover possession on account of nonpayment of rent, the tenant cannot assert that an offset or counterclaim exists in his favor to an amount sufficient to extinguish the claim for rent, whether the asserted claim on his part arises from a breach of covenant by the landlord or otherwise.³¹⁷ It has been remarked that the ob-

the opinion whether the proceeding was or was not under the express clause of forfeiture for nonpayment of rent.

³¹³ *Lacrabere v. Wise*, 141 Cal. 554, 75 Pac. 185, 99 Am. St. Rep. 88. It was there held that a statutory provision that an affidavit may be used to prove the service of a notice in an action or special proceeding to obtain a provisional remedy did not apply.

³¹⁴ *Douglass v. Whitaker*, 32 Kan. 381, 4 Pac. 874. But *contra* when the tenant repudiated the tenancy on receiving the notice. *Douglass v. Anderson*, 32 Kan. 350, 4 Pac. 257.

³¹⁵ *McLain v. Nurnberg*, 16 N. D. 144, 112 N. W. 243.

³¹⁶ *Whitney v. Swett*, 22 N. H. 10,

33 Am. Dec. 228. But there is no waiver, it is there said, if the third person merely agrees to obtain security, which he fails to do.

^{316a} *Norris v. Morrill*, 43 N. H. 213. As to the effect of the acceptance of the overdue rent, see post, § 274 d (7).

³¹⁷ *Van Every v. Ogg*, 59 Cal. 563, 43 Am. St. Rep. 50; *Moroney v. Helings*, 110 Cal. 219, 42 Pac. 560; *Borden v. Sackett*, 113 Mass. 214; *Barker v. Walbridge*, 14 Minn. 469 (Gil. 351); *McSloy v. Ryan*, 27 Mich. 110; *Peterson v. Kreuger*, 67 Minn. 449, 70 N. W. 567; *People v. Kelsey*, 14 Abb. Pr. (N. Y.) 372; *Durant Land Imp. Co. v. East River Elec. Co.*, 15 Daly, 337, 6 N. Y. Supp. 659; *Pearson v. Germond*, 83 Hun, 88, 31 N. Y. Supp.

ject of the statute in providing an adequate and summary method of obtaining possession would be frustrated if the tenant could assert defenses of this character.³¹⁸ In one state, however, a statute has been adopted expressly providing for such a defense.³¹⁹

The view that the tenant has, apart from statute, no right to assert a counterclaim, does not in any way affect his right to show that for some reason there is no rent due to the landlord, as when there has been an eviction by the latter.³²⁰ It has been regarded as a good defense that a garnishment proceeding, instituted against the tenant by the landlord's creditor, is pending, a statute providing that all right of action for money garnished shall be suspended by such a proceeding.³²¹

358; *Barnum v. Fitzpatrick*, 42 N. Y. St. Rep. 179, 16 N. Y. Supp. 934; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; *Carmack v. Drum*, 27 Wash. 382, 67 Pac. 808; *Hunter v. Porter*, 10 Idaho, 72, 86, 77 Pac. 434. In *Barnum v. Keeler*, 33 Conn. 209, it is questioned whether a counterclaim arising from breach of the landlord's covenant could be asserted in such a proceeding. The decision was based on the fact that the asserted damages did not equal the rent due.

³¹⁸ *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476.

³¹⁹ New York Code Civ. Proc. § 2244, as amended by Laws 1893, c. 705, authorizes the tenant to set forth "a statement of any new matter constituting a legal or equitable defense or counterclaim," and provides that "such defense or counterclaim may be set up and established as though the claim for rent in such proceeding was the subject of an action." This statute does not authorize an affirmative money judgment in favor of the tenant. *Wulff v. Cilento*, 28 Misc. 551, 59 N. Y. Supp. 525. In a lower court this statute has, somewhat singularly, been given the effect of authorizing the tenant to deny his landlord's title in such a proceeding.

See *In re McCormick*, 30 Misc. 285, 63 N. Y. Supp. 492. The case of *Liebmann's Sons' Brew. Co. v. DeNicolo*, 46 Misc. 268, 91 N. Y. Supp. 791, seems adverse to the right to assert a breach of covenant by the lessor as a counterclaim under this statute. A breach of covenant, to be available under this statute, must be pleaded as a counterclaim. *Jefferson Real Estate Co. v. Hiller*, 39 Misc. 784, 81 N. Y. Supp. 374.

³²⁰ *Wheelock v. Warschauer*, 34 Cal. 265; *Steinback v. Krone*, 36 Cal. 303; *Skaggs v. Emerson*, 50 Cal. 3; *Witte v. Quinn*, 38 Mo. App. 681; *Hamilton v. Graybill*, 19 Misc. 521, 43 N. Y. Supp. 1079; *Ferber v. Apfel*, 113 App. Div. 720, 99 N. Y. Supp. 215. See *Wetterer v. Soubirous*, 22 Misc. 739, 49 N. Y. Supp. 1043; *Seigel v. Neary*, 38 Misc. 297, 77 N. Y. Supp. 854. And so he may show that the rent was reduced, in accordance with the stipulations of the lease, by his deprivation of the enjoyment of the premises owing to repairs made by the landlord. *Durant Land Imp. Co. v. East River Elec. Co.*, 17 Civ. Proc. R. 224, 15 Daly, 337, 6 N. Y. Supp. 659.

³²¹ *O'Connor v. White*, 124 Mich. 22, 82 N. W. 664. It was held to be im-

(6) **Waiver of right to maintain proceeding.** The courts have occasionally recognized the possibility of a waiver by the landlord of the right to maintain a summary proceeding on account of nonpayment of rent. The taking of the tenant's note for past due rent and the acceptance of rent subsequently accruing have been regarded as constituting a waiver of the right to maintain the proceeding on account of the nonpayment of the former,³²² though a different view seems to have been adopted as to the mere taking of a note for the rent.³²³ The acceptance of subsequent rent alone has also been regarded as constituting a waiver of the right.^{324, 325} There is one decision to the effect that a levy of distress operates as a waiver.³²⁶ The taking of security for the rent does not involve a waiver in this regard,³²⁷ nor does the bringing of an action therefor.³²⁸

That the tenant has paid part of the arrears of rent, and that this payment has been accepted by the landlord, does not, it would seem clear, preclude a proceeding for nonpayment of the balance, and it has been so decided.³²⁹ In one state, however, it has been decided that payment of part of an installment of rent precludes a proceeding for nonpayment of the balance, at least until the period covered by such part payment has elapsed.^{330, 331}

material that the tenant informed the creditor of the indebtedness and acted in collusion with the creditor.

³²² *Horn v. Peteler*, 16 Mo. App. 438.

³²³ *Evans v. Voght*, 8 Mo. App. 575.

This view is indicated in *Spiro v. Barkin*, 30 Misc. 87, 61 N. Y. Supp. 870, it being said that the proceeding cannot be brought till after the note matures.

^{324, 325} *Wolff v. Shinkle*, 4 Mo. App. 197; *Mooers v. Martin*, 23 Mo. App. 654; *Id.*, 99 Mo. 94, 12 S. W. 522; *Neiner v. Altemeyer*, 68 Mo. App. 243; *Stover v. Hazelbaker*, 42 Neb. 393, 60 N. W. 597 (semble). The bringing of an action for such rent has likewise been so regarded. *Rich v. Rose*, 124 Ky. 669, 30 Ky. Law Rep. 925, 99 S. W. 953.

³²⁶ *Wilder v. Eubanks*, 21 Wend. (N. Y.) 587.

³²⁷ *People v. McAdam*, 59 How. Pr. (N. Y.) 19. See *Brainard v. Hudson*, 1 City Ct. R. (N. Y.) 448.

³²⁸ See ante, at note 253.

³²⁹ *Durant Land Imp. Co. v. East River Elec. Co.*, 15 Daly, 337, 6 N. Y. Supp. 659; *Barnum v. Fitzpatrick*, 46 N. Y. St. Rep. 891, 19 N. Y. Supp. 385; *Bennett v. Nick*, 29 Misc. 632, 61 N. Y. Supp. 106. Where the payment was to be in part in "board" and in part in cash, the fact that the board was furnished did not prevent a proceeding for nonpayment of the cash. *Mahan v. Sewell*, 25 N. Y. St. Rep. 930, 6 N. Y. Supp. 662.

^{330, 331} *Barber v. Stone*, 104 Mich. 90, 62 N. W. 139.

(7) **Payment or tender of rent—Redemption.** A tender of the rent, made before the giving of the statutory demand for possession or notice to quit, is a bar to a proceeding to recover possession on account of the nonpayment of the rent.³³²

The statute, in providing for a notice to quit, occasionally provides that the rent may be paid within the period named for the notice,³³³ or requires the notice to be in the alternative, for the payment of rent or delivery of possession.³³⁴ But it has been decided that even when the statute does not in terms provide for the payment of the overdue rent within the period during which the notice is to run, the purpose of the provision, for a certain length of notice before the tenant is liable to suit for dispossession, must have been to enable the tenant to pay, and that he has until the expiration of the notice in which to pay or tender the rent, and so prevent his expulsion.³³⁵

After the period of the notice has expired, it has been held, the tenant has no longer this right,³³⁶ and a like view has been taken as regards a tender after the commencement of the proceeding.³³⁷ But occasionally the statute provides that the tenant may pay the

³³² *Fisher v. Smith*, 48 Ill. 184; *Tuttle v. Bean*, 54 Mass. (13 Metc.) 275; *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435. In the case first cited it was held that a tender at the place where the rent was payable was no defense, since the tenant had, by a statement to the landlord that he would call and pay it, misled the landlord, so that the latter was not present to receive it at such place.

³³³ See *Indiana*, *Burns' Ann. St.* 1901, § 7092; *Michigan Comp. Laws* 1897, § 11164.

³³⁴ See statutes referred to ante, note 279, and *Johnston v. Hargrove*, 81 Va. 118.

³³⁵ *Chadwick v. Parker*, 44 Ill. 326; *Chapman v. Kirby*, 49 Ill. 211; *Fisher v. Smith*, 48 Ill. 184; *Lasher v. Graves*, 124 Ill. App. 646. To the same effect is *Dakota Hot Springs Co. v. Young*, 9 S. D. 577, 70 N. W.

842. But a different view is indicated in *Norris v. Morrill*, 43 N. H. 213; and in *Kimball v. Rowland*, 72 Mass. (6 Gray) 224, it was held that, after the giving of notice to quit under a statute authorizing the termination of a tenancy at will for nonpayment of rent by fourteen days' notice, the landlord did not, by accepting the overdue rent, lose his right to terminate the lease, he expressly reserving this right on accepting the rent.

³³⁶ *Roussel v. Kelly*, 41 Cal. 360; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760. See *Tuttle v. Bean*, 54 Mass. (13 Metc.) 275, where the court refrains from deciding this question.

³³⁷ *Stover v. Chasse*, 9 Misc. 45, 29 N. Y. Supp. 291, a tender being allowed by statute as a defense only when the complaint demands judgment for a sum of money.

rent and costs before the judgment of dispossession is rendered,³³⁸ or before the issuance or execution of the writ.³³⁹ In one state it was decided that a statute authorizing the tenant, after dispossession under such proceedings, to pay, within six months, the rent, costs, and interest, and thereby regain possession,³⁴⁰ impliedly authorized him to do so before dispossession.³⁴¹ In another state it has been decided that, when the statute provides that one against whom a final order of dispossession is made may stay the issue of a warrant by payment of the rent due and costs, the tenant may pay the rent and costs into court, although no formal order of removal has been rendered, he electing not to try any issue.³⁴²

There are in a few states provisions authorizing the tenant, or other person interested, even after dispossession under the judgment in the proceeding, to regain possession by paying or tendering the rent due and costs,³⁴³ this being occasionally referred

³³⁸ *Arkansas*, Kirby's Dig. St. 1904, § 4705 (Before judgment); *Missouri* Rev. St. 1899, § 4133 (At hearing).

³³⁹ *California* Code Civ. Proc. § 1174 (Execution not to issue until five days after judgment, within which time any person interested in the term may pay into court the rent with interest). That the right is lost by relinquishment of possession, see *Owen v. Herzihoff*, 2 Cal. App. 622, 84 Pac. 274. *Idaho* Code Civ. Proc. § 2900 (same as California); *Massachusetts* Rev. Laws 1902, c. 129, §§ 11, 12 (Lease terminated unless tenant, at least four days before return day of the writ, pays or tenders rent due with interest and cost). This implies that tender may be made at any time after notice to quit, and it is sufficient to tender the rent without the taxes due, although the tenant has agreed to pay taxes. *Hodgkins v. Price*, 127 Mass. 13. *Mississippi* Code 1903, § 2894 (Issue of warrant to be stayed if before its issue the rent due and costs are paid). Such

stay may be obtained after judgment on appeal. *Flanneken v. Wright*, 64 Miss. 217, 1 So. 157. *Montana* Rev. Codes 1907, § 7283 (same as California); *New York* Code Civ. Proc. § 2254 (After order of restitution and before warrant issued, tenant may pay rent and obtain a stay); *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," § 34 (May pay rent and costs at any time before execution and supersede judgment); *Utah* Comp. Laws 1907, § 3584 (same as California); *Washington*, Ball. Ann. Codes & St. § 5542 (same as California); *Wisconsin* Rev. St. 1898, § 3371 (May stay proceedings by paying rent and costs).

³⁴⁰ *Minnesota* Rev. Laws 1905, § 3328.

³⁴¹ *George v. Manoney*, 62 Minn. 370, 64 N. W. 911.

³⁴² *Flewollen v. Lent*, 91 App. Div. 430, 86 N. Y. Supp. 919.

³⁴³ *Arkansas*, Kirby's Dig. St. 1904, § 4707 (Authorizes a mortgagee of the leasehold to redeem within six months, while section 4471 recog-

to as "redemption." In New York it is provided that, in case the term has five years yet to run, the lessee, his executor, administrator or assignee, may, within one year, redeem by paying rent and interest, with charges and costs incurred, whereupon he will hold as before,³⁴⁴ and a judgment creditor of the lessee and a mortgage of the leasehold are given the same right.³⁴⁵ The statute provides for the filing of a petition for redemption, and requires the court to establish the rights of the parties by "such a final order as justice requires."³⁴⁶

The burden of showing a payment of the rent in order to pre-

nizes a right in the tenant to relief in equity by providing that the tenant's rights are barred if he fails to ask such relief within six months); *California* Code Civ. Proc. § 1179 (Relief in case of hardship, if application for relief made within six months after the forfeiture declared); *Minnesota* Rev. Laws 1905, § 3328 (Tenant entitled to be restored to possession on paying or bringing into court, within six months after dispossession, the amount of the rent, interest, and costs). See *Wacholz v. Griesgraber*, 70 Minn. 220, 73 N. W. 7. *Washington*, Ball. Ann. Codes & St. 5545 (Court may relieve if application made, within thirty days after judgment of forfeiture, by the tenant, subtenant, mortgagee or other person interested).

³⁴⁴ Code Civ. Proc. § 2256. It has been decided that the lessee of the tenant has no right to redeem under this statute. *Koppel v. Tilyou*, 31 Civ. Proc. R. 185, 70 N. Y. Supp. 910. Since the effect of the tender of rent and costs is not to discharge the landlord's claim, but only to enable the tenant to obtain a standing in court in order to have all rights and liabilities adjusted, the tender need not be kept good, nor need the

money be paid into court. *Bien v. Bixby*, 18 Misc. 415, 41 N. Y. Supp. 423. Tender of the excess of the arrears of rent and costs and charges over the profits received by the landlord during the interval of his possession is insufficient. *Pursell v. New York Life Ins. & Trust Co*, 42 N. Y. Super. Ct. (10 Jones & S.) 383. This provision of the statute does not apply when the tenant is dispossessed under Code Civ. Proc. § 2231 for the nonpayment of taxes as well as of rent. *Witty v. Acton*, 58 Hun, 552, 12 N. Y. Supp. 757. The term named in a covenant for renewal cannot, it has been decided, be added to the original term in order to make a five-year term within the statute. *Bokee v. Hamersley*, 16 How. Pr. (N. Y.) 461. As to the right of a mortgagee of the leasehold, who has taken a new lease, to foreclose the tenant's outstanding right of redemption, see *Chumar v. Melvin*, 53 Misc. 460, 105 N. Y. Supp. 27.

³⁴⁵ Code Civ. Proc. § 2257.

³⁴⁶ Code Civ. Proc. § 2259.

The final adjustment of the amount to be paid by the tenant in order to redeem is based on general equitable principles, and not strictly

vent a judgment for the landlord would seem to lie upon the tenant,³⁴⁷ but in one state it has been said to be for the landlord to show that the rent was not paid before the expiration of the notice.³⁴⁸ Any provision of the statute as to notice to the landlord, as a prerequisite to an assertion of the right of redemption, must obviously be complied with.³⁴⁹

e. **Breach of express stipulation other than for rent.** Ordinarily the breach by the tenant of a covenant or stipulation to be performed by him can give no right to the landlord to maintain a summary proceeding to recover possession.³⁵⁰ In some states, however, the statutes authorize such proceedings by the landlord who has violated or who has failed to perform some stipulation or covenant of the lease,³⁵¹ and in a number a special reference is

on the covenants of the lease, and while the tenant should be required to comply with such covenants, as by paying taxes, insurance and the cost of repairs, he has also been required to repay outlays made by the landlord to make a building on the premises fire proof, in accordance with the orders of the municipal authorities, the building belonging to the tenant, with an option in the landlord to purchase it, and also to repay the wages of custodians and the rental value of furniture procured by the landlord for the building. *Bien v. Bixby*, 22 Misc. 126, 48 N. Y. Supp. 810.

³⁴⁷ *Collender v. Smith*, 20 Misc. 612, 45 N. Y. Supp. 1130.

³⁴⁸ *Dakota Hot Springs Co. v. Young*, 9 S. D. 577, 70 N. W. 842.

³⁴⁹ *Bateman v. Superior Ct. of San Francisco*, 139 Cal. 140, 72 Pac. 922.

³⁵⁰ *Bauer v. Knoble*, 51 Minn. 358, 53 N. W. 805. And see ante, at note 235. But in *Buckner v. Warren*, 41 Ark. 532, 48 Am. Rep. 46, it is decided that the breach by the lessee of his covenant authorizes the lessor to resume possession, on the

ground that if one party to a contract refuses to perform, the other party may rescind the contract. The decision is opposed to the numerous decisions to the effect that there is no right of re-entry upon breach of a covenant by the lessee (see ante, § 194 b, note 62), and represents but one of the numerous errors arising from the mistaken view that a lease is a mere contract. See ante, § 16.

³⁵¹ *Arizona Rev. St. 1901*, § 2693 (When tenant shall violate any provision of the lease, landlord may re-enter, and may, without formal demand or entry, commence proceeding for possession); *California Code Civ. Proc. § 1161* (Unlawful detainer when tenant continues in possession after a neglect to perform any condition or covenant, other than that for rent, including any covenant not to assign or sublet, and three days' notice to quit); *Colorado. Mills' Ann. St. 1891*, § 1973 (substantially same as California); *Idaho Code Civ. Proc. § 3976* (same as California); *Illinois. Hurd's Rev. St. 1905*, c. 80, § 9 (When default is made in any of the terms of the

made to an assignment or sublease by the tenant in violation of his agreement, as being ground for the proceeding.³⁵²

In one state the tenant's failure to pay taxes or assessments in accordance with his stipulation is made ground for the proceeding.³⁵²

That the landlord is, by the express terms of the lease, given a right to re-enter upon a default, does not, it seems clear, affect his right to proceed under the statutory provision.³⁵⁴

In some states there are provisions authorizing the proceeding against a tenant holding over "contrary to" the terms or conditions of his lease.³⁵⁵ What may be the meaning of such a provi-

lease and after ten days' notice); *Utah* Comp. Laws 1907, § 3575 (If tenant continues in possession after neglect to perform any condition or covenant of the lease and after five days' notice to perform); *Washington*, Ball. Ann. Codes & St. § 5527 (4) (substantially same as *Utah*).

³⁵² *California* Code Civ. Proc. § 1161 (See *Bernero v. Allen*, 68 Cal. 505, 9 Pac. 429); *Colorado*, Mills' Ann. St. 1891, § 1973; *Idaho* Code Civ. Proc. § 3976; *Utah* Comp. Laws 1907, § 3375 (4); *Washington*, Ball. Ann. Codes & St. § 5527 (4).

³⁵³ *New York* Code Civ. Proc. § 2231 (3) (If tenant in a city, having agreed to pay taxes or assessments, fails to do so for sixty days after they become payable, and after three days' notice in writing to pay them or deliver up possession). In *Bixby v. Casino Co.*, 14 Misc. 346, 35 N. Y. Supp. 677, it was decided by two judges that an express provision in the lease that summary proceedings should lie in case of nonpayment of rent raised an inference of an agreement that they should not lie, under this clause of the statute, for nonpayment of taxes.

There is no right of redemption in case of nonpayment of taxes, un-

der the *New York* statute, as there is in case of nonpayment of rent, and consequently if, when a proceeding is instituted for nonpayment both of rent and taxes, the taxes are paid pending the proceeding, it is prejudicial error to make an order awarding possession by reason of the nonpayment of taxes as well as of rent, and the tenant can demand a modification thereof. *Peabody v. Long Acre Square Bldg. Co.*, 188 N. Y. 103, 80 N. E. 657.

³⁵⁴ *Fleishauer v. Bell*, 44 Misc. 240, 88 N. Y. Supp. 922; *Crosby v. Jarvis*, 46 Misc. 436, 92 N. Y. Supp. 229.

³⁵⁵ *Iowa* Code 1897, § 4208 (Tenant holding over contrary to the terms of the lease); *Michigan* Comp. Laws 1897, § 11164 (Tenant holding over contrary to the terms and conditions of the lease); *Minnesota* Rev. Laws 1905, § 4038 (same); *New Mexico* Comp. Laws 1897, § 3345 (Tenant holding over contrary to the terms of his lease); *Oregon*, Bell. & C. Codes, § 5755 (Tenant retaining possession contrary to any condition or covenant of the lease); *Wisconsin* Rev. St. 1898, § 3358 (Tenant holding over contrary to any condition or covenant, and after three days' notice to quit).

sion it is difficult to say. In Michigan it was decided to apply only when there are "conditions or covenants which are in the nature of limitations, by which, upon the happening of the contingency, the estate becomes *ipso facto* terminated."³⁵⁶ And there is a later decision in that state that when there was a covenant against assignment, with an express condition of re-entry for breach of any covenant, an assignment brought the case within the statute.³⁵⁷ In Minnesota it is said that, to be within the statute, "the holding over must be after a determination of the lease by a forfeiture or in pursuance of a proviso in the lease giving a right of re-entry."³⁵⁸ A somewhat similar provision, authorizing the proceeding when the lease "shall terminate by lapse of time or by reason of any express stipulation," has been construed not to authorize the proceeding upon a breach of a mere covenant.³⁵⁹ In another state, however, a statute authorizing the proceeding against a tenant holding "without right after breach of a stipulation contained in the lease" appears to have been applied when there was merely a breach of a covenant to pay rent.³⁶⁰

Any provision of the statute as to demand or notice as a prerequisite to a proceeding to recover possession for failure to comply with a covenant must obviously be complied with.³⁶¹ A statute providing that a notice requiring the tenant either to perform the covenant or relinquish possession shall be given, but that notice need not be given if the covenant broken cannot afterwards be performed, has been held not to render a notice necessary when the breach is of a covenant not to sublet,³⁶² or, apparently, of a covenant to pay taxes.³⁶³ But the clause of the statute dispensing with notice to perform in such case does not dispense with the necessity of a notice demanding possession as a prerequisite to the maintenance of the proceeding.³⁶⁴ When the stat-

³⁵⁶ Langley v. Ross, 55 Mich. 163, 20 N. W. 886. ³⁶¹ See Opera House v. Bert, 52 Cal. 471; Iroquois Realty Co. v. Iroquois Hotel & Apartment Co., 104 N. Y. Supp. 748.

³⁵⁷ Marvin v. Hartz, 130 Mich. 26, 89 N. W. 557.

³⁵⁸ Bauer v. Knoble, 51 Minn. 358, 53 N. W. 805.

³⁵⁹ Lang v. Young, 34 Conn. 526.

³⁶⁰ Horan v. Thomas, 60 Vt. 325, 13 Atl. 567. The opinion does not discuss the meaning of the statute, and the decision appears to be con-

³⁶² Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88.

³⁶³ Kelly v. Teague, 63 Cal. 68.

³⁶⁴ Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449.

ute thus provides for a notice requiring the tenant, in the alternative, either to perform the covenant or to relinquish possession, the notice must recite the breach of stipulation relied on with sufficient particularity to enable the defendant to correct his default.³⁶⁵

Even though a breach is waived by the acceptance of rent subsequently accruing, the proceeding will lie upon a subsequent breach.³⁶⁶

f. **Assignment or subletting.** In two states it is provided, without reference to whether there is a stipulation in the lease against assignment or subletting, that if a tenant for a term less than a period named, or at will, or at sufferance, makes an assignment or sublease, a proceeding to recover possession may be maintained by the landlord.³⁶⁷

g. **Bankruptcy.** In one state it is provided that the landlord may recover possession as against his tenant for a term of three years or less if the latter takes the benefit of the insolvent laws or is adjudicated a bankrupt.³⁶⁸

§ 275. Statutes of limitation.

There are, in some jurisdictions, statutes of limitation expressly applicable to proceedings against a tenant holding over or to proceedings for unlawful detainer. It is sometimes provided that the proceeding must be instituted within a specified time after the accrual of the cause of action,³⁶⁹ and sometimes, within a

³⁶⁵ Byrnett v. Gardner, 35 Wash. E. 67; Dickenson v. Petrie, 38 Ill. App. 155.

It has been held that when the statute authorized a proceeding to recover possession upon a default in any of the terms of the lease upon a ten days' notice to quit, without "any other notice or demand of possession," the proceeding might be maintained upon a default in rent, without any demand of rent, though another provision authorized a proceeding on a default in rent provided there was a previous demand. Woods v. Soucy, 166 Ill. 407, 47 N.

³⁶⁶ Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027.

³⁶⁷ Kentucky St. 1903, § 2292; Missouri Rev. St. 1899, § 4108.

³⁶⁸ New York Code Civ. Proc. § 2231.

³⁶⁹ Iowa Code 1897, § 4217 (Thirty days' peaceable possession with knowledge of plaintiff); Kansas Gen. St. 1905, § 4883 (5) (Two years); Ohio Rev. St. 1906, § 6599 (Two years); Oklahoma Rev. St. 1903, § 4214 (Two years); West Virginia Code 1906, § 2162 (Two years).

specified time after the unlawful detainer,³⁷⁰ or after the commencement of the unlawful detainer.³⁷¹ In at least one state a certain period after the termination of the tenant's estate is named.³⁷²

It has apparently been decided that the fact that a statute requires an action for the forcible detention of real property to be begun within a specified time after the accrual of the cause of action does not prevent a proceeding on account of the nonpayment of rent which has been due for that length of time.³⁷³

It has been decided that, where the statute provides that the proceeding shall be barred by "thirty days' peaceable and uninterrupted possession, with the knowledge of the plaintiff, after the cause of action accrued," the service of the statutory notice to quit within the thirty days is not sufficient to preserve the right of action, but the proceeding itself must be commenced within the time named; and it was also decided that "the knowledge of the plaintiff" referred to in the statute is the knowledge by the plaintiff of the defendant's possession, and not of the fact that a cause of action to terminate possession has accrued.³⁷⁴

In one state the statute provides that an uninterrupted possession for three years immediately previous to suit shall bar the proceeding "if the defendant's estate has not terminated within that time,"³⁷⁵ and this proviso, it seems, in effect gives the landlord three years after the termination of the defendant's estate in which to institute the proceeding. In another state there is, in the chapter of the statutes which treats of forcible entry and detainer, a similar clause providing that three years' peaceable and uninterrupted possession immediately previous to suit shall be a bar, omitting, however, any proviso that the defendant's estate shall not have terminated within that time.³⁷⁶ Such a provision, applied to the case of a tenant wrongfully holding over,

³⁷⁰ *Florida* Gen. St. 1906, § 2155 (semble); *Kentucky* Civ. Code Prac. 1895, § 469; *Virginia* Code 1904, § 2716.

³⁷¹ *Arizona* Rev. St. 1901, § 2961.

³⁷² *Minnesota* Rev. Laws 1905, § 4039 (Proceeding barred by three years' quiet possession after end of leasehold estate).

³⁷³ *Maran v. Maran*, 54 Kan. 270, 38 Pac. 268; *Donahoe v. Mitchem*, 13 Okl. 383, 74 Pac. 903.

³⁷⁴ *Heiple v. Reinhart*, 100 Iowa, 525, 69 N. W. 871.

³⁷⁵ *Tennessee*, Shannon's Code 1896, § 5096.

³⁷⁶ *Arkansas*, Kirby's Dig. St. 1904, § 3649.

would preclude a summary proceeding against him if the original lease was for three years or over, or if the term had been extended so as to make the total period of permissive possession cover such a period.³⁷⁷ Recognizing the absurdity of such a result, it was held that the provision, in its literal construction, was intended to apply only to cases of forcible dispossession, and not to the case of one who entered under a lease, but that in his case the period named should be computed from the termination of the lease.³⁷⁸

Occasionally the statute provides that uninterrupted possession for a time named immediately preceding suit shall be a bar unless the defendant's estate is terminated.³⁷⁹ The reference to the termination of the defendant's estate is perhaps to be construed as equivalent to the words "unless the defendant's estate has been terminated within that time," and such a construction seems to have been placed thereon in one state.³⁸⁰ In one state it was held that a statute, thus making three years' possession a bar unless the defendant's estate was terminated, precluded a summary proceeding to recover possession for nonpayment of rent, if the defendant had already been in occupation under the lease for three years.³⁸¹

In the absence of any statutory provision bearing on the subject, the proceeding is, it has been decided, maintainable so long as the tenant remains in possession,³⁸² provided he has not, by reason of a repudiation of the tenancy and lapse of time, acquired absolute title.³⁸³

§ 276. Equitable defenses.

Equitable defenses cannot ordinarily be asserted in a proceed-

³⁷⁷ An enactment in this language, assumed without discussion that formerly in force in Maine, was apparently so construed. *Morton v. Thompson*, 13 Me. 162. such is the meaning of the statute.

³⁷⁸ *Burke v. Hale*, 9 Ark. 328. ³⁸¹ *Brown v. Brackett*, 26 Minn. 292, 3 N. W. 705. This provision was subsequently repealed. See *Suchan- eck v. Smith*, 45 Minn. 26, 47 N. W. 397; *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. 454.

³⁷⁹ *Alabama Code* 1907, § 4272; *Massachusetts Rev. Laws* 1902, c. 181, § 10. ³⁸² *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794.

³⁸⁰ *Cunningham v. Davis*, 175 Mass. 213, 56 N. E. 2. There it is ³⁸³ See ante, § 4.

ing of this character, for the reason that such a proceeding is legal in its nature, and also, frequently, because the court, being one of inferior jurisdiction, cannot take cognizance of such defenses.³⁸⁴ But in some states, by reason of legislation allowing equitable defenses in proceedings at law, or otherwise, such a defense is available in a summary proceeding.³⁸⁵

§ 277. Title to premises.

As before stated, the doctrine that a tenant is precluded from denying his landlord's title applies in the case of a summary proceeding to recover possession to the same extent as in an action of ejectment,³⁸⁶ and accordingly the petitioner need not show that there is no title outstanding paramount to his title, nor can the tenant assert the existence of such a paramount title.³⁸⁷ This

³⁸⁴ *Brockway v. Thomas*, 36 Ark. 518; *Petsch v. Biggs*, 31 Minn. 392, 18 N. W. 101; *Norton v. Beckman*, 53 Minn. 456, 55 N. W. 603; *Orr v. McCurdy*, 34 Mo. App. 418; *Garrie v. Schmidt*, 25 Misc. 753, 55 N. Y. Supp. 703; *Merki v. Merki*, 113 Ill. App. 518; *Id.*, 212 Ill. 121, 72 N. E. 9; *Cottrell v. Moran*, 138 Mich. 410, 101 N. W. 561; *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476; *Bond v. Chapman*, 34 Wash. 606, 76 Pac. 97.

³⁸⁵ *Simon Newman Co. v. Lassing*, 141 Cal. 174, 74 Pac. 761; *Ogle v. Hubbel*, 1 Cal. App. 357, 82 Pac. 217; *Gray v. Maier & Zobelein Brew. Co.*, 2 Cal. App. 653, 84 Pac. 280; *Ferguson v. Jackson*, 180 Mass. 557, 62 N. E. 965; *Forsythe v. Bullock*, 74 N. C. 135; *Hahn v. Guilford*, 87 N. C. 172; *Appeal of Pittsburgh & A. Drove Yard Co.*, 123 Pa. 250, 16 Atl. 625.

In Massachusetts and Pennsylvania a covenant to renew may be asserted by the tenant. *Ferguson v. Jackson*, 180 Mass. 557, 62 N. E. 965; *Appeal of Pittsburgh & A. Drove Yard Co.*, 123 Pa. 250, 16 Atl. 625. And a like

view has been asserted in Maryland. *Gelston v. Sigmund*, 27 Md. 334. *Contra*, *Platt v. Cutler*, 75 Conn. 183, 52 Atl. 819.

In New York the statute (Laws 1893, c. 705) authorizes the tenant to plead any defense, legal or equitable. This does not authorize affirmative relief, however. *Rodgers v. Earle*, 5 Misc. 164, 24 N. Y. Supp. 913. In spite of this statute, it has been there decided that the tenant cannot assert a contract for a renewal lease as a defense. *Salomon v. Weisberg*, 29 Misc. 650, 61 N. Y. Supp. 60.

³⁸⁶ See ante, § 78 c (2).

³⁸⁷ *Bostwick v. Mahoney*, 73 Cal. 238, 14 Pac. 832; *Felton v. Millard*, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; *Fiske v. Bigelow*, 9 D. C. (2 MacArthur) 427; *Slaughter v. Crouch*, 23 Ky. Law Rep. 1214, 64 S. W. 968; *Coburn v. Palmer*, 62 Mass. (8 Cush.) 124; *Patrick v. Cobb*, 122 Ga. 80, 49 S. E. 806; *Newman v. Mackin*, 21 Miss. (13 Smedes & M.) 383; *Silvey v. Summer*, 61 Mo. 253; *Logan v. Woolwine*, 56 Mo. App. 453; *Thorn-*

doctrine, however, does not preclude the defendant in a summary proceeding, any more than in any other action based on the relation of tenancy,³⁸⁸ from showing that the complainant or petitioner is not in fact his landlord, for the reason that the reversion has never been transferred to him by the original lessor,³⁸⁹ or that it has been transferred to some other person,³⁹⁰ or even to the defendant himself,³⁹¹ and the tenant is at liberty to show in defence an actual or constructive eviction by paramount title.³⁹²

Occasionally the statute in regard to summary proceedings provides that the merits of the title shall not be inquired into in such a proceeding.³⁹³ Since the tenant is precluded from

dike v. Norris, 24 N. H. 454, 57 Am. Dec. 294; Heyer v. Beatty, 76 N. C. 28; Shy v. Brockhause, 7 Okl. 35, 54 Pac. 306; Heritage v. Wilfong, 58 Pa. 137; Williams v. Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768; Juneman v. Franklin, 67 Tex. 411, 3 S. W. 562; Hall & Paulson Furniture Co. v. Wilbur, 4 Wash. 644, 30 Pac. 665.

In Connecticut the statute (Gen. St. 1902, § 1081) authorizes the defendant in such proceeding to show that he has obtained title to the premises after the date of the lease, and this has been held to authorize him to show that he holds under a lease so obtained from the holder of a paramount title. *Rodgers v. Palmer*, 33 Conn. 155.

It was decided in one state that a judgment in favor of the plaintiff for the recovery of possession of the land was not authorized, when the lease was in terms merely of "his interest" therein, and what that interest was did not appear. *Chandler v. Kent*, 8 Minn. 524 (Gil. 467).

³⁸⁸ See ante, § 78 n. o.

³⁸⁹ *Goldsmith v. Smith*, 3 Phila. (Pa.) 260, 16 Leg. Int. 93; *Lehnen v. Dickson*, 148 U. S. 71, 37 Law. Ed. 373.

³⁹⁰ *Pentz v. Kuester*, 41 Mo. 447; *Logan v. Woolwine*, 56 Mo. App. 453; *Koontz v. Hammond*, 62 Pa. 177; *Smith v. Crosland*, 106 Pa. 413.

³⁹¹ *Higgins v. Turner*, 61 Mo. 249; *Silvey v. Summer*, 61 Mo. 253; *Camley v. Stanfield*, 10 Tex. 546, 60 Am. Dec. 219. But in *Voss v. King*, 38 W. Va. 607, 18 S. E. 762, it was held that the fact that the premises had been, since the lease, forfeited to the state for taxes, was no defense to a proceeding by the lessor.

³⁹² *Wheelock v. Warschauer*, 34 Cal. 265; *Steinback v. Krone*, 36 Cal. 303; *Hinckley v. Guyon*, 172 Mass. 412, 52 N. E. 523, 70 Am. St. Rep. 292. See *Elms v. Randall*, 32 Ky. (2 Dana) 100. But not, it has been suggested, if the eviction is subsequent to the commencement of the proceeding. *Coburn v. Palmer*, 62 Mass. (8 Cush.) 124. And see *Blish v. Harlow*, 81 Mass. (15 Gray) 316. Compare *Pugh v. Davis*, 103 Ala. 316, 18 So. 8, 49 Am. St. Rep. 30, post, note 394.

³⁹³ *Alabama Code* 1907, § 4271; *Missouri Rev. St.* 1899, § 3343; *New Jersey*, 2 Gen. St. p. 1599, § 23; *Oregon*, Bell & C. Codes, § 5760; *Tennessee*, Shannon's Code 1896, § 5103.

denying his landlord's title, no question could, even apart from such a provision, arise as to the merits of the title of the lessor at the time of the lease, that is, as to whether there is any outstanding title paramount to that title. But since this rule of preclusion does not prevent the defendant from showing that the complainant or petitioner is not his landlord, for the reason that he has not succeeded to the interest of the lessor, or that it has passed from him to another, the question arises whether he is so precluded by reason of a statutory provision of the character referred to, that is, whether a prohibition of an inquiry into the merits of the title prohibits an inquiry as to whether the complainant in the proceeding has become or still is the owner of the reversion, so as to be entitled to maintain the proceeding. There are occasional decisions to the effect that the tenant is, by such a provision, precluded, in a proceeding by the lessor, from showing that the latter's title has passed to another.³⁹⁴ In one case it is said that "if the defendant cannot, without enquiry into the estate and title of the premises, protect himself, he must submit and seek his rights in another forum;"³⁹⁵ but in another case it is decided that he cannot protect himself from a double liability to the lessor and the lessor's transferee even by going into equity.³⁹⁶ The provision in question may, it seems possible,

New Hampshire Pub. St. 1901, c. 246, § 12, provides that the defendant may bring the title in issue only on giving bond to pay all rent, damages and costs. See *Thorndike v. Norris*, 24 N. H. 454, 57 Am. Dec. 294.

³⁹⁴ *Allen v. Smith*, 12 N. J. Law (7 Halst.) 199; *Kellum v. Balkum*, 93 Ala. 217, 9 So. 463; *Howard v. Jones*, 123 Ala. 488, 26 So. 129. To that effect is the language of the opinion in *Pugh v. Davis*, 103 Ala. 316, 18 So. 8, 49 Am. St. Rep. 30, read in connection with that in *Davis v. Pou*, 108 Ala. 443, 19 So. 362 (post, note 396). There it was decided that, though the tenant had attorned and paid rent, upon demand, to a purchaser at foreclosure sale under a mortgage made by the lessor before the lease, the lessor could re-

cover possession and damages against him as a holding-over tenant. At the time of this decision, the Alabama statute provided that "the merits of the title cannot be inquired into on the trial of any complaint exhibited under this chapter." Subsequently, and in consequence of this decision, there were added the words: "But all legal and equitable defenses may be had against a recovery for damages or for the unlawful detention of the land." There appears to be some inconsistency between the language of the statute as it formerly existed and that added thereto.

³⁹⁵ *Allen v. Smith*, 12 N. J. Law (7 Halst.) 199.

³⁹⁶ In *Davis v. Pou*, 108 Ala. 443, 19 So. 362 (ante, note 394), the court

have been introduced into the statutes with particular reference to the proceeding for forcible entry against a stranger, there provided for, and without consideration of its possible effect as against a tenant under a lease. If such a provision is to be construed as precluding the defendant from showing that the complainant is not entitled to maintain the proceeding because he has disposed of the reversion to another, it should, it seems, preclude him from showing that the reversion has never been transferred to the complainant, that the latter is, in fact, an entire stranger, who neither has, nor ever has had, any interest in the premises. In both cases there is an inquiry into title, for the purpose of showing whether the complainant is the landlord or person entitled to possession, so as to come within the terms of the statute. It might be suggested, moreover, that if the tenant cannot show that the complainant is, by reason of the making of a transfer by him, not entitled to maintain the proceeding, the complainant should also be precluded from showing that, by reason of a transfer to him, he is entitled to maintain it. But that the complainant is not ordinarily so precluded would seem to be involved in the decisions before referred to,^{396a} recognizing the right of the transferee of the reversion to maintain the proceedings.^{396b} In one state at least, where such a statutory provision exists, the tenant is allowed to show that the person instituting the proceeding, although the original lessor, has transferred the reversion to another, and hence has no right to maintain the proceeding.³⁹⁷

refused to enjoin the proceeding by the original lessor on the ground that the lessee had no remedy at law by which to avoid liability to both the original lessor and the person claiming under the mortgage. In *Howard v. Jones*, 123 Ala. 488, 26 So. 129, it was held that the statutory provision precluded the defendant from showing that he had purchased the property under a mortgage. The mortgage appears to have been prior to the lease, and so constituted a paramount title in the tenant, which he could not assert, even apart from statute, until evicted thereunder.

In *Patterson v. Folmar*, 125 Ala. 130, 28 So. 450, it was decided that evidence that defendant was in possession under a contract of sale, which provided that in case of default the relation of tenancy should arise and that defendant should then be liable for rent to a certain amount, did not involve an inquiry into title, but only tended to show the relation of tenancy.

^{396a} See ante, note 97. See, also, post, at note 423.

^{396b} Compare *Watson v. Idler*, 54 N. J. Law, 467, 24 Atl. 554.

³⁹⁷ *Pentz v. Kuester*, 41 Mo. 447;

The statutes of many states, while conferring the primary jurisdiction to try proceedings of this character upon justices of the peace, provide that justices shall have no power to try questions of title to land, and accordingly a question arises in connection with such provisions, similar to that just discussed in connection with provisions of like character expressly applying to summary proceedings. The jurisdiction of the justice cannot, in a landlord and tenant proceeding, be ousted by the tenant's denial of the title of the lessor at the time of the lease, since he is precluded from making such denial,³⁹⁸ but the more difficult question is whether it is ousted by his denial that the complainant is the owner of the reversion and so entitled to the land, in other words, that he is the landlord. In at least one state it has been decided that he can deny the plaintiff's title to the reversion,³⁹⁹ it being said that the jurisdiction to determine whether a particular instrument operated to transfer the reversion was the same as that

Gunn v. Sinclair, 52 Mo. 327; *Higgins v. Turner*, 61 Mo. 249. See *Lehnen v. Dickson*, 148 U. S. 71, 37 Law. Ed. 373.

³⁹⁸ See *Heritage v. Wilfong*, 58 Pa. 137, and ante, at note 387. But see *Forsythe v. Bullock*, 74 N. C. 135; *Hahn v. Guilford*, 87 N. C. 172, and ante, § 78 i (2), at notes 350-352, as to the North Carolina rule that the tenant may attack the landlord's title by showing an equitable title in himself.

³⁹⁹ *Savage v. Carney*, 8 Wis. 162; *Jarvis v. Hamilton*, 16 Wis. 575; *Menominee River Lumber Co. v. Philbrook*, 78 Wis. 142, 47 N. W. 188. *Bergman v. Roberts*, 61 Pa. 497, is to this effect. And see *Smith v. Crossland*, 106 Pa. 413. But *Clark v. Everly*, 8 Watts & S. (Pa.) 226, seems contra.

In Maryland (Code Pub. Gen. Laws 1904, art. 53, § 5) and Pennsylvania (Pepper & Lewis' Dig. Laws, "Landlord & Tenant," § 26), there are statutory provisions to the effect

that if the tenant shall allege that the title is disputed or claimed by some person named, by virtue of a right or title accruing since the lease, by descent, deed or devise from or by the lessor, and the person so named shall appear and make oath that he believes himself to be entitled and gives bond to prosecute his claim with effect, the justice shall forbear to give judgment for restitution and costs. This may perhaps involve an implication that, apart from statute, the tenant could not assert, for the purpose of excluding the jurisdiction of the justice, that the lessor's title has passed to another than the plaintiff in the proceeding. See, as to the construction of these provisions, *Mousley v. Wilson*, 1 Md. Ch. 388; *Newell v. Gibbs*, 1 Watts & S. (Pa.) 496; *De Coursey v. Guarantee Trust & Deposit Co.*, 81 Pa. 217; *Clark v. Everly*, 8 Watts & S. (Pa.) 226; *Esler v. Johnson*, 25 Pa. 350.

to determine whether the instrument under which the defendant had entered was a lease, creating the relation of landlord and tenant,⁴⁰⁰ a most reasonable view, it is submitted. In other jurisdictions it has been held that a statute, in terms excluding from the justice's jurisdiction only "actions" involving title, does not apply to summary proceedings.⁴⁰¹ There is, on the other hand, at least one decision to the effect that a general statute excluding the jurisdiction of a justice in questions of title necessarily precludes him from determining whether the plaintiff lessor is, as still having the reversion, entitled to recover possession from the defendant tenant,⁴⁰² and this view would seem to accord with occasional decisions that in an action for rent the justice cannot try the question whether the plaintiff is owner of the reversion and so entitled to the rent.⁴⁰³

A plea of title in fee, by one against whom a proceeding is instituted as holding under a lease, involves, it seems, merely a denial that he holds under a lease, so to authorize the proceeding, and hence is not sufficient to exclude the jurisdiction of the justice.⁴⁰⁴ If the plea were regarded as equivalent to an averment that he has a title paramount to that of the landlord, it would be defective, since he cannot make such an assertion.⁴⁰⁵ The only other mode in which such a plea could be regarded would be to view it as an averment that the lessor's title has passed since the lease to the defendant, in which case the validity of the plea would involve the question, above referred to, of the jurisdiction of the justice to determine whether the plaintiff is the owner of the reversion, and so entitled to maintain the pro-

⁴⁰⁰ *Winterfield v. Stauss*, 24 Wis. 394. could not try the case. Whether the third person had a paramount title,

⁴⁰¹ *State v. Fickling*, 10 S. C. 301; *State v. Marshall*, 24 S. C. 507; *In re White*, 12 Abb. N. C. (N. Y.) 348; *People v. Goldfogle*, 23 N. Y. Civ. Proc. 417, 30 N. Y. Supp. 296. or had acquired the lessor's title, does not appear. Compare *Misouri* cases ante, note 397.

⁴⁰² *White v. Bailey*, 14 Conn. 271; *Meier v. Thieman*, 90 Mo. 433, 2 S. W. 435, may be to this effect, it being stated that since the defendant claimed to be the tenant of, and to have paid rent to, a third person, title was in issue and the justice could not try the case. Whether the third person had a paramount title, or had acquired the lessor's title, does not appear. Compare *Misouri* cases ante, note 397.

⁴⁰³ See *Messler v. Fleming*, 41 N. J. Law, 108; *Smith v. Harris*, 3 Blackf. (Ind.) 416; *Main v. Cooper*, 25 N. Y. 180.

⁴⁰⁴ See *Menominee River Lumber Co. v. Philbrook*, 78 Wis. 142, 47 N. W. 188. Compare *Foster v. Penry*, 77 N. C. 160.

⁴⁰⁵ See ante, at note 387.

ceeding. A general plea of title in the defendant, who is alleged in the complaint to have entered under a lease, should, it seems, be construed most strongly against him, as attempting to assert a paramount title without denying the tenancy.^{405a} The fact that the plaintiff avers in his complaint that he is the owner, and that the defendant denies such assertion, does not raise a question of title, so as to exclude the justice's jurisdiction, since such averment is unnecessary and is to be regarded as surplusage,⁴⁰⁶ nor does the fact that the defendant avers an extension of his lease involve a question of title.⁴⁰⁷

In some states the statute in regard to summary proceedings provides that if it shall appear from the pleadings or otherwise that a question of title is at issue, the case shall be removed from the justice to a higher court.⁴⁰⁸ And in some there are general provisions to that effect applicable to all proceedings instituted before a justice. In some states the statutes merely provide for a dismissal by the justice of any action in which a question of title appears to be involved.

§ 278. Complaint, petition or affidavit.

a. **General considerations.** The statutes of some states provide for the filing by the landlord of a complaint or petition in

^{405a} See *Heritage v. Wilfong*, 58 Pa. 137.

⁴⁰⁶ *Chicago, M. & St. P. R. Co. v. Nield*, 16 S. D. 370, 92 N. W. 1069.

⁴⁰⁷ *Judd v. Arnold*, 31 Minn. 430, 18 N. W. 151. See *De Coursey v. Guarantee Trust & Safe Deposit Co.*, 81 Pa. 217.

⁴⁰⁸ *Alabama Code 1907*, § 4283 (Defendant in suit for forcible entry or forcible detainer may remove to circuit court by making affidavit that he entered peaceably, under claim of title, and not under a contract with plaintiff or one under whom he claims, and that petitioner bona fide desires to contest with plaintiff the title); *District of Columbia Code 1902*, §§ 23, 1225 (Removal to su-

preme court if defendant pleads title in himself or another under whom he claims, stating nature of the title, under oath, and enters into undertaking to pay intervening damages, costs and rent); *Iowa Code 1897*, §§ 4216, 4505 (Case to be removed to district court if title put in issue by verified pleading). See *Jordan v. Walker*, 52 Iowa, 647, 3 N. W. 679; *Id.*, 56 Iowa, 686, 10 N. W. 232. *Massachusetts Rev. Laws 1902*, c. 161, § 19, c. 181, §§ 6, 8 (If title to land appears, from pleadings or otherwise, to be drawn in question, case to be removed, provided defendant gives bond to enter case in superior court and pay rent, damages, and costs).

writing,⁴⁰⁹ a verification thereof being required in some states.⁴¹⁰ In other states it is provided that a summons shall be issued on the making of an affidavit,⁴¹¹ and in some, upon a merely verbal application therefor.⁴¹²

There are a number of decisions as to the sufficiency of the complaint or affidavit in the particular case to support a judgment of dispossession.⁴¹³ The statute ordinarily provides that it shall state the facts which show the complainant or defendant to be entitled to the benefit of the statute, and when the statute so provides averments of mere conclusions are insufficient.⁴¹⁴ It has

⁴⁰⁹ *California* Code Civ. Proc. § a pleading within the statute as to 1166; *Idaho* Code Civ. Proc. § 3983; amendments.

Illinois, Hurd's Rev. St. 1905, c. 57, § ⁴¹² *Connecticut* Gen. St. 1902, § 5; *Maryland* Code Pub. Gen. Laws (On giving of bond by lessor); 1904, art. 53, § 1; *Minnesota* Rev. *Massachusetts* Rev. Laws 1902, c. Laws 1905, § 4040; *Nebraska* Comp. 181, § 2; *New Hampshire* Pub. St. St. 1905, § 7528; *Nevada* Comp. Laws 1901, c. 246, § 8; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," §§ 25, 28; *South Carolina* Civ. Code, § 2421; *Vermont* Pub. St. *Wisconsin* Rev. St. 1898, § 3362. And see statutes cited in the note next following. 1906, § 1870; *Virginia* Code 1904, § 2716.

⁴¹⁰ *District of Columbia* Code 1901, § 20; *Florida* Gen. St. 1906, § 2228; *Iowa* Code 1897, § 4212; *Kansas* Gen. St. 1905, § 5844; *Michigan* Comp. Laws 1897, § 11165; *Missouri* Rev. St. 1899, § 4131; *Montana* Rev. Codes 1907, § 7276; *New Mexico* Comp. Laws 1897, § 3348; *New York* Code Civ. Proc. § 2235; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," § 34; *South Dakota*, Justices' Code, § 47; *Texas* Rev. St. 1895, art. 2523; *Utah* Comp. Laws 1907, § 3580; *Washington*, Ball. Ann. Codes & St. § 5532.

⁴¹¹ See *Georgia* Code 1895, § 4813; *Mississippi* Code 1906, § 2886; *New Jersey*, 2 Gen. St. p. 1918, § 12 (Oath in writing); *North Carolina* Revisal 1905, § 2002 (Oath in writing).

In *Cardin v. Standly*, 20 Ga. 105, it is decided that the affidavit is not

For the sake of convenience, the paper by the presentation of which the proceeding is instituted will, in the following discussion, be ordinarily referred to as the "complaint."

⁴¹³ For forms of complaint which have been held sufficient, see *Harris v. Barber*, 129 U. S. 366, 22 Law. Ed. 697; *McNatt v. Grange Hall Ass'n*, 2 Ind. App. 341, 27 N. E. 325; *Sweeney v. Mines*, 31 Mo. 240; *Alexander v. Westcott*, 37 Mo. 108; *Brahn v. Jersey City Forge Co.*, 38 N. J. Law, 74; *Irwin v. Davenport*, 84 Tex. 512, 19 S. W. 692; *Rains v. City of Oshkosh*, 14 Wis. 372. The proceeding is not "founded" on the lease so that the instrument of lease or a copy thereof must be filed with the complaint. *Whipple v. Shewalter*, 91 Ind. 114.

⁴¹⁴ *Fowler v. Roe*, 25 N. J. Law,

been decided, however, that a statutory provision that the complaint shall set forth that the person complained of is in possession of the premises, and holds them unlawfully and against the right of the complainant, is satisfied if the complaint is couched in the general language of the statute, without stating the facts of the particular case.⁴¹⁵ The statement of the facts must be clear and unambiguous, and it is insufficient if they are so stated that the language is open to either of two constructions.⁴¹⁶

That the complaint seeks to recover rent does not render it insufficient, it has been decided, even though such recovery is not authorized in such a proceeding.⁴¹⁷ If the complaint fails to state circumstances which bring the case within the statutory provision, the court has no jurisdiction of the proceeding.⁴¹⁸

b. **Showing as to tenancy.** It is stated in a number of cases that the complaint or affidavit must show that the relation of landlord and tenant exists between the person who is seeking to maintain the proceeding, or in behalf of whom this is sought, and the defendant in the proceeding.⁴¹⁹ Occasionally, however,

549; *Shepherd v. Sliker*, 31 N. J. Law, 432; *State v. Lane*, 51 N. J. Law, 504, 18 Atl. 353; *People v. Matthews*, 38 N. Y. 451; *Fry v. Day*, 97 Ind. 348; *Conley v. Conley*, 78 Wis. 665, 47 N. W. 950. But if the facts are stated, the statement of a conclusion based thereon does not invalidate the affidavit. *Steffens v. Earl*, 40 N. J. Law, 128, 29 Am. Rep. 210.

⁴¹⁵ *Bryan v. Smith*, 10 Mich. 229; *Bennett v. Robinson*, 27 Mich. 26; *Blackford v. Frenzer*, 44 Neb. 829, 62 N. W. 1101. But it was held that if the complainant undertook to aver any particular facts, he must aver all which could be regarded as included in the general averments named in the statute. *Bryan v. Smith*, 10 Mich. 229.

⁴¹⁶ *People v. Matthews*, 38 N. Y. 451.

⁴¹⁷ *Sullivan v. Lueck*, 105 Mo. App. 199, 79 S. W. 724. See *Ellis v. Fitzpatrick*, 55 C. C. A. 260, 118 Fed. 430.

⁴¹⁸ *Conley v. Conley*, 78 Wis. 665, 47 N. W. 950; *Sperry v. Seidel*, 218 Pa. 16, 66 Atl. 853; *Eveleth v. Gill*, 97 Me. 315, 54 Atl. 756; *Cleary v. Waldron* (N. J. Law) 54 Atl. 565.

⁴¹⁹ *Smith v. Killeck*, 10 Ill. (5 Gilm.) 293; *Dunne v. School Trustees*, 39 Ill. 578; *Powers v. Sutherland*, 62 Ky. (1 Duv.) 151; *Taylor v. Monohan*, 71 Ky. (8 Bush) 238; *Bowles v. Dean*, 84 Miss. 376, 36 So. 391; *Woodman v. Ranger*, 30 Me. 180, 50 Am. Dec. 625; *Eveleth v. Gill*, 97 Me. 315, 54 Atl. 756; *Gray v. Reynolds*, 67 N. J. Law, 169, 50 Atl. 670; *State v. Staiger*, 52 N. J. Law, 350, 19 Atl. 387; *People v. Simpson*, 28 N. Y. 55; *Earle v. McGoldrick*, 15 Misc. 135, 36 N. Y. Supp. 803; *Cohen v. Brossevitich*, 33 Misc. 600, 67 N. Y. Supp. 1025; *Gulledge v. White*, 73 Tex. 498, 11 S. W. 527. In *Dunning v. Finson*, 46 Me. 546, it is said that the relation need not be shown in the case of a tenancy at will, the

under special circumstances, it appears, the proceeding may be maintained though no such relation exists,⁴²⁰ and, when such special circumstances occur, the complaint or affidavit need not, it is plain, show the relation of landlord and tenant.⁴²¹ The requirement as expressed merely means, it seems, that the complaint must show that the complainant stands in such a relation to the defendant as to be entitled to maintain the proceeding against him. That the relation exists would usually appear from a statement that the complainant had made a lease to the defendant.⁴²² If the proceeding is by a person other than the original lessor, the complaint must show, it has been decided, how he became entitled to maintain it, that is, how the reversion or the right of possession passed to him from the lessor.⁴²³

c. **Interest of petitioner.** In the state of New York it is provided by statute that the petition shall describe "the interest" of the petitioner, or of the person whom he represents, "in the premises."⁴²⁴ This provision inferentially requires that the petitioner shall aver that he, or the person whom he represents, has an interest in the premises, and applies in terms both to a summary proceeding against a stranger who has forcibly entered,⁴²⁵

court being under the erroneous impression, apparently, that a tenant at will is not necessarily the tenant of another person. The opinion is obscure and unsatisfactory.

An averment that affiant "leased said premises to said S by the month, to commence on the first of May last, at the monthly rent of \$10," sufficiently states the existence of a tenancy. *Steffens v. Earl*, 40 N. J. Law, 128, 29 Am. Rep. 210.

⁴²⁰ See ante, § 273a (1).

⁴²¹ See *State v. Pittenger*, 37 Wash. 384, 79 Pac. 942.

⁴²² See e. g., *Steffens v. Earl*, 40 N. J. Law, 128, 29 Am. Rep. 210; *Engels v. Mitchell*, 30 Minn. 122, 14 N. W. 510.

⁴²³ See *Evans v. Muller*, 25 Mo. 195; *Binder v. Azzaro*, 74 N. J. Law, 328, 65 Atl. 849; *Lloyd v. Richman*, 57 N. J. Law, 385, 30 Atl. 432; *Hifi v.*

Stocking, 6 Hill (N. Y.) 314, 41 Am. Dec. 748; *Dreyfus v. Carroll*, 58 N. Y. Supp. 1116. But see *Sweeney v. Mines*, 31 Mo. 240. In *Peck v. Peck*, 35 Conn. 390, it was decided that an allegation that the complainants "are interested in the reversion of E, deceased," accompanied by a statement that E's widow, as tenant in dower, leased to defendant, and then died, and concluding by praying judgment for the complainants, "as such reversioners," sufficiently showed the complainants to be owners of the reversion. It would seem, however, that where a life tenant makes a lease, the remainderman cannot properly be regarded as the owner of the reversion. There is no privity between him and the lessee of the life tenant. See ante, § 69 c.

⁴²⁴ Code Civ. Proc. § 2235.

⁴²⁵ The statute was applied in con-

and also to one against a tenant. However desirable it may be that the plaintiff in the former class of proceeding be compelled to state what interest or title he may have, such a requirement in the case of a proceeding against a tenant is open to the objection that it permits the tenant to defend on the ground of defects in the landlord's title, in violation of the general rule precluding the tenant from asserting such defects.^{426, 427} It has been decided that an averment that the petitioner is the landlord,⁴²⁸ or that he "leased" the premises to the defendant,⁴²⁹ or that he was himself a lessee of the premises,⁴³⁰ is not a compliance with the statute. In other cases, however, the petition was decided to be sufficient when it alleged that the petitioner entered into an agreement with the defendant whereby he let to and the defendant hired the premises, and for the use and occupation thereof promised to pay an annual rental of a sum named,⁴³¹ and also, as averring the interest of the person represented by the petitioner, when it stated that the latter was the agent for persons named "who are the owners and landlords of such premises,"⁴³² or for the executor and trustee under a will which authorized the latter to dispose of the decedent's real estate, and that he entered into an agreement with the defendant as tenant.⁴³³ In these latter cases, it is evident, the averment was, in effect, merely of the making of the lease by the person whose right to the possession

nection with such a proceeding in *her v. Apfel*, 113 App. Div. 720, 99 Fuchs v. Cohen, 29 App. N. C. 56, 19 N. Y. Supp. 222; *Cahill v. Wyand*, 22 Civ. Proc. R. (N. Y.) 271; *Potter v. New York Baptist Mission Soc.*, 23 Misc. 671, 52 N. Y. Supp. 294. In *Crane v. Van Derveer*, 45 App. Div. 139, 60 N. Y. Supp. 1540, it was held that the objection that no such averment was made was waived by the action of the defendant in filing a verified answer, procuring a panel of jurors, and obtaining an adjournment.

^{426, 427} See ante, § 78 c (2).
⁴²⁸ *Engel-Heller Co. v. Henry Elias Prew. Co.*, 37 Misc. 480, 75 N. Y. Supp. 1089; *Kazis v. Loft*, 81 App. Div. 636, 80 N. Y. Supp. 1015; *Ferber v. Apfel*, 113 App. Div. 720, 99 N. Y. Supp. 215; *Matthews v. Carman*, 122 App. Div. 582, 107 N. Y. Supp. 694.

⁴²⁹ *Matthews v. Carman*, 122 App. Div. 582, 107 N. Y. Supp. 694.

⁴³⁰ *Eldner Realty & Const. Co. v. Bensamen*, 56 Misc. 483, 107 N. Y. Supp. 128; *Ferber v. Apfel*, 113 App. Div. 720, 99 N. Y. Supp. 215.

⁴³¹ *Slater v. Waterson & Law Amusement Co.*, 58 Misc. 215, 109 N. Y. Supp. 50.

⁴³² *Equitable Life Assur. Soc. v. Schum*, 40 Misc. 657, 83 N. Y. Supp. 161.

⁴³³ *Rowland v. Dillingham*, 83 App. Div. 156, 82 N. Y. Supp. 470.

⁴²⁸ *Engel-Heller Co. v. Henry Elias Prew. Co.*, 37 Misc. 480, 75 N. Y. Supp. 1089; *Kazis v. Loft*, 81 App. Div. 636, 80 N. Y. Supp. 1015; *Ferber*

was asserted. The statement that the petitioner or person represented by him is the landlord, or that he leased the premises to the defendant, is not an averment of the petitioner's interest in the premises, but rather of the defendant's interest therein and of the relation between them, but a strict application of the requirement that the petitioner's interest be averred would be attended with such very considerable inconvenience as almost to compel the courts to put a forced construction on the language, as they apparently have done in the cases last referred to.

It has been decided that if the petition alleges that the title was originally in a person other than the petitioner, and that it was subsequently transferred to him, he cannot show that it was always in him.⁴³⁴

d. **Defendant's possession.** The complaint, petition, on affidavit, must show that the person complained of is in possession of the premises,⁴³⁵ which, it would seem, it can hardly fail to do.

e. **Petitioner's agency for landlord.** As before stated, the statutes quite frequently provide for the institution of the proceeding by the agent or attorney of the person entitled to possession,⁴³⁶ and this means, it seems, that the complaint or affidavit may be in the name of the agent rather than of the principal.⁴³⁷ The complaint or affidavit, if made by an agent, must, it has been decided, contain a direct averment that he is an agent, a mere description of him as agent being insufficient.⁴³⁸ Where the statute required the petition to state the facts authorizing him to make the application, a statement that the petitioner "is an agent of P. B., who is the owner and landlord," and "is duly authorized to commence proceedings to dispossess the tenant," was held to be sufficient.⁴³⁹

A statutory provision requiring the petition to be verified in the same way as the complaint in an ordinary action refers, it has

⁴³⁴ *McFarland Real Estate Co. v. Gerardi Hotel Co.*, 202 Mo. 597, 100 S. W. 577.

⁴³⁵ *Hill v. Stocking*, 6 Hill (N. Y.) 314, 41 Am. Dec. 748; *Rains v. City of Oshkosh*, 14 Wis. 372. For a petition held to be sufficient in this respect, see *Quandt v. Smith*, 28 Wash. 664, 69 Pac. 369.

⁴³⁶ See ante, § 273 l.

⁴³⁷ It is so decided in *Johnson v. Thrower*, 117 Ga. 1007, 44 S. E. 846.

⁴³⁸ *Cunningham v. Goelet*, 4 Denio (N. Y.) 71. Compare *Patterson v. Graham*, 140 Ill. 531, 30 N. E. 460.

⁴³⁹ *Bennett v. Budweiser Brew. Co.*, 27 Misc. 805, 58 N. Y. Supp. 313.

been decided, to the form of the verification and not to the person verifying, and consequently does not preclude a verification by the agent of a corporation landlord.⁴⁴⁰

f. Designation of subtenants. In one state a statutory requirement that the petition shall "name or otherwise intelligibly designate the person or persons against whom the special proceeding is instituted, and if there are two or more such persons, and some are undertenants or assigns, specify who are principals or tenants and who are undertenants or assigns," was held to be sufficiently complied with by designating such persons as "John Doe and Richard Roe (fictitious names), undertenants."⁴⁴¹

g. Description of premises. The complaint or affidavit must describe the premises⁴⁴² with such sufficiency as to enable the tenant, and also the officer who may have to carry the judgment into execution, to identify them.⁴⁴³ A description of the premises as those on which the defendant resides has been regarded as insufficient.⁴⁴⁴ Ordinarily a description similar to that of the lease will be sufficient.⁴⁴⁵ It has in one state been regarded as necessary that the county be named,⁴⁴⁶ and elsewhere it is stated that it must appear that the premises are within the court's jurisdiction.⁴⁴⁷

A failure to describe the premises has been regarded as a jurisdictional defect which cannot be cured by the appearance of the defendant.⁴⁴⁸

⁴⁴⁰ *Stuyvesant Real Estate Co. v. Stilwell*, 67 N. J. Law, 96, 50 Atl. 493. *Sherman*, 40 Misc. 205, 81 N. Y. Supp. 642. See *Torrey v. Cook*, 11 Miss. (3 Smedes & M.) 60; *Haynes v. Sherwin-Williams Co.*, 126 Ill. App. 414.

⁴⁴¹ *Ash v. Purnell*, 16 Daly, 189, 26 Abb. N. C. 92, 11 N. Y. Supp. 54.

⁴⁴² *Cairo & St. L. R. Co. v. Wiggins Ferry Co.*, 82 Ill. 230; *Gerlach v. Walsh*, 41 Ill. App. 83; *Jolly v. Ghering*, 40 Ind. 139; *Allen v. Shannon*, 74 Ind. 164; *Smith v. White*, 35 Ky. (5 Dana) 376; *Campbell v. Mallory*, 22 How. Pr. (N. Y.) 183; *Schneider v. Leizman*, 57 Hun. 561, 11 N. Y. Supp. 434; *Conley v. Conley*, 78 Wis. 665, 47 N. W. 950.

⁴⁴³ *Vaughan v. Vaughan*, 111 Ga. 807, 35 S. E. 650; *Story v. Walker*, 71 N. J. Law, 226, 58 Atl. 349; *Newing v.*

⁴⁴⁴ *Thompson v. Chapman*, 57 Ga. 16; *Snoddy v. Watt*, 9 Ala. 609. And see *Atkinson v. Lester*, 2 Ill. (1 Scam.) 407.

⁴⁴⁵ See *Duff v. Fitzwater*, 54 Pa. 224, 93 Am. Dec. 691; *Stanford Land Co. v. Steidle*, 28 Wash. 72, 68 Pac. 178.

⁴⁴⁶ *Leary v. Langsdale*, 35 Ind. 74; *Jackson v. Adams*, Wils. (Ind.) 398.

⁴⁴⁷ *People v. Boardman*, 4 Keyes (N. Y.) 59.

⁴⁴⁸ *Simms v. Humphrey*, 4 Denio (N. Y.) 185; *Potter v. New York Baptist*

h. Previous demand or notice. If the statute requires a demand for possession or notice to quit, the complaint or affidavit must aver the making or service of a demand or notice answering to the statutory requirement.⁴⁴⁹ It has been held, however, that the fact that the statute requires a written notice to quit does not necessitate an averment that the notice was in writing, though this must be shown on the trial.⁴⁵⁰

There need not be an averment as to the person by whom the service was made.⁴⁵¹ But the person on whom the demand or notice was served must appear.⁴⁵² In one state it has been decided that a general allegation of service is sufficient without stating the mode of service,⁴⁵³ but elsewhere there are decisions to the effect that the mode of service must be stated;⁴⁵⁴ and it has been decided that if the service was not a personal one, the complaint must show that such substituted service was in accordance with the statute providing therefor,⁴⁵⁵ and must state the facts rendering such mode of service proper in the particular case.⁴⁵⁶

Mission Soc., 23 Misc. 671, 52 N. Y. Supp. 294.

⁴⁴⁹ *Spear v. Lomax*, 42 Ala. 576; *Smith v. Killeck*, 10 Ill. (5 Gilm.) 295; *Dunne v. School Trustees*, 39 Ill. 578; *Hickey v. Conley*, 24 Pa. Super. Ct. 388; *State v. Allen*, 45 Mo. App. 551; *Brahn v. Jersey City Forge Co.*, 38 N. J. Law, 74; *Conley v. Conley*, 78 Wis. 665, 47 N. W. 950; *Bristed v. Harrell*, 20 Misc. 348, 45 N. Y. Supp. 918. But if the statute names the essentials of the complaint, without requiring an averment of notice, this need not be made. *Chung Yow v. Hop Chung*, 11 Or. 220, 4 Pac. 326. An averment of notice is obviously unnecessary when no notice is necessary. *Campbell v. Johnson*, 129 Mo. App. 201, 107 S. W. 1020.

⁴⁵⁰ *Hitchcock v. McKinster*, 21 Neb. 148, 31 N. W. 507.

⁴⁵¹ *Morris Canal & Banking Co. v. Mitchell*, 31 N. J. Law, 100.

⁴⁵² *Rogers v. Lynds*, 14 Wend. (N. Y.) 172; *Wolcott v. Schenk*, 16 How. Pr. (N. Y.) 44.

⁴⁵³ *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111. See *Ballance v. Fortier*, 8 Ill. (3 Gilm.) 291.

⁴⁵⁴ *People v. Keteltas*, 12 Hun (N. Y.) 67; *Posson v. Dean*, 8 Civ. Proc. R. (N. Y.) 177; *Stuvesant Real Estate Co. v. Sherman*, 40 Misc. 205, 81 N. Y. Supp. 642; *Lowman v. West*, 8 Wash. 355, 36 Pac. 258. These were cases of notice to quit for nonpayment of rent. In *Boyd v. Milone*, 24 Misc. 734, 53 N. Y. Supp. 785, it was held that a general averment of a demand for rent was insufficient, it not being averred to have been personal. As to the cure of defects in the petition in this regard by the answer, see *Peabody v. Long Acre Square Bldg. Co.*, 112 App. Div. 114, 98 N. Y. Supp. 242.

⁴⁵⁵ *Beach v. McGovern*, 41 App. Div. 381, 58 N. Y. Supp. 493; *People v. Platt*, 43 Barb. (N. Y.) 116.

⁴⁵⁶ *Scheifele v. Irving*, 53 N. J. Law, 180, 20 Atl. 1075.

i. **Right to possession.** To enable the landlord to recover possession after the expiration of the term, or, in the case of a tenancy at will or from year to year, after the termination of such tenancy by notice or otherwise, it has been regarded as necessary, in some jurisdictions, to state the terms of the lease as regards its character and duration, so that, if it is a lease for years, it will appear to have come to an end by lapse of time, and, if terminable by notice, it will appear to have been properly terminated by the notice stated to have been given.⁴⁵⁷ If the facts stated show that the complainant is entitled to possession, this need not be expressly averred.⁴⁵⁸

It need not be alleged that the holding over is wrongful⁴⁵⁹ or by force,⁴⁶⁰ or, it has been decided, that it is "without the permission" of the landlord,⁴⁶¹ though a different view has been taken as to the latter averment when the statute in terms authorized a proceeding against one holding over "without permission."^{462, 463}

j. **Nonpayment of rent.** When the proceeding is based on the nonpayment of rent, an allegation of the amount of rent due has been regarded as necessary, in order that the defendant may be

⁴⁵⁷ Bowles v. Dean, 84 Miss. 376, 36 So. 391; Fowler v. Roe, 25 N. J. Law,

549; Shepherd v. Sliker, 31 N. J. Law, 432; Steffens v. Earl, 40 N. J. Law, 128; People v. Matthews, 38 N. Y. 451; People v. Simpson, 28 N. Y. 55. In Maryland a statement in substance that the landlord has rented or leased certain property to the tenant for a term which has ended is said to be sufficient in this regard. Burrell v. Lamm, 67 Md. 580, 11 Atl. 56. See, also, Spear v. Lomax, 42 Ala. 576.

It has been decided that a complaint seeking to recover possession on account of the breach of a condition against subletting without the landlord's consent is not substantially defective because it fails to state that the subletting was without such consent. Schroeder v. Tomlinson, 70 Conn. 348, 39 Atl. 484.

⁴⁵⁸ Engels v. Mitchell, 30 Minn. 122, 14 N. W. 510.

⁴⁵⁹ Uridias v. Morrell, 25 Cal. 31 (semble); Stanford Land Co. v. Steidle, 28 Wash. 72, 68 Pac. 178. In Fry v. Day, 97 Ind. 348, it is said that where the statute provides for a proceeding against a tenant who "unlawfully holds over," if an averment of unlawful holding is necessary, an averment that defendant "unlawfully detains" is sufficient.

⁴⁶⁰ Wheeler v. Reitz, 92 Ind. 379; Chambers v. Hoover, 3 Wash. T. 107, 13 Pac. 466.

⁴⁶¹ Moore v. Smith, 56 N. J. Law, 446, 29 Atl. 159. See Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073.

^{462, 463} Prouty v. Prouty, 5 How. Pr. (N. Y.) 81; Conley v. Conley, 78 Wis. 665, 47 N. W. 950. See Campbell v. Mallory, 22 How. Pr. (N. Y.) 183.

able to pay the rent and so put an end to the proceeding.⁴⁶⁴ In one state, however, such an allegation has been decided to be unnecessary,⁴⁶⁵ and in another state it appears that if any rent is shown to be due, though less than that named, a judgment for the landlord is proper.⁴⁶⁶ The amount of rent named must be only that due to the petitioner, and must not include rent due to his predecessor in interest.⁴⁶⁷

A complaint on this ground need not, it seems, state the character or duration of the tenancy,⁴⁶⁸ unless the remedy is restricted by the statute to particular classes of tenancy.⁴⁶⁹

If the statute authorizes such a proceeding only if the arrears of rent cannot be collected by distress, the affidavit must state that such is the case,⁴⁷⁰ and an averment that the landlord believes such to be the case is insufficient.⁴⁷¹

If a demand of the rent is a prerequisite, the making of the demand must be stated.⁴⁷² In New York it appears to have been decided that a general averment of the demand of rent, without stating whether it is personal or how otherwise it was made, is insufficient.^{473,474}

⁴⁶⁴ *Vaughn v. Locke*, 27 Mo. 290; actually due, the proceeding is not
Welch v. Ashby, 88 Mo. App. 400; defeated because he states less than
Layton v. Dennis, 43 N. J. Law, 380. that due.

⁴⁶⁵ *Vaughn v. Locke*, 27 Mo. 290.
⁴⁶⁶ See *Layton v. Dennis*, 43 N. J. Law, 380; *People v. Teed*, 48 Barb. (N. Y.) 424.

⁴⁶⁷ *McDermott v. McIlwain*, 75 Pa. 341.

⁴⁶⁸ *Wilson v. Wood*, 84 Miss. L.S. 36 So. 609; *Hickey v. Conley*, 24 Pa. Super. Ct. 388.

⁴⁶⁹ *Schuyler v. Trefren*, 26 N. J. Law, 213.

⁴⁷⁰ *Lacrabere v. Wise*, 141 Cal. 554, 75 Pac. 185, 99 Am. St. Rep. 88;

Schuyler v. Trefren, 26 N. J. Law, 213; *People v. Platt*, 43 Barb. (N. Y.) 116; *Wolcott v. Schenk*, 16 How. Pr. (N. Y.) 449; *People v. Keteltas*, 12 Hun (N. Y.) 67; *Miles v. Orr* (N. J. Law) 25 Atl. 268; *Wilson v. Wood*, 84 Miss. 728, 36 So. 609.

⁴⁷¹ *Schuyler v. Trefren*, 26 N. J. Law, 213.

⁴⁷² *Lacrabere v. Wise*, 141 Cal. 554, 75 Pac. 185, 99 Am. St. Rep. 88;

Schuyler v. Trefren, 26 N. J. Law, 213; *People v. Platt*, 43 Barb. (N. Y.) 116; *Wolcott v. Schenk*, 16 How. Pr. (N. Y.) 449; *People v. Keteltas*, 12 Hun (N. Y.) 67; *Miles v. Orr* (N. J. Law) 25 Atl. 268; *Wilson v. Wood*, 84 Miss. 728, 36 So. 609.

^{473, 474} *Engel-Heller Co. v. Henry*

k. **Amendment.** In one state it has been decided that the complaint cannot be amended after filing, the statute not in terms giving the justice this power,⁴⁷⁵ and in another state it was decided that the affidavit of defense cannot be amended.⁴⁷⁶ In other cases a right of amendment in proceedings of this character has been clearly recognized.⁴⁷⁷

§ 279. Answer or plea.

The statutes rarely contain specific provisions as to the pleading to be filed by the person or persons against whom the proceeding is brought,⁴⁷⁸ and the practice in this regard is usually

Elias Brew. Co., 37 Misc. 480, 75 N. Y. Supp. 1080.

⁴⁷⁵ *Wilson v. Bayley*, 42 N. J. Law, 132; *Waters v. Haynes*, 49 N. J. Law, 598, 9 Atl. 770, 60 Am. Rep. 592. In *Bliss v. Caryell*, 28 Misc. 162, 59 N. Y. Supp. 13, it was decided that if the tenant appears and proceeds to trial without pointing out any defect in the petition, he cannot thereafter object that the court was without jurisdiction because, after the issuance of the precept and before trial, the landlord's name was substituted in the verification for that of his agent.

⁴⁷⁶ *Mothershead v. DeGive*, 82 Ga. 193, 8 S. E. 62.

⁴⁷⁷ *Thompson v. Sornberger*, 78 Ill. 353; *Valencia v. Couch*, 32 Cal. 340, 91 Am. Dec. 589; *Shelby v. Houston*, 38 Cal. 410; *Howard v. Valentine*, 20 Cal. 282; *Earl Orchard Co. v. Fava*, 138 Cal. 76, 70 Pac. 1073; *Liddon v. Hodnett*, 22 Fla. 271; *Jackson v. Warren*, 32 Ill. 331; *Spurck v. Forsyth*, 40 Ill. 438; *Bowles v. Dean*, 84 Miss. 376, 36 So. 391; *Gensler v. Nicholas*, 151 Mich. 529, 15 Det. Leg. N. 13, 115 N. W. 458.

⁴⁷⁸ A few of the statutes refer to a pleading to be filed by the defendant in the proceeding. See *Michigan Comp. Laws* 1897, § 11168 (Defend-

ant may plead "not guilty," or such plea may be entered for him); *Minnesota Rev. Laws* 1905, § 4042 (All matters in excuse, justification, or avoidance, shall be set up in the answer); *New Hampshire Pub. St.* 1901, c. 246, § 11 (Under general issue, defendant shall not question title); *New York Code Civ. Proc.* § 2244 (Person to whom precept is directed, or his landlord, or any person in possession, may file a written answer, verified, denying generally the allegations, or specifically any material allegation of the petition, or setting forth any new matter constituting a defense or counterclaim). Under this statute, a counter affidavit is insufficient (*Yuelin v. Meade*, 1 Civ. Proc. R. 446), as is a motion to dismiss, for the purpose of raising the issue of *res judicata* (*Fritzuskie v. Wauroski*, 83 App. Div. 150, 82 N. Y. Supp. 543). *Virginia Code* 1904, § 2717 (Plea to be not guilty); *West Virginia Code* 1906, § 3333 (ditto); *Wisconsin Rev. St.* 1898, § 3364 (same as Minnesota).

In two states, there is a provision for a counter affidavit by the person in possession. *Georgia Code* 1895, §§ 4813, 4821 (Tenant may arrest proceedings by filing affidavit that his

determined by the practice ordinarily adopted in proceedings in the particular court.⁴⁷⁹ In some, probably in most, of the states, the plea of "not guilty" is a proper plea, as in proceedings for forcible entry.⁴⁸⁰ This plea has been regarded as equivalent to a general denial, putting in issue all the facts alleged by plaintiff, including that of the existence of the relation of landlord and tenant.⁴⁸¹

In New York the statute provides that any person in possession or claiming possession of the premises, or a part thereof, may file a verified answer.⁴⁸² It has been held that no person can avail himself of this provision unless he belongs to one of the classes against whom, under the statute, the proceeding might have been instituted, and that it gives no right to entire strangers to intervene.⁴⁸³ An assignee may, it has been decided, intervene by force of such provision, though she has transferred her entire term, provided she reserved a rent.⁴⁸⁴

§ 280. Summons and return.

The statutes almost invariably provide for the issuance of a summons or notice to the person against whom the proceeding is instituted, notifying him to appear before the court or officer issuing it, and to show cause why he should not be compelled to relinquish possession. Some statutes contain specific provisions

lease has not expired, that rent a plea of the general issue, nor to a claimed is not due, or that he does plea of nontenure at the time of the not hold under complainant). See filing of the complaint and service of notice.

Moody v. Ronaldson, 38 Ga. 652; Werner v. Footman, 54 Ga. 128; Mothershead v. De Give, 82 Ga. 193, 8 S. E. 448; See McGuire v. Cook, 13 Ark. 448; Sullivan v. Cary, 17 Cal. 80; Minturn v. Burr, 20 Cal. 49; Raymond v. Bell, 18 Conn. 81; McKinney v. Hartman, 4 Iowa, 154; Gallagher v. Connell, 23 Neb. 391, 36 N. W. 566.

⁴⁷⁹ See Poffenberger v. Blackstone, 57 Ind. 288; Ward v. Pittsburg, C., O. & St. L. R. Co., 25 Ind. App. 405, 58 N. E. 264. In Davis v. Alden, 66 Mass. (12 Cush.) 323, it was decided that a plea that the respondent "is not in possession of the premises demanded" is bad, it not amounting to

⁴⁸⁰ See McGuire v. Cook, 13 Ark. 448; Sullivan v. Cary, 17 Cal. 80; Minturn v. Burr, 20 Cal. 49; Raymond v. Bell, 18 Conn. 81; McKinney v. Hartman, 4 Iowa, 154; Gallagher v. Connell, 23 Neb. 391, 36 N. W. 566.

⁴⁸¹ Sodini v. Gaber, 101 Minn. 155, 111 N. W. 962.

⁴⁸² Code Civ. Proc. § 2244.

⁴⁸³ Heuser v. Antonius, 84 N. Y. Supp. 580.

⁴⁸⁴ Levy v. Winkler, 59 Misc. 482, 110 N. Y. Supp. 997.

as to the contents of the summons, as, for instance, that it describe the premises sought to be recovered, or that it state the grounds on which relief is sought.⁴⁸⁵ That it must state the grounds upon which the proceeding is based has been recognized, however, apart from any statutory provision in that regard,⁴⁸⁶ and presumably a statement of the grounds necessarily involves an identification of the premises sought to be recovered. That the statute requires the summons to describe the premises does not necessitate that it show them to be within the judicial district.⁴⁸⁷ In one state at least the statute requires the summons to be directed to the persons named in the petition as being in possession of the property.⁴⁸⁸

A defect in the summons is cured by the appearance of the defendant in the proceeding for the purpose of trial, without objection on account of such defect,⁴⁸⁹ though it is different, apparently, if he appears merely to object on that ground.⁴⁹⁰

In a majority of the states the statute contains specific provisions as to the length of time to intervene between the time of issuing or serving the summons and the time named therein for

⁴⁸⁵ See e. g., *Michigan Comp. Laws* 1897, § 11197; *Mississippi Code* 1904, § 2836; *Nebraska Comp. St.* 1905, § 7178; *New Jersey*, 2 *Gen. St.* p. 1618, § 12; *New York Code Civ. Proc.* § 2118; *North Carolina Revised* 1905, § 2062; *Ohio Rev. St.* 1904, § 3404; *Ontario Rev. St.* 1902, § 1381. See *Denzel v. Rust*, 24 Barb. (N. Y.) 428; *Campbell v. Mallory*, 22 How. Pr. (N. Y.) 185.

⁴⁸⁶ *McGinnis v. Vernon*, 67 Pa. 149; *Kaier v. Leachy*, 15 Pa. Co. Ct. R. 243. In *Carlisle v. Prior*, 48 S. C. 180, 24 S. E. 244, it is stated that the notice must show on which of the various statutory grounds the proceeding was commenced. The "notice" in that jurisdiction answers apparently to what is ordinarily called the "summons." It is also decided in that case that an allegation in the notice that the plaintiff is the executor of the deceased owner does

not sufficiently show his right to maintain the proceeding.

⁴⁸⁷ *People v. Kelly*, 20 Hun (N. Y.) 549.

⁴⁸⁸ *New York Code Civ. Proc.* § 2228. See *Hill v. Stocking*, 6 Hill (N. Y.) 314, 41 Am. Dec. 748; *Cunningham v. Goehet*, 4 Denio (N. Y.) 71. A summons addressed to a firm was held to be sufficient when the names of the members appeared in the title of the cause on the summons. *Case v. Porterfield*, 54 App. Div. 109, 66 N. Y. Supp. 337.

⁴⁸⁹ *Sims v. Humphrey*, 4 Denio (N. Y.) 185; *Nemoff v. Naylor*, 100 N. Y. 522, 3 N. E. 497. See *Maves v. Evans* (S. C.) 61 S. E. 218. As to what constitutes an appearance for this purpose, see *Lukers v. Commiss.*, 13 Abb. N. C. (N. Y.) 88.

⁴⁹⁰ *Givens v. Miller*, 62 Pa. 133; *State v. Marshall*, 24 S. C. 507.

its return or the trial of the proceeding. The purpose of the statutes being to enable the landlord to speedily obtain the possession to which he is entitled, the summons is ordinarily required to be returnable after the lapse of but a few days, while the person in possession is protected by a requirement that it shall not be returnable until a minimum number of days has elapsed.⁴⁹¹

⁴⁹¹ *California* Code Civ. Proc. § 1167 (Must require defendant to appear and answer within three days); *Colorado*, Mills' Ann. St. 1891, § 1980 (Summons must require appearance in not less than five nor more than seven days, nor more than thirty in court of record); *District of Columbia* Code 1901, § 21 (Summons must issue seven days before trial); *Florida* Gen. St. 1906, § 2227 (Must require defendant to remove or show cause within not less than three nor more than five days); *Georgia* Code 1895, §§ 4813, 4821 (Warrant to deliver possession to complainant to be executed after three days, unless counter affidavit filed and bond given); *Illinois*, Hurd's Rev. St. 1905, c. 57, § 7 (Summons to name day for trial not less than five nor more than fifteen days from date of summons, unless in court of record, when returnable to first day of next term); *Indiana*, Burns' Ann. St. 1901, § 7108 (Summons to require appearance in not less than five nor more than fifteen days after its issuance); *Iowa* Code 1897, § 4214 (Appearance to be in not less than two nor more than six days after service, unless in court of record); *Michigan* Comp. Laws 1897, § 11167 (Summons to be served at least two days before time for appearance named therein); *Minnesota* Rev. Laws 1905, § 4040 (Day named for appearance to be not less than three nor more than ten days from issuance of summons); *Mississippi* Code 1906, § 2887 (Summons to require tenant to show cause on a day not less than three nor more than five days from date); *Missouri* Rev. St. 1899, § 4132 (Summons to be served at least five days before return day); *Nebraska* Comp. St. § 7527 (Service to be three days before trial); *Nevada* Comp. Laws 1900, § 3842 (Service to be at least two days before return day); *New Hampshire* Pub. St. 1901, c. 246, § 8 (Service to be seven days before return day); *New Jersey*, 2 Gen. St. p. 1918, § 13 (Summons to require tenant to show cause not less than ten nor more than fifteen days from date); *New York* Code Civ. Proc. § 2238 (Precept to be made returnable not less than three nor more than five days after issuance, except that when proceeding is based on holding over by tenant and is instituted on day of expiration of lease, or the next day thereafter, the precept may be made returnable on the same day). See *Russell v. Ostrander*, 36 How. Pr. 93; *Luhrs v. Commoss*, 13 Abb. N. C. 88. *North Carolina* Revisal 1905, § 2602 (Summons to require appearance at a time not more than five days from issue, unless by consent); *Ohio* Rev. St. 1906, § 6604 (Service shall be three days before day of trial); *Oklahoma* Rev. St. 1903, § 5091 (ditto); *Oregon*, Bell. & C. Codes, § 5749 (Service to be not less than two nor more than four days before day of trial); *Pennsylvania*, Pepper &

When the statute requires the summons to be returnable in not less than three days after issuance, it may, if issued on the twenty-first day of the month, be made returnable on the twenty-fifth,⁴⁹² but three entire days must elapse between the date of issuance and that of return, and it cannot be made returnable in such case on the twenty-fourth.⁴⁹³ A requirement that the summons shall be returnable "within four days" is satisfied if it is made returnable on the fourth day,⁴⁹⁴ and the naming of an excessive time for return is, like other defects, cured by appearance without objection.⁴⁹⁵ The fact that the writ was dated six days before the return day named, when the statute provided that the interval must be no greater than five days, was held to be immaterial, it being actually issued only three days before.⁴⁹⁶

The statutes frequently contain specific provisions for substituted service, in case the person to whom the summons is directed is not found, by leaving a copy at his place of residence or on the premises, with some person of suitable age and discretion, or by posting a copy on the premises.⁴⁹⁷ Such substituted service is

Lewis' Dig. Laws, "Landlord & Tenant," §§ 25, 34 (Tenant holding over to show cause within four days after issuance, and tenant not paying rent to appear not less than three nor more than eight days thereafter); *South Carolina* Civ. Code 1902, § 2423 (Summons to require tenant to show cause within three days from service); *South Dakota*, Justices' Code, § 48 (Time for appearance and pleading to be not less than two nor more than four days from service of summons;); *Tennessee*, Shannon's Code 1896, § 5101 (Time of trial not to be less than six days after service); *Texas* Rev. St. 1895, art. 2523 (Time for appearance to be not more than ten nor less than six days from date of citation); *Utah* Comp. Laws 1907, § 3580 (Summons shall require defendant to appear not less than three nor more than twelve days after service); *Virginia* Code 1904, § 2717 (Service to be at least

five days before return day); *West Virginia* Code 1906, § 2333 (Service to be at least ten days before return day); *Wisconsin* Rev. St. § 3362 (Summons must require appearance not less than three nor more than ten days from issuance); *Wyoming* Rev. St. 1899, § 4488 (Summons to be served not less than three nor more than twelve days before trial).

⁴⁹² *People v. Marvin Safe Co.*, 5 Hun (N. Y.) 218.

⁴⁹³ *Sallee v. Ireland*, 9 Mich. 154.

⁴⁹⁴ *Hlower v. Krider*, 15 Serg. & R. (Pa.) 43.

⁴⁹⁵ *Stroup v. McClure*, 4 Yeates (Pa.) 523.

⁴⁹⁶ *Powers v. De O.* 64 App. Div. 373, 72 N. Y. Supp. 103.

⁴⁹⁷ *Colorado*, Mills' Ann. St. 1891, § 1981; *District of Columbia* Code 1901, § 1225; *Illinois*, Hurd's Rev. St. 1903, c. 57, § 4; *Indiana*, Burns' Ann. St. 1901, § 7109; *Iowa* Code 1897, § 4213; *Kansas* Gen. St. 1905,

valid only when the conditions named in the statute are shown to exist.⁴⁹⁸ Service on a person in possession of the premises, claiming to be the lessee's agent, has been regarded as sufficient, as against the lessee, when the statute provides for summoning the lessee "or other person claiming or coming into possession under the said lessee or tenant,"⁴⁹⁹ and service on one member of a firm was regarded as sufficient as against both, when the other was absent from the city and *non compos mentis*, and the members of the firm were subtenants, the member who was served being the lessee.⁵⁰⁰

§ 281. Adjournment of the proceeding.

Since the object of the statute is to furnish a speedy method of obtaining the possession to which one is entitled, there is frequently to be found a provision restricting the grounds upon which and time for which an adjournment may be granted.⁵⁰¹

§ 5845; *Kentucky* St. 1903, § 2294; *Michigan* Comp. Laws 1897, § 11, 167; *Minnesota* Rev. Laws 1905, § 4041; *Mississippi* Code 1906, § 2888; *Missouri* Rev. St. 1899, §§ 4116, 4132; *Nevada* Comp. Laws 1900, § 3843; *New Jersey*, 2 Gen. St. 1923, § 35; *New York* Code Civ. Proc. § 2240; *North Carolina* Revisal 1905, § 2003; *Oklahoma* Rev. St. 1903, § 5091; *Tennessee*, Shannon's Code 1896, § 5127; *Texas* Rev. St. 1895, art. 2525; *Wisconsin* Rev. St. 1898, § 3363.

⁴⁹⁸ See *People v. Boardman*, 4 Keyes (N. Y.) 59; *Beach v. Bainbridge*, 7 Hun (N. Y.) 81; *Rathburn v. Weber*, 13 Civ. Proc. R. (N. Y.) 50; *People v. Platt*, 43 Barb. (N. Y.) 116; *Cameron v. McDonald*, 1 Hill (N. Y.) 512; *Deuel v. Rust*, 24 Barb. (N. Y.) 438; *People v. Matthews*, 43 Barb. (N. Y.) 168; *Id.*, 38 N. Y. 451.

Service on two joint lessees cannot be made, it has been decided, by leaving one copy with another per-

son in the absence of both, the statute providing for substituted service on the person named in the precept, in his absence, by leaving a copy. *People v. DeCamp*, 12 Hun (N. Y.) 378.

⁴⁹⁹ *Watts v. Fox*, 64 Pa. 336.

⁵⁰⁰ *Ludwig v. Lazarus*, 10 App. Div. 62, 41 N. Y. Supp. 773.

⁵⁰¹ *Alabama* Code 1907, § 4268 (For good cause, trial may be postponed not more than fifteen days, at the cost of the applicant); *Iowa* Code 1897, § 4215 (No adjournment in justice's court for more than ten days); *Kansas* Gen. St. 1905, § 5401 (No continuance for more than eight days unless applicant files bond); *Michigan* Comp. Laws 1897, § 11169 (If no appearance on return day, officer may adjourn hearing not more than six days); *Minnesota* Rev. Laws 1905, § 4043 (Justice may, in discretion, adjourn trial for not more than six days, or for three months if no written lease signed and acknowledged by both parties,

§ 232. Findings of fact.

In order to justify a judgment of dispossession, there must be a finding of the existence of the facts which, under the statute, give jurisdiction to render such a judgment.⁵⁰²

The statute quite frequently provides for a trial by jury, usually on the request of one of the parties to the proceeding.⁵⁰³

and defendant makes oath as to absence of material witness and gives bond); *Mississippi* Code 1906, § 2391 (Magistrate may, at request of either party, adjourn the hearing from time to time. No adjournment to be for more than ten days unless by consent); *Nebraska* Comp. St. 1905, § 7531 (same as Kansas); *Nevada* Comp. Laws 1900, § 3845 (Justice may adjourn trial, but not more than five days, unless defendant makes oath as to absence of witness and gives bond); *New York* Code Civ. Proc. § 2243 (Adjournment in discretion of justice, to enable witnesses to be procured, for not more than ten days, except by consent); *Ohio* Rev. St. 1903, § 6603 (No continuance for more than eight days unless undertaking given for rent to accrue and costs); *Oklahoma* Rev. St. 1903, § 5093 (same as Ohio); *Oregon*, Bell. & C. Codes, § 5750 (No continuance for more than two days, unless undertaking given to pay rent to accrue); *South Dakota*, Justices' Code, § 48 (No adjournment for more than five days, unless applicant gives security for rent to accrue and costs); *Texas* Rev. St. 1895, art. 2530 (For good cause, trial may be postponed not more than six days); *Wisconsin* Rev. St. 1898, § 2365 (No adjournment for more than six days after return day unless affidavit as to absence of material witness and bond given for

rent); *Wyoming* Rev. St. 1899, § 4491 (No continuance for more than eight days unless defendant gives undertaking to pay rent and costs).

⁵⁰² *Lacabere v. Wise*, 141 Cal. 554, 75 Pac. 185, 99 Am. St. Rep. 88 (finding of service of notice necessary); *Cambridge Lodge No. 9, K. P. v. Routh*, 163 Ind. 1, 71 N. E. 148 (finding of nonpayment of rent due, after notice to pay, necessary); *Thomas v. Flamer*, 1 Phila. (Pa.) 518, 12 Leg. Int. 10 (finding of insufficiency of distress necessary).

⁵⁰³ *California* Code Civ. Proc. § 1171; *Connecticut* Gen. St. 1902, § 1089; *Florida* Gen. St. 1906, § 2231; *Georgia* Code 1895, § 4816; *Idaho* Code Civ. Proc. § 3987; *Illinois*, Hurd's Rev. St. 1905, c. 57, § 10; *Kansas* Gen. St. 1905, § 5849; *Minnesota* Rev. Laws 1905, § 4042; *Nebraska* Comp. St. 1905, §§ 2005, 6556 a; *Nevada* Comp. Laws 1900, § 3844; *New Jersey*, 2 Gen. St. p. 1918, § 20; *New York* Code Civ. Proc. § 2247; *North Carolina* Revisal 1905, § 2005; *Ohio* Rev. St. 1906, § 6608; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," § 25; *South Carolina* Civ. Code 1902, § 2421; *Texas* Rev. St. 1895, art. 2525; *Utah* Comp. Laws 1907, § 3581; *Vermont* Pub. St. 1906, § 1871; *Virginia* Code 1904, § 2719; *Washington*, Ball. Ann. Codes & St. § 5539. The statutes above cited of California, Georgia, Idaho, and Pennsylvania, provide

§ 283. Judgment or order.

a. In default of appearance. A number of the statutes have provisions bearing upon the question whether, upon failure of the defendant to appear, a judgment for possession shall be given in favor of the plaintiff. By some it is provided that possession shall be awarded unless cause to the contrary is shown,⁵⁰⁴ while by others it is provided that if he fails to appear the trial shall proceed as if he had appeared and pleaded.⁵⁰⁵ Even though the statute provides for a trial in the absence of any appearance by defendant, judgment may be rendered on the pleadings if he admits the material allegations of the complaint and alleges no defense.⁵⁰⁶

It has been decided that if the plaintiff produces a written

that the trial shall be by a jury. defendant does not appear, or de- The statute of Tennessee (Shan- dlines to plead, cause to proceed as non's Code, § 5102) provides that if he had pleaded not guilty); *Illi-* the trial shall be without a jury. *Illinois*, Hurd's Rev. St. 1905, c. 57, §

⁵⁰⁴ *California* Code Civ. Proc. § 12 (If defendant does not appear, 1169 (If defendant does not appear, trial may be ex parte); *Kansas* Gen. his default to be entered and judg- St. 1905, § 5400 (Trial to proceed as ment for plaintiff); *Florida* Gen. St. if defendant present); *Minnesota* 1906, § 2230 (If no cause to contrary Rev. Laws 1905, §§ 4040, 4042, 4044. shown, judgment for possession in See *Hennessey v. Pederson*, 28 favor of plaintiff); *Idaho* Code Civ. Minn. 461, 11 N. W. 63. *Michigan* Proc. § 3986 (Same as California); Comp. Laws 1897, § 11170 (If no ap- *Maine* Rev. St. 1903, c. 96, § 5 (If pearance and case not adjourned, defendant defaulted, or fails to officer shall try the case); *Missis-* show sufficient cause, judgment for sippi Code 1906, § 2889 (If no cause possession); *New Jersey*, 2 Gen. St. shown to the contrary, warrant of p. 1919, § 16 (If no sufficient cause restitution shall issue); *Nebraska* shown to contrary, warrant of pos- Comp. St. 1905, § 7530 (same as session to issue). See *Watson v. Kansas*); *Ohio* Rev. St. 1906, § 6605 *Idler*, 54 N. J. Law, 407, 21 A.L.R. 551. (If no appearance by defendant, *New York* Code Civ. Proc. § 2249 trial to be as if he were present); (Substantially same as *New Jer-* *Oklahoma* Rev. St. 1903, § 5092 sey). See *Peer v. O'Leary*, 8 Misc. (same as Ohio); *West Virginia* 350, 28 N. Y. Supp. 687; *People v.* Code 1906, § 3333 (If no appearance, Murray, 2 Misc. 152, 23 N. Y. Supp. jury shall try issue); *Wyoming* 160; *Id.*, 138 N. Y. 635, 33 N. E. Rev. St. 1899, § 4489 (If no appear- 1084; *Brown v. City of New York*, ance, justice to try cause as if plain- 66 N. Y. 385. *North Carolina* Re- tiff were present). visal 1905, § 2004 (If no appearance, ⁵⁰⁶ *Norton v. Beckman*, 53 Minn. judgment for removal). 156, 55 N. W. 603.

⁵⁰⁵ *Alabama* Code 1907, § 4268 (If

lease as that under which defendant held, he cannot, on failure to prove the formal execution thereof, maintain the proceeding on oral proof of possession and payment of rent by defendant.⁵⁰⁷

A warrant of attorney in the instrument of lease, authorizing a confession of judgment for possession in favor of the landlord in a summary proceeding, has in one state been held to be invalid, and insufficient to support such a judgment, rendered without the issuance of any process.⁵⁰⁸ In another state, however, there is a recognized practice by which a judgment for possession may be entered in favor of the landlord, in what is known as an "amicable action of ejectment," under such a warrant of attorney, upon the expiration of the term or upon a default by the tenant of a character named, the judgment being subject to be stricken off if shown to have been confessed without justification.⁵⁰⁹

b. **For rent or damages.** The statute usually provides that, in case the decision is in favor of the petitioner or plaintiff in the proceeding, judgment shall be rendered for possession and costs, while, if for the defendant, the judgment shall be for costs. The statute also quite frequently provides that when the proceeding is based on the nonpayment of rent, judgment shall be given for the amount of the rent due, and occasionally for twice or treble this amount.⁵¹⁰ In some of the states the landlord, proceeding

⁵⁰⁷ *Barry v. Ryan*, 70 Mass. (4 Gray) 523, 64 Am. Dec. 92, where it is stated, as a reason for so holding, that the law will imply no contract when the parties have made an express one, and the plaintiff, having produced what he asserted to be an express contract, cannot deny its existence.

⁵⁰⁸ *French v. Willer*, 126 Ill. 611, 18 N. E. 811, 2 L. R. A. 717, 9 Am. St. Rep. 651.

⁵⁰⁹ See *Cook v. Gilbert*, 8 Serg. & R. (Pa.) 567, 11 Am. Dec. 632; *McCalmont v. Peters*, 13 Serg. & R. (Pa.) 136; *Flanigen v. City of Philadelphia*, 51 Pa. 491; *Grossman's Appeal*, 102 Pa. 137, 48 Am. Rep. 196; *Swartz's Appeal*, 113 Pa. 208, 13 Atl. 69, 4 Am. St. Rep. 631; *Dike-*

man v. Butterfield, 135 Pa. 236, 19 Atl. 938; *Stewart v. Jackson*, 181 Pa. 549, 37 Atl. 518.

⁵¹⁰ *California* Code Civ. Proc. § 1174 (Three times amount of rent due). See *Nolan v. Hentig*, 138 Cal. 281, 71 Pac. 440. *Georgia* Code 1895, § 4817 (Double stipulated rent). See *Sykes v. Benton*, 90 Ga. 402, 17 S. E. 1002. *Michigan* Comp. Laws 1897, § 11168; *Missouri* Rev. St. 1899, § 4132; *Montana* Rev. Codes 1907, § 7283 (Three times amount of rent due); *Utah* Comp. Laws 1907, § 3584 (Three times amount of rent due); *Washington*. Ball. Ann. Codes & St. § 5542 (Twice amount of rent due). See *Bond v. Chapman*, 34 Wash. 606, 76 Pac. 97.

against the tenant holding over, is entitled to judgment for compensation or damages on account of such holding over,^{511, 512} or occasionally for double or treble the agreed rent or rental value for the time of such wrongful holding.⁵¹³ A recovery of any rent which may be in arrear is also occasionally authorized, even though the proceeding is based merely on a holding over by the tenant.⁵¹⁴

It has been held that there can, in a proceeding based on non-payment of rent, be no judgment for the unpaid rent, unless the statute expressly authorizes it,⁵¹⁵ nor can a judgment for com-

^{511, 512} *Alabama* Code 1907, § 4273; proceeding against a tenant holding *Arkansas*, Kirby's Dig. St. 1904, § over, does not refer to the rent reserved, but a fair and reasonable compensation for the use of the premises. *Baldwin v. Skeels*, 51 Vt. 121. For a like construction of a substantially similar statute, see *Leahy v. Lubman*, 67 Mo. App. 191. *California* Code Civ. Proc. § 3644; (Treble damages); *Colorado*, Mills' Ann. St. 1891, § 1995 (Treble damages, recoverable in separate suit); *District of Columbia* Code 1901, §§ 996, 1226; *Idaho* Code Civ. Proc. § 3990 (same as California); *Indiana*, Burns' Ann. St. 1901, § 7106. (See *Whipple v. Shewalter*, 91 Ind. 114; *Thomas v. Walmer*, 18 Ind. App. 112, 46 N. E. 695). *Montana* Rev. Codes 1907, § 7283 (Treble damages); *Nevada* Comp. Laws 1900, § 3849 (Treble damages); *North Carolina* Revisal 1905, §§ 2004-2006; *North Dakota* Rev. Codes 1905, § 8441; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," §§ 25, 28. See *Murtland v. English*, 214 Pa. 325, 63 Atl. 882. *Tennessee*, Shannon's Code 1896, §§ 5112, 5116; *Utah* Comp. Laws 1907, § 5584; *Washington*, Ball. Ann. Codes & St. § 5542. See *Hinckley v. Casey*, 45 Wash. 430, 88 Pac. 753. *Wisconsin* Rev. St. 1898, § 3367.

⁵¹³ *Alabama* Code 1907, § 4273; *District of Columbia* Code 1901, §§ 996, 1226; *Georgia* Code 1895, § 4817 (semble).

Vermont Pub. St. 1906, § 1873, authorizing recovery of "rents" in a

⁵¹⁴ *District of Columbia* Code 1901, §§ 996, 1226 (Landlord may embody in his declaration claim for arrears of rent, for double rent, or for damages for waste); *North Carolina* Revisal 1905, §§ 2002, 2005 (Plaintiff may claim rent in arrear).

⁵¹⁵ *Ow v. Wickham*, 38 Kan. 225, 16 Pac. 335; *Jarvis v. Driggs*, 69 N. Y. 147; *Bennett v. Nick*, 29 Misc. 632, 61 N. Y. Supp. 106; *Spiro v. Barkin*, 30 Misc. 87, 61 N. Y. Supp. 870; *Stelle v. Creamer*, 69 App. Div. 296, 74 N. Y. Supp. 669. In *Whipple v. Shewalter*, 91 Ind. 114, it is decided that, conceding that the plaintiff had no right to assert such claim in the summary proceeding, objection on that account must be promptly made. In *Duke v. Comp-ton*, 49 Mo. App. 304, it was decided that a provision giving the transferee of the reversion the right, on a default in rent, to institute the proceeding to recover possession, did not give him the benefit of the

pensation for the loss of the use of the premises be rendered in a proceeding against a tenant holding over his term, in the absence of statutory authority therefor.⁵¹⁶

The statutory right of the landlord to recover overdue rent, in a summary proceeding based on nonpayment of the rent, is not waived, it has been held, by his acceptance of rent falling due after the institution of the proceeding, though he thereby waives his right to recover possession for nonpayment.⁵¹⁷ Nor is the landlord's statutory right to recover damages and costs against a tenant holding over affected by the fact that pending the proceeding the tenant relinquishes possession to him.⁵¹⁸

It has been held in one jurisdiction that the plaintiff cannot recover double damages under the statute unless they are claimed in the complaint,⁵¹⁹ though a different view has been adopted in other jurisdictions on a construction of the local statute.⁵²⁰ It has also been decided that where the statute, in naming the requisites of the complaint, does not refer to the necessity of a prayer for a judgment for rent, such prayer is unnecessary to uphold a judgment for the rent, for nonpayment of which possession is demanded.⁵²¹ In the jurisdiction first referred to it was also decided that rent becoming due between the time of the trial and the time of the filing of the complaint could not be recovered in the absence of the assertion of a claim therefor, either in the original complaint or in a supplement thereto,⁵²² but a different view has been taken in another state.⁵²³

A provision of the statute authorizing the recovery of damages for the detention of the premises, "to be estimated up to the

statute entitling the "landlord" to recover both possession and rent. *v. Wilbur*, 4 Wash. 644, 30 Pac. 665; *Gaffney v. Megrath*, 11 Wash. 456,

⁵¹⁶ *Clark v. Snow*, 24 Tex. 242; 39 Pac. 973. See *Hart v. Pratt*, 19 Sargent v. Smith, 78 Mass. (12 Wash. 560, 53 Pac. 711.

Gray) 426; *Shunick v. Thompson*, 520 *Pettis v. Brewster*, 94 Ga. 527, 25 Ill. App. 619; *Mackenzie v. Porter*, 40 Colo. 340, 91 Pac. 916. 19 S. E. 755; *Bierkenkamp v. Bierkenkamp*, 88 Mo. App. 445.

⁵¹⁷ *Neiner v. Altemeyer*, 68 Mo. App. 243. ⁵²¹ *Shields v. Stillman*, 48 Mo. 82.

⁵²² *State v. Pittenger*, 37 Wash.

⁵¹⁸ *Peters v. Fisher*, 50 Mich. 331, 384, 79 Pac. 942.

15 N. W. 496; *McLain v. Nurnberg*, 523 *Nolan v. Hentig*, 138 Cal. 281, 16 N. D. 144, 112 N. W. 243. See 71 Pac. 440. And see *Goesse & Hebron Church v. Adams*, 121 Mass. Remmers Bldg. & Cont. Co. v. Kin- 257; *Barnett v. Feary*, 101 Ind. 95. nerk, 127 Mo. App. 451, 105 S. W.

⁵¹⁹ *Hall & Paulson Furniture Co.* 673.

time of trial," has been held to authorize damages in excess of the amount named in the complaint.⁵²⁴ In computing such damages, it has been decided, the rental value of the property, and any loss of profits or rents from the detention of the premises, may be considered.⁵²⁵

In case of a proceeding against a tenant and a subtenant, it has been said, a judgment for possession should be entered against both, and a judgment for double rent against the former only.⁵²⁶

§ 284. Appeal and certiorari.

The statutes almost invariably authorize an appeal by the person against whom the judgment is given in the proceeding, such appeal being effective to stay the execution of a judgment of dispossession only in case the appellant gives a bond or undertaking sufficient to satisfy any damage to the plaintiff caused by the continued withholding of possession.⁵²⁷ The appeal is or-

⁵²⁴ *White v. Stellwagon*, 54 Ind. 186; *Maryland* Code Pub. Gen. Laws 1904, art. 53, § 2; *Massachusetts* Rev. Laws 1902, c. 181, § 6; *Michigan* Comp. Laws 1897, § 11176; *Minnesota* Rev. Laws 1905, § 4047; *Missouri* Rev. St. 1899, § 4139; *Nebraska* Comp. St. 1905, § 7539; *Nevada* Comp. Laws 1900, § 3849; *New Hampshire* Pub. St. 1901, c. 246, § 17; *New Mexico* Comp. Laws 1897, §§ 3357, 3358; *New York* Code Civ. Proc. § 2262; *North Carolina* Re-
⁵²⁵ *Barnett v. Feary*, 101 Ind. 95; *Lautmann v. Miller*, 158 Ind. 382, 63 N. E. 761; *Campbell v. Nixon*, 2 Ind. App. 463, 28 N. E. 107; *Pence v. Williams*, 14 Ind. App. 86, 42 N. E. 494; *Thomas v. Walmer*, 18 Ind. App. 112, 46 N. E. 695.

Special damages, it is said, cannot be recovered, if not alleged. *Thomas v. Walmer*, 18 Ind. App. 112, 46 N. E. 695. The special damages here in question were for waste.

⁵²⁶ *Fletcher v. Fletcher*, 123 Ga. 470, 51 S. E. 418.

⁵²⁷ *Alabama* Code 1907, § 4281; *Arizona* Rev. St. 1901, §§ 2684, 2693; *Colorado*, Mills' Ann. St. 1891, §§ 1987, 1988; *Connecticut* Gen. St. 1902, § 1087; *District of Columbia* Code 1901, § 1232; *Florida* Gen. St. 1906, § 2234; *Georgia* Code 1895, § 4821; *Illinois*, Hurd's Rev. St. c. 57, § 10; *Indiana*, Burns' Ann. St. 1901, § 7112; *Kansas* Gen. St. 1905, § 5809; *Maine* Rev. St. 1903, c. 96, § 8; *Maryland* Code Pub. Gen. Laws 1904, art. 53, § 2; *Massachusetts* Rev. Laws 1902, c. 181, § 6; *Michigan* Comp. Laws 1897, § 11176; *Minnesota* Rev. Laws 1905, § 4047; *Missouri* Rev. St. 1899, § 4139; *Nebraska* Comp. St. 1905, § 7539; *Nevada* Comp. Laws 1900, § 3849; *New Hampshire* Pub. St. 1901, c. 246, § 17; *New Mexico* Comp. Laws 1897, §§ 3357, 3358; *New York* Code Civ. Proc. § 2262; *North Carolina* Re-
visal 1905, § 2008; *Oregon*, Bell. & C. Codes, § 5754; *South Carolina* Civ. Code 1902, § 2423; *Tennessee*, Shannon's Code 1896, §§ 5108, 5110; *Texas* Rev. St. 1895, art. 2534; *Utah* Comp. Laws 1907, § 3586; *Vermont* Pub. St. 1906, § 1876; *Virginia* Code 1904, § 2720; *Washington*, Ball. Ann. Codes & St. § 5546; *West Virginia* Code 1906, § 2169; *Wisconsin* Rev. St. 1898, § 3368.

As to liabilities on appeal bonds in such proceedings, see *King v. Brewer*, 19 Ind. 267; *Stults v. Zahn*, 117 Ind. 297, 2 N. E. 154; *Harring-*

dinarily to a superior court of original jurisdiction, and the trial in such court proceeds as if the cause had been originally instituted there. Occasionally the statute specifically provides for the removal of a proceeding of this character to a higher court by writ of certiorari.⁵²⁸ In some jurisdictions such a writ will lie under general statutory provisions or under common-law rules.⁵²⁹

In case judgment of dispossession is awarded in favor of the plaintiff in the lower court, and he is put in possession thereunder, the appellate court will, in a proper case, upon reversing such judgment, issue a writ of restitution restoring the defendant to the possession of the premises.⁵³⁰ Such a writ will not issue, however, if there is a mere reversal without rendition of any judgment in the higher court,⁵³¹ nor if it clearly appears that the plaintiff has no longer any interest in the land, entitling him to possession.⁵³² In one state it is said that the writ will issue in case the reversal is for jurisdictional defects in the proceedings, but not when it is based on mere irregularities.⁵³³

ton v. Brown, 24 Mass. (7 Pick.) 232; Byrne v. Morrison, 25 App. D. C. 72; Bartholomew v. Chapin, 51 Mass. (10 Metc.) 1; Davis v. Alden, 68 Mass. (2 Gray) 309; Jackson v. Richards, 82 Mass. (16 Gray) 497; Pray v. Wasdell, 146 Mass. 324, 16 N. E. 266.

⁵²⁸ *Michigan* Comp. Laws 1905, § 11179; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," § 28; *Tennessee*, Shannon's Code 1896, § 5111.

⁵²⁹ See *Morris Canal & Banking Co. v. Mitchell*, 31 N. J. Law, 99; *Layton v. Dennis*, 43 N. J. Law, 380; *Roberts v. McPherson*, 62 N. J. Law, 165, 40 Atl. 630; *Id.*, 63 N. J. Law, 352, 43 Atl. 1098; *Benjamin v. Benjamin*, 5 N. Y. (1 Seld.) 383; *Freeman v. Ogden*, 40 N. Y. 105.

Where the statute authorized the plaintiff, in case restitution of the premises was awarded him upon the tenant's appeal, either to recover on the appeal bond or to sue in tres-

pass or in case for the unlawful detainer and for all other damage sustained by him, it was held that, having elected to sue on the bond, and having recovered the rental value of the premises up to the time of the rendition of the judgment of restitution, the landlord could not afterwards sue for items of damage not recoverable in the action on the bond. *Schellenberg v. Frank*, 139 Mich. 183, 102 N. W. 644.

⁵³⁰ See *Du Bouchet v. Wharton*, 12 Conn. 533; *McGee v. Fessler*, 1 Pa. 126.

⁵³¹ *Mears v. Remare*, 34 Md. 333.

⁵³² *Chretien v. Doney*, 1 N. Y. (1 Comst.) 419; *McGee v. Fessler*, 1 Pa. 126. See *McQuade v. Emmons*, 33 N. J. Law, 397. So restitution was refused when the plaintiff was not entitled to possession owing to the existence of a receivership. *Marsh v. Masterson*, 15 Daly, 114, 3 N. Y. Supp. 414.

⁵³³ *People v. Platt*, 43 Barb. (N.

The landlord may, it has been decided, have such a judgment in the higher court as will give him his costs and entitle him to the benefit of any recognizance which he may have taken to secure intervening rent upon the appeal from the magistrate, although, pending the appeal, the tenant may have relinquished possession to him,⁵³⁴ or the landlord's estate, and consequent right of possession, may have come to an end.⁵³⁵

It has been decided that where the statute provided that the tenant might, at any time before the time appointed for showing cause, file an affidavit denying the facts alleged, which matters might be tried by the magistrate, and it also provided that on appeal the case should be tried anew, the tenant might file such affidavit on appeal.⁵³⁶

The fact that the complaint is required by the statute to be verified in order to confer jurisdiction on the justice does not, it has been decided, preclude an amendment on appeal, increasing the amount demanded for damages, without a new verification.⁵³⁷

After the landlord has obtained a judgment for possession and for rent up to a specified date, and the tenant has appealed, giving a bond to relinquish possession upon the affirmance of the judgment and to pay all damages and all rent due up to the time of such relinquishment, another action, between the same parties, cannot be instituted to recover possession of the same premises and for rent from the time of the recovery of such judgment in the former proceeding.⁵³⁸

§ 285. Warrant of dispossession.

In case the judgment is in favor of the plaintiff, a warrant issues directing the delivery to him of the possession of the premises. It is the duty of the officer executing the warrant to remove all persons who are parties to the proceeding, and, if

Y.) 116; *People v. Hamilton*, 15 Abb. Mass. 309; *Casey v. King*, 98 Mass. Pr. (N. Y.) 328; *Bristed v. Harrell*, 503.
21 Misc. 93, 46 N. Y. Supp. 966. See ⁵³⁶ *Harvey v. Clark*, 81 Miss. 166, 32 So. 906.
People v. Matthews, 38 N. Y. 451. ⁵³⁷ *Ver Steeg v. Becker-Moore Paint Co.*, 106 Mo. App. 257, 80 S. W. 346.

⁵³⁴ *Hebron Church v. Adams*, 121 Mass. 257.

⁵³⁵ *Coburn v. Palmer*, 62 Mass. (8 Cush.) 124; *King v. Lawson*, 98

⁵³⁸ *McLain v. Nurnberg*, 16 N. D. 138, 112 N. W. 245.

seems, all those persons on the premises who are there as members of the tenant's family, servants or licensees.⁵³⁹ He has been held to be liable in damages if he ejects persons not holding under, or deriving title from, parties to the proceeding, although the warrant required him to remove the defendant in the proceeding "and all others,"⁵⁴⁰ and this is in accord with the modern decisions, as to the execution of a writ for the possession of lands, that persons not parties cannot be removed thereunder.⁵⁴¹

It has been decided that the officer owes no duty to the landlord to remove the tenant's goods, but that he may do so as representative of the landlord.⁵⁴² In one state it is said that if he removes the goods, and the tenant refuses to take them as they are removed, he is bound to exercise reasonable care in storing them.⁵⁴³ Elsewhere, however, it is said that the landlord may leave them on the sidewalk, without any responsibility in reference to their future disposition,⁵⁴⁴ and that he is not liable because the goods are removed by him in the rain and so injured.⁵⁴⁵ If he chooses to care for or store them, he cannot assert any right to charge storage.⁵⁴⁶ If he refuses to relinquish the goods when demand is made, he becomes liable as for conversion,⁵⁴⁷ but not if they are still on the premises and these are

⁵³⁹ See ante, at note 140.

⁵⁴⁰ *Colt v. Eves*, 12 Conn. 243. But in *Inhabitants of Union Tp. v. Bayliss*, 40 N. J. Law, 60, it is said to be the officer's duty to remove "all persons in possession, as well the defendant as other persons not parties to the record." The opinion cites authorities bearing on the execution of the writ of *habere facias* issued in an ejectment under the old law, in which case the execution of the writ against persons other than parties to the record was absolutely necessary to render a judgment against the casual ejector effective.

⁵⁴¹ See *Freeman, Executions*, § 475; *Murfree, Sheriffs* (2d Ed.) § 1022.

⁵⁴² *Inhabitants of Union Tp. v.*

Bayliss, 40 N. J. Law, 60. But see *Danforth v. Stratton*, 77 Me. 200; *Scott v. Richardson*, 41 Ky. (2 B. Mon.) 516, 38 Am. Dec. 170.

⁵⁴³ *Caertner v. Bues*, 109 Wis. 165, 85 N. W. 388. Compare ante, § 255b, at notes 25-29.

⁵⁴⁴ *Conway v. Kennedy*, 2 City Ct. R. (N. Y.) 309.

⁵⁴⁵ *Higenbotham v. Lowenbein*, 28 How. Pr. (N. Y.) 221.

⁵⁴⁶ *Roberts v. Kain*, 29 N. Y. Super. Ct. (6 Rob.) 354; *Conway v. Kennedy*, 2 City Ct. R. (N. Y.) 309. Compare ante, § 255 b, at note 546.

⁵⁴⁷ *Conway v. Kennedy*, 2 City Ct. R. (N. Y.) 309; *Smusch v. Kohn*, 22 Misc. 344, 42 N. Y. Supp. 172; *Reich v. Cochran*, 114 App. Div. 141, 95 N. Y. Supp. 755.

in the possession of another, since in such case the demand should be made on the latter.⁵⁴⁸ Both the landlord and the officer are no doubt liable for injuries wantonly caused to the tenant's goods.⁵⁴⁹

It is said that the tenant has a reasonable time within which to remove his chattels, after the dispossession in summary proceedings.⁵⁵⁰ His right of property therein cannot be lost, however, by his mere delay in asserting it, until the statute of limitations has run against him^{551, 552} though any delay beyond a reasonable time in this regard would deprive him of the right to go on the premises, for the purpose of removing his chattels, without thereby becoming liable as a trespasser.

§ 286. Conclusiveness of judgment.

A judgment in a summary proceeding determining the right of possession is a bar to any subsequent action or proceeding based upon a claim by the defeated party that he and not the other should have had judgment for possession.⁵⁵³ But the judgment is not a bar to a subsequent proceeding by the landlord to recover rent, or damages for holding over, even though these might have been recovered in such proceeding,⁵⁵⁴ nor is it a bar to an action for breach of covenants by either party.⁵⁵⁵ It is a bar to another proceeding by the landlord to obtain possession based upon the same state of facts.⁵⁵⁶

A judgment in a summary proceeding is ordinarily, like a judgment in any other legal proceeding, conclusive as to such facts as are necessary conditions to the rendition of the judgment.⁵⁵⁷ Applying this rule, it has been stated in a number of cases that a judgment for plaintiff is conclusive as to the exis-

⁵⁴⁸ *Peck v. Knox*, 31 N. Y. Super. Rep. 929; *Campbell v. Nixon*, 2 Ind. Ct. (1 Sweeney) 311. App. 463, 28 N. E. 107; *Hinsdale v.*

⁵⁴⁹ See *Miller v. White*, 80 Ill. 580. White, 6 Hill (N. Y.) 507.

⁵⁵⁰ *Smusch v. Kohn*, 22 Misc. 344, 49 N. Y. Supp. 176. ⁵⁵³ *Abrams v. Watson*, 59 Ala. 524; *Schuricht v. Broadwell*, 4 Mo.

^{551, 552} See ante, § 242 a, note 113; App. 160; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, § 255, note 24. 37 Am. St. Rep. 175.

⁵⁵³ *Norwood v. Kirby's Adm'r*, 70 Ala. 397; *Nemetty v. Naylor*, 100 N. Y. 562, 3 N. E. 497. ⁵⁵⁶ *Marsteller v. Marsteller*, 132 Pa. 517, 19 Atl. 344, 19 Am. St. Rep.

⁵⁵⁴ *Belshaw v. Moses*, 49 Ala. 283; 604. ⁵⁵⁷ See 2 Black, Judgments, §§ Ullman v. Herzberg, 91 Ala. 458, 8 So. 408, 11 L. R. A. 619, 24 Am. St. 613, 663.

tence of the relation of landlord and tenant between the parties,⁵⁵⁸ but in view of the fact that, as we have seen, the proceedings will in some cases lie even though such relation does not exist,⁵⁵⁹ it would be perhaps more strictly correct to say that it is conclusive of the existence of that relation, or of such other relation as will, under the statute, justify the proceeding.⁵⁶⁰ A judgment for the plaintiff is conclusive as to the fact of the defendant's possession of the premises at the time of its rendition and the plaintiff's right to possession.⁵⁶¹ It is also said to be conclusive of the validity of the lease,⁵⁶² but as to this, some question might be raised, it seems, since the fact that a lease is invalid would not, ordinarily, it is conceived, preclude a summary proceeding by the landlord to recover possession.⁵⁶³

⁵⁵⁸ *Harvin v. Blackman*, 112 La. 24, 36 So. 213; *Brown v. City of New York*, 66 N. Y. 385; *Reich v. Cochran*, 151 N. Y. 122, 45 N. E. 367, 37 L. R. A. 805, 56 Am. St. Rep. 607; *Rosenquest v. Noble*, 21 App. Div. 583, 48 N. Y. Supp. 398. So in *Richmond v. Stahle*, 48 Conn. 22, it is decided that a judgment for plaintiff in such proceeding is conclusive that the relation of landlord and tenant exists, so that the possession of the defendant cannot have been adverse. In *Reich v. Cochran*, 151 N. Y. 122, 45 N. E. 367, 37 L. R. A. 805, 56 Am. St. Rep. 607, it is decided that a judgment for plaintiff in the proceeding precludes a subsequent showing by defendant that the alleged lease to him was merely part of a proceeding to secure a usurious loan to him by the lessor, that is, the judgment is conclusive that the defendant held under a lease. And in *McCotter v. Flynn*, 30 Misc. 119, 61 N. Y. Supp. 786, it is decided that the judgment in a summary proceeding based on the nonpayment of rent is conclusive that there had been no previous surrender.

⁵⁵⁹ See ante, § 273 a (1).

⁵⁶⁰ A judgment for plaintiff in a proceeding by the original lessor against an undertenant would not be conclusive that the latter is a tenant of the plaintiff. See *La Farge v. Park*, 1 Edm. Sel. Cas. (N. Y.) 223. Nor would the judgment be conclusive of this relation when rendered in favor of a subsequent lessee, as being entitled to possession, so as to authorize the latter to recover in use and occupation.

⁵⁶¹ *Western Book & Stationery Co. v. Jevne*, 179 Ill. 71, 53 N. E. 565; *Brown v. City of New York*, 66 N. Y. 385; *Reich v. Cochran*, 151 N. Y. 122, 45 N. E. 367, 37 L. R. A. 805, 56 Am. St. Rep. 607. But see *McWilliams v. King*, 32 N. J. Law, 21, contra, construing a statute.

⁵⁶² *Harvin v. Blackman*, 112 La. 24, 36 So. 213; *Reich v. Cochran*, 151 N. Y. 122, 45 N. E. 367, 37 L. R. A. 805, 56 Am. St. Rep. 607; *Mulligan v. Cox*, 23 Misc. 695, 52 N. Y. Supp. 111; *Meyerhoffer v. Baker*, 121 App. Div. 797, 106 N. Y. Supp. 718.

⁵⁶³ See ante, § 273 a (3). In *Boller v. City of New York*, 40 N. Y.

A judgment for plaintiff in a proceeding to recover possession on the ground of nonpayment of rent is conclusive, it has been decided, as to the fact that some rent is due, though not as to the amount,⁵⁶⁴ and a judgment for defendant therein is conclusive that no rent is due, if it is based on a finding to that effect.⁵⁶⁵ A judgment for plaintiff in such a proceeding, based on an allegation of an assignment of the lease to the defendant, and nonpayment of rent by him, has been regarded as conclusive of his liability, in a subsequent action for rent, as an assignee of the lease.⁵⁶⁶

In some jurisdictions the doctrine prevails that where a judgment might have been based on any one of two or more distinct facts, and it does not appear upon which it was actually based, the person asserting it as an estoppel has the burden of showing upon which it was based,⁵⁶⁷ and this doctrine has been applied in the case of a judgment in a summary proceeding.⁵⁶⁸ In other jurisdictions the view is taken that a judgment is to be presumed, in the absence of evidence to the contrary, to have settled all the issues involved in favor of the successful party.⁵⁶⁹

§ 287. Effect of proceeding as terminating tenancy.

A judgment for the plaintiff against a tenant holding over establishes that the tenancy has already come to an end, and consequently the question whether the judgment terminates the tenancy cannot arise. When the proceeding is based, however, on the nonpayment of rent, or breach of other covenant, the question whether a judgment for recovery of possession will termi-

Super. Ct. (8 Jones & S.) 523, it is decided that a judgment for plaintiff is not conclusive of the validity of the lease in a subsequent action for rent.

⁵⁶⁴ *Brown v. City of New York*, 66 N. Y. 385 (judgment by default); *Jarvis v. Driggs*, 69 N. Y. 143; *Rosenquest v. Noble*, 21 App. Div. 583, 48 N. Y. Supp. 398; *Steele v. Creamer*, 69 App. Div. 296, 74 N. Y. Supp. 669; *Harley v. McAuliff*, 26 Mo. 525. See *Lewy v. Wolfman*, 110 N. Y. Supp. 256.

⁵⁶⁵ *White v. Coatsworth*, 6 N. Y. (2 Seld.) 137.

⁵⁶⁶ *Grafton v. Brigham*, 70 Hun, 131, 24 N. Y. Supp. 54.

⁵⁶⁷ See 2 Black, Judgments, § 629.

⁵⁶⁸ *McSloy v. Ryan*, 27 Mich. 110; *Lewis v. Ocean Nav. & Pier Co.*, 125 N. Y. 341, 26 N. E. 301. The case of *Yonkers & New York Fire Ins. Co. v. Bishop*, 1 Daly (N. Y.) 449, is apparently contra, and must be regarded as overruled.

⁵⁶⁹ See 2 Black, Judgments, § 629.

nate all rights and liabilities under the lease may possibly arise. The recovery of a judgment of dispossession in such a case would presumably, in the absence of any express provision on the subject, terminate the tenancy, especially after the issue of execution on the judgment.⁵⁷⁰

In New York it was originally provided by statute that the issue of a warrant for the removal of a tenant should cancel the agreement for the use of the premises and annul the relation of landlord and tenant, and it was held that, in the case of a proceeding based on the nonpayment of rent, the warrant related back to the time of the default for which the possession was awarded, and that no rent thereafter accruing could be recovered, though the landlord could recover the rent, for nonpayment of which the proceeding was instituted.⁵⁷¹ Subsequently there was an addition to the statute in the form of a provision that the issue of the warrant should not prevent the recovery by the landlord of any sum of money which was, at the time when the precept was issued, payable as rent; or the reasonable value of the use and occupation for any period of time as to rent for which there was no agreement.⁵⁷² The effect of the last clause of the statute is to authorize the recovery of the value of the use and occupation for any period or fractional period during which the tenant remains in possession after the date of dissolution of the tenancy.⁵⁷³ If the rent is payable in advance, the fact that the tenant is dispossessed during a particular rent period does not affect the right of the landlord to recover the whole rent for that period.⁵⁷⁴

In view of the above provision of the New York statute, terminating the tenancy upon the issue of the warrant of removal, the

⁵⁷⁰ In *Johannes v. Kielgast*, 27 Ill. App. 576, the effect of a judgment of dispossession was stated to be to terminate the tenancy, and this statement is adopted in *Snell v. Owen*, 63 Ill. App. 377.

⁵⁷¹ *Hinsdale v. White*, 6 Hill (N. Y.) 507; *Crane v. Hardman*, 4 E. D. Smith (N. Y.) 339.

⁵⁷² Code Civ. Proc. § 2253.

⁵⁷³ *Fursman v. Pennace*, 15 Civ. Proc. R. 340, 2 N. Y. Supp. 339; *Rig-*

lander v. Nile Tobacco Works, 21 Misc. 339, 47 N. Y. Supp. 188. See *Davison v. Donadi*, 2 E. D. Smith (N. Y.) 121.

⁵⁷⁴ *Kahn v. Tobias*, 16 Misc. 83, 37 N. Y. Supp. 632; *Martin v. Lee*, 29 Misc. 333, 60 N. Y. Supp. 515; *Bernstein v. Heinemann*, 23 Misc. 464, 51 N. Y. Supp. 467. Compare *Riglander v. Nile Tobacco Works*, 21 Misc. 339, 47 N. Y. Supp. 188, and ante, § 182 j, at notes 955-955 c.

tenancy is not, it has been held, restored by the subsequent reversal of the order of dispossession, unless, it seems, the tenant invokes the discretionary power of the court to award to him restitution of possession.⁵⁷⁵

Although the statute expressly provides that the relation of tenancy shall be annulled by the issue of the warrant, it has been decided that if the warrant is not actually executed, and the tenant accepts the rent, this shows a consent by the landlord to "waive" his rights in this regard, and the tenancy is still to be considered in existence upon the same terms as before.⁵⁷⁶ This provision has been held to apply to a case in which the warrant is not actually issued because, owing to the tenant's relinquishment of possession, its issue is unnecessary, and consequently the liability for rent then ceases.⁵⁷⁷ The issuance of the warrant, it has been decided, terminates not only the original tenancy, but also the subtenancies.⁵⁷⁸

The New York statute, providing that the issue of the warrant shall cancel the agreement for the use of the premises and terminate the relation of landlord and tenant, does not affect the existence of covenants, not a part of the agreement for the use of the premises, though contained in the same instrument, which are designed to furnish security to the lessors against the effect of dispossession,⁵⁷⁹ and consequently it may be validly stipulated that, upon dispossession by summary proceedings, the landlord may relet for account of the tenant, and that he shall remain liable for any disparity between the rent so obtained and the amount so reserved in the lease.⁵⁸⁰ But a provision that in case

⁵⁷⁵ *Niles v. Iroquois Realty Co.*, 57 Misc. 443, 109 N. Y. Supp. 712.

⁵⁷⁶ *Voorhies v. Cummings*, 42 App. Div. 260, 58 N. Y. Supp. 1120.

⁵⁷⁷ *Gallagher v. Reilly*, 16 Daly, 227, 10 N. Y. Supp. 536; *Riglander v. Nile Tobacco Works*, 21 Misc. 339, 47 N. Y. Supp. 188; *Baldwin v. Thibadeau*, 28 Abb. N. C. 14, 17 N. Y. Supp. 532.

⁵⁷⁸ *Ash v. Purnell*, 26 Abb. N. C. 92, 16 Daly, 189, 11 N. Y. Supp. 54, the court making special reference to the fact that Code Civ. Proc. §

2251 provides that the warrant shall direct the removal of "all" tenants.

⁵⁷⁹ *Hall v. Gould*, 13 N. Y. (3 Kern.) 127; *Michaels v. Fishel*, 169 N. Y. 381, 62 N. E. 425; *Longobardi v. Yuliano*, 33 Misc. 472, 67 N. Y. Supp. 902; *Franceshini v. Chaucer*, 110 N. Y. Supp. 775.

⁵⁸⁰ *Hackett v. Richards*, 13 N. Y. (3 Kern.) 138; *Lewis v. Stafford*, 24 Misc. 717, 53 N. Y. Supp. 801; *James v. Rubino*, 30 Misc. 452, 62 N. Y. Supp. 468. See ante, § 182 j.

of "re-entry" the lessor may so relet in behalf of the tenant, inserted in a lease containing an express clause of re-entry for breach of covenants, has been held not to authorize him to so relet upon recovery of possession by summary proceeding.⁵⁸¹

It has been decided in several cases that if, after the service of the summons or precept, in a proceeding based on the non-payment of rent, the tenant relinquishes possession of the premises in compliance therewith, the relation of tenancy is terminated.⁵⁸² This may, perhaps, be regarded as a case of surrender by operation of law, the prior demand for possession being equivalent to a subsequent acceptance thereof.⁵⁸³ The cases do not discuss the question from the standpoint of principle.

§ 288. Injunction against proceeding.

A proceeding by a landlord to recover possession, or execution of a judgment therein in his favor, will not be restrained by a court of equity on a ground which might be asserted in the proceeding itself as a defense thereto,⁵⁸⁴ nor on the ground of error in the proceeding.⁵⁸⁵ An injunction will issue, it seems, to relieve from fraud in such a proceeding,⁵⁸⁶ or to allow the assertion of

⁵⁸¹ *Michaels v. Fishel*, 169 N. Y. 381, 62 N. E. 425, 57 L. R. A. 317. A different view was taken when the lessor was given the right to enter the said premises on default, "either by process of law or otherwise," and to relet. *Baylies v. Ingram*, 84 App. Div. 360, 82 N. Y. Supp. 891.

⁵⁸² *Ash v. Purnell*, 26 Abb. N. C. 92, 16 Daly, 189, 11 N. Y. Supp. 54; *Baldwin v. Thibadeau*, 28 Abb. N. C. 14, 17 N. Y. Supp. 532; *Gallagher v. Reilly*, 10 N. Y. Supp. 536.

⁵⁸³ See ante, § 190 c (5).

⁵⁸⁴ *Wingo v. Hardy*, 94 Ala. 184, 10 So. 659, 16 L. R. A. 813, 33 Am. St. Rep. 105; *Brown v. Watson*, 115 Ga. 502, 41 S. E. 998 (though defendant unable by reason of poverty to defend at law); *Curd v. Farrar*, 47 Iowa, 504, 29 Am. Rep. 492; *Chad-*

wick v. Spargur, 1 Civ. Proc. R. (N. Y.) 422, and note; *Natkins v. Weterer*, 76 App. Div. 93, 78 N. Y. Supp. 713; *Appeal of Pittsburg & A. Droveyard Co.*, 123 Pa. 250, 16 Atl. 625; *Vanarsdalen v. Whitaker*, 10 Phila. (Pa.) 153.

⁵⁸⁵ *McLean v. Carroll*, 6 Rob. (La.) 43; *Leonard v. McCool*, 3 Strob. Eq. (S. C.) 44.

⁵⁸⁶ In *Huff v. Markham*, 71 Ga. 555, it is said that it will issue only in extraordinary cases and to prevent fraud and irreparable injury. In New York it was held that an injunction will issue to relieve the tenant from fraud by the landlord in such a proceeding. See cases cited 14 N. Y. Ann. Cas., at p. 155, note to *Weber v. Rogers*. See, also, *Asbyll v. Haims*, 38 Misc. 578, 78 N. Y. Supp. 64. That fraud or mistake

equities which could not be asserted in the proceeding itself.⁵⁸⁷

In New York it is held that an injunction will issue to restrain the execution of a writ of dispossession if the justice is for any reason without jurisdiction,⁵⁸⁸ and in Pennsylvania the fact that complicated issues of law are involved, not proper for the decision of the inferior tribunal having jurisdiction of the proceeding, has been regarded as ground for an injunction.⁵⁸⁹

There is a decision to the effect that a grantee of the reversion may have an injunction against a proceeding by the original lessor, who is insolvent.⁵⁹⁰

§ 289. Liability for wrongful institution of proceeding.

The general rule is that, in order to make one liable for the institution of a civil suit, as of a criminal prosecution, it must have been with malice and without probable cause,⁵⁹¹ and, under this rule, a landlord would not be liable to his tenant for damage to the latter arising from his wrongful institution of a summary proceeding to recover possession, unless it was instituted maliciously and without probable cause. There are decisions to this effect,⁵⁹² but there are also decisions to the effect that, even apart from statute, the tenant, if improperly deprived of possession by force of such a proceeding, may recover damages against the landlord, without any suggestion that malice and probable cause must exist.⁵⁹³ In any case, no doubt, if the proceedings are in-

would be ground for an injunction is recognized in *Denny v. Fronheiser*, 207 Pa. 174, 56 Atl. 406.

⁵⁸⁷ *Petsch v. Biggs*, 31 Minn. 392, 18 N. W. 101; *Webb v. King*, 21 App. D. C. 141 (semble). See 14 N. Y. Ann. Cas., at p. 156, and also note in 1 N. Y. Civ. Proc. R. at p. 425.

⁵⁸⁸ See cases cited 14 N. Y. Ann. Cas., at p. 153.

⁵⁸⁹ *Kaufmann v. Liggett*, 209 Pa. 87, 58 Atl. 129, 67 L. R. A. 353, 103 Am. St. Rep. 988.

⁵⁹⁰ *Texas Land Co. v. Turman*, 53 Tex. 619.

⁵⁹¹ See authorities cited 19 Am. & Eng. Enc. Law (2d Ed.) 655, 673.

⁵⁹² *Melson v. Dickson*, 63 Ga. 682, 36 Am. Rep. 128; *Porter v. Johnson*, 96 Ga. 145, 23 S. E. 123; *Hegan Mantel Co. v. Cook's Adm'r*, 22 Ky. Law Rep. 427, 57 S. W. 929. See *Block v. Bonnet*, 28 La. Ann. 540. In *Juergen v. Allegheny County*, 204 Pa. 501, 54 Atl. 281, it was held that the tenant could not maintain an action for damages for the reason, it seems, that he was protected against a wrongful ouster owing to the fact that the statute provides for a jury trial in the summary proceeding.

⁵⁹³ See *Wacholz v. Griesgraber*, 70 Minn. 220, 73 N. W. 7; *Richardson*

valid as to the person ousted thereunder, for lack of jurisdiction of the subject-matter of the person, the judgment is no protection to the landlord, or to the persons undertaking to execute it, and they are liable in damages as trespassers.⁵⁹⁴

Occasionally the statute expressly provides that if a judgment in favor of the landlord is reversed on appeal, the tenant shall be entitled to recover for any damage caused him by such proceeding;⁵⁹⁵ and under such a statute, it has been held, the grounds of reversal are immaterial, and cannot be proven in defense to the action for damages.⁵⁹⁶ Such a statute has been regarded as authorizing the tenant either to demand an issue to ascertain the damages on the trial on appeal, or to bring a separate action for damages.⁵⁹⁷ Where the statute expressly provided that the landlord should remain liable in trespass for any unlawful proceeding under the statute; and also that either the landlord or the tenant might, in subsequent legal proceedings, deny or disprove the facts on which the decision was based, the landlord was held liable for a dispossession under an erroneous judgment, this latter protecting the justice and constable, but not the landlord.⁵⁹⁸

It has been held that the tenant may recover the pecuniary loss caused by his dispossession,⁵⁹⁹ and nothing more, in the absence of malice or oppression.⁶⁰⁰ He has also been allowed to recover the value of the building erected by him and destroyed by the landlord on obtaining possession, and the amount of a sum of

v. Callihan, 73 Miss. 4, 19 So. 95.

The facts in these cases were, however, such as to show both malice and lack of probable cause.

⁵⁹⁴ McCoy v. Hyde, 8 Cow. (N. Y.) 68; Croft v. King, 8 Daly (N. Y.) 265; Colt v. Eves, 12 Conn. 243.

⁵⁹⁵ See *New York Code Civ. Proc.* § 2263; *North Carolina Revisal* 1905, § 2010; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landlord & Tenant," § 28.

⁵⁹⁶ Hayden v. Florence Sewing Mach. Co., 54 N. Y. 221.

⁵⁹⁷ Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

⁵⁹⁸ McWilliams v. King, 32 N. J.

Law, 21. But it was held that the relinquishment of possession by the tenant on a statement by the officer that if he did not do so the officer would return the next day and put him out did not involve any liability in trespass on the part of the landlord, the officer not having at the time any warrant to dispossess the tenant. Coe v. Haines, 44 N. J. Law, 134.

⁵⁹⁹ Quinn v. McCarty, 33 Leg. Int. (Pa.) 312.

⁶⁰⁰ Koenig v. Bauer, 1 Brewst. (Pa.) 304.

money kept on the premises and lost in the course of the tenant's removal,⁶⁰¹ and also the value of the unexpired term, which latter is, ordinarily, to be ascertained by deducting the rent reserved from the rental value of the premises.⁶⁰² The landlord has been held liable for injuries to the tenant's goods and loss of fruit and vegetables caused by the latter's dispossession,⁶⁰³ and a claim for damages by reason of the tenant's deprivation of his shelter and support, and distress in body and mind, and mortification and loss of employment, has been upheld.⁶⁰⁴

The landlord, by wrongfully procuring the dispossession of the tenant, does not lose his right to credits which he would otherwise have, such as those for advances and supplies.⁶⁰⁵

⁶⁰¹ *Eten v. Luyster*, 60 N. Y. 252. the measure of damages, but that

⁶⁰² See *Small v. Clark*, 97 Me. 304, his damages were the same as in 54 Atl. 758; *Woods v. Kernan*, 57 any case of wrongful deprivation of Hun, 215, 10 N. Y. Supp. 654. In possession by the landlord.

Wilkinson v. Stanley (Tex. Civ. App.) 43 S. W. 606, it was held that ⁶⁰³ *Woods v. Kernan*, 57 Hun, 215, 10 N. Y. Supp. 654.

if the tenant was wrongfully dis- ⁶⁰⁴ *Burwell v. Brodie*, 134 N. C. 540, 47 S. E. 47.

possessed by sequestration proceed- ⁶⁰⁵ *Burwell v. Brodie*, 134 N. C. 540, 47 S. E. 47.

ings at the suit of the landlord, the value of the unexpired term was not

CHAPTER XXIX.

ACTIONS FOR RENT.

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§ 290. At common law.

a. **Debt.** At common law, when the person to whom rent was payable had a freehold interest in the rent, the nonpayment thereof on demand was considered a disseisin of the rent, and consequently the real action of novel disseisin was the proper

form of proceeding by which to recover it.¹ By statute, however, an exception to this rule was made in favor of the executors and administrators of tenants in fee of rents, who were authorized to sue in debt for arrears of rent due to their decedents.² Since the abolition of real actions, it has, in England, been decided that an action of debt, or its equivalent, will lie in favor of the owner of a rent charge in fee, on the theory that such an action did not lie at common law owing merely to the fact that the higher remedy by real action existed.^{3, 4}

In the case of a rent for life, whether rent reserved on a lease for life or a rent charge granted for life, the tenant of the land was at common law regarded as personally liable for the rent, and, while this personal liability could not be enforced during the existence of the life interest in the rent, because temporarily superseded by the existence of the "real" obligation on the part of the land, upon the termination of such real obligation by the termination of the life interest the tenant's personal obligation became enforceable by the owner of the rent, or his personal representatives.⁵ This was changed, however, by the statute of 8 Anne, c. 14, § 4, so far as concerns leases for life,⁶ and there are, in several states, similar statutory provisions empowering one having rent due upon a lease for life to sue thereon as if the lease were for years.⁷

¹ Litt. §§ 233-240.

² 32 Hen. VIII, c. 37 (A. D. 1540); Co. Litt. 162 a; Harrison, Chief Rents, 180. A tenant of land in fee simple who has leased for years has been held not to be a tenant in fee of the rent reserved on the lease for years, so that the statute would authorize an action of debt for the rent by his executors. Prescott v. Boucher, 3 Barn. & Adol. 849.

^{3, 4} Thomas v. Sylvester, L. R. 8 Q. B. 368; Christie v. Barker, 53 Law J. Q. B. 537; Searle v. Cooke, 43 Ch. Div. 519. See *In re Herbage Rents* [1896] 2 Ch. 811. The correctness of these decisions has been questioned on the ground that the duty of paying rent was, at common

law, imposed on the land alone, a "real obligation," and hence the mere abolition of real actions could not make it a personal obligation. See the learned review of the subject by T. Cyprian Williams, Esq., 13 Law Quart. Rev. 288, and the references therein to Ognel's Case, 4 Coke, 48 b.

⁵ Ognel's Case, 4 Coke, 49 a; Gilbert, Rents, 98; Co. Litt. 162 a, Hargrave's note; 15 Law Quart. Rev. 291.

⁶ See Webb v. Jiggs, 4 Maule & S. 113.

⁷ Delaware Rev. Code 1903, p. 867; Indiana, Burns' Ann. St. 1901, § 7100; Missouri Rev. St. 1899, § 4101; New Jersey, 2 Gen. St. p. 1915, § 1;

The right of one leasing for years to sue for arrears of the rent reserved in an action of debt was recognized at an early date in the history of that section,⁸ and that the action is available for this purpose has never been questioned.⁹ The action will also lie for rent reserved upon a tenancy at will.¹⁰

The action of debt is, as before stated,¹¹ not based on a contract, but is rather a remedy for the recovery of a specific sum in the possession of the defendant belonging to the plaintiff, and, in order to impose liability on the tenant therein, he need not have contracted to pay the rent reserved, he being liable as having obtained the profits of the land. In other words, privity of estate, as distinct from privity of contract, is sufficient to sustain the right of action.¹² Accordingly, an assignee of the leasehold estate which owes the rent is liable in debt to the person entitled to the rent,¹³ and a transferee of the reversion may recover therein against the lessee or an assignee of the lessee,¹⁴ as may a transferee of the rent without the reversion.¹⁵ And if part only of the reversion is transferred, the transferee may recover his proportion of the rent in an action of debt.¹⁶ Debt will, moreover, lie against the original lessee although the latter has as-

New York Real Prop. Law, § 191; 125; *McKeon v. Whitney*, 3 Denio
South Carolina Civ. Code, § 2433. (N. Y.) 452.

⁸ 2 Pollock & Maitland, *Hist. Eng. Law*, 209.

⁹ Litt. §§ 58, 72; Co. Litt. 47 b; Gilbert, *Rents*, 93; *Trapnall v. Merrick*, 21 Ark. 503; *Howland v. Coffin*, 26 Mass. (9 Pick.) 52; *Id.*, 29 Mass. (12 Pick.) 125; *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134; *McKeon v. Whitney*, 3 Denio (N. Y.) 452; *McEwen v. Joy*, 7 Rich. Law (S. C.) 33; *Elder v. Henry*, 34 Tenn. (2 Sneed) 81.

¹⁰ Litt. § 72.

¹¹ See ante, § 171, at note 124.

¹² See ante, § 171, at notes 122, 123.

¹³ *Walker's Case*, 3 Coke, 22 a; *Thursby v. Plant*, 1 Wms. Saund. 237, note (1); *Howland v. Coffin*, 26 Mass. (9 Pick.) 52; *Id.*, 29 Mass. (12 Pick.)

¹⁴ *Walker's Case*, 3 Coke, 22 a, *Thursby v. Plant*, 1 Wms. Saund. 237, 1 Lev. 259; *Ards v. Watkin*, Cro. Eliz. 637, 651; *Howland v. Coffin*, 26 Mass. (12 Pick.) 125; *Patten v. Deshon*, 67 Mass. (1 Gray) 325; *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134. The lessee and his assignee may, it has been said, be sued jointly. See Com. Dig., Dett (e).

¹⁵ *Williams v. Hayward*, 1 El. & El. 1040; *Allen v. Bryan*, 5 Barn. & C. 512; *Ryerson v. Quackenbush*, 26 N. J. Law, 236; *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Kendall v. Carland*, 59 Mass. (5 Cush.) 74, 51 Am. Dec. 44.

¹⁶ *Broom v. Hore*, Cro. Eliz. 633; *Ards v. Watkin*, Cro. Eliz. 637, 651.

signed his lease, since the lessee cannot destroy the tenancy into which he has entered without the landlord's assent. If, however, the landlord accept the lessee's assignee as tenant, expressly, or by implication, as by receiving rent from him, he cannot thereafter bring debt against the original lessee, since he is no longer in privity of estate with the latter.¹⁷ If the lessee's interest in a part of the premises is assigned to another person, or in different parts to different persons, each of such assignees is liable in debt, by reason of privity of estate, for a proportional part of the rent.¹⁸ The transferee of the reversion cannot bring debt against the original lessee after the latter's assignment of the term, since there is, in such case, neither privity of contract nor of estate.¹⁹ And for the same reason the owner of the property cannot bring debt against one holding under a lease made by a stranger to the title.²⁰

An action of debt, if brought by or against one not a party to the original lease, as in the case of an action by the transferee of the lessor or against the assignee of the lessee, being based on privity of estate, was, at common law, regarded as a "local" action, which must be brought in the county where the land lies²¹ while, if brought against the original lessee by his lessor, it was regarded as transitory, as being based on contract, and might be brought where the lessee was found or where the contract was made.²²

¹⁷ Walker's Case, 3 Coke, 22 a; Bayly v. Briggs, Latch, 271; Stev-
Marsh v. Brace, Cro. Jac. 334; Mills enton v. Lambard, 2 East, 575; Bar-
v. Auriol, 1 H. Bl. 433; Auriol v. ker v. Damer, Carth. 183; Whitaker
Mills, 4 Term R. 94; Wadham v. v. Forbes, L. R. 10 C. P. 533; Brack
Marlowe, 8 East, 314, note; Wall v. et v. Alvord, 5 Cow. (N. Y.) 18;
Hinds, 70 Mass. (4 Gray) 256, 64 Lansing v. Van Alstyne, 2 Wend. (N.
Am. Dec. 64; Bliss v. Gardner, 2 Ill. Y.) 561, note.
App. (2 Bradw.) 422.

¹⁸ Gamon v. Vernon, 2 Lev. 231; 22 Y. B. 38 Hen. 6, 15; Y. B. 8 Hen.
Curtis v. Spitty, 1 Bing. N. C. 700; 6, 23; Walker's Case, 3 Coke, 21 b;
Harris v. Frank, 52 Miss. 155; St. Bulwer's Case, 7 Coke, 28 b; Wey
Louis Public Schools v. Boatmen's v. Yally, 6 Mod. 194; 1 Wms. Saund.
Ins. & Trust Co., 5 Mo. App. 91. (Ed. 1871), notes to Thursby v.
Plant, 306-308; Bracket v. Alvord,

¹⁹ Humble v. Glover, Cro. Eliz. 5 Cow. (N. Y.) 18; Henwood v.
328; Walker's Case, 3 Coke, 22 a. Cheeseman, 3 Serg. & R. (Pa.) 502;

²⁰ Mackey v. Robinson, 12 Pa. 170. Chitty, Pleading (7th Ed.) 282.
See post, § 304, at note 20. The statement that the action of

²¹ Bord v. Cudmore, Cro. Car. 183; debt, when brought by the lessor

The action of debt for rent, involving a statement of the demise under which the rent was reserved, the amount of the rent, and the period at which it became due, was to a great extent superseded in England, while yet the distinctive forms of action existed, by the action of debt for use and occupation, which, unlike the action of assumpsit for use and occupation,²³ was not based on statute,²⁴ but, like the latter action, necessitated no allegation by the plaintiff of any formal demise of the premises or reservation of any rent, it being sufficient to state that the defendant was indebted to the plaintiff for the use and occupation of certain premises belonging to the plaintiff and occupied by the defendant by his request.²⁵ This action was always regarded as transitory.²⁶

b. **Covenant.** On the lessee's covenant to pay rent ordinarily contained in the instrument of lease, an action of covenant may be brought at common law,²⁷ and, in jurisdictions where such form of action is abolished, an equivalent action to enforce the lessee's liability on his covenant will lie. To support the common-law action of covenant, there must be a technical covenant by the lessee, that is, the lease must be sealed by him,²⁸ since

against the lessee, is based on contract, involves a use of the term "contract" in a sense different from that in which it is now ordinarily used. See ante, § 157 a (1), note 294.

The action of debt was regarded as transitory if brought by the lessor against the lessee's executor for rent due in the lessee's time, while local if brought against such executor for rent due in the executor's time. *Bolton v. Cannon*, 1 Vent. 271; *Cormel v. Lisset*, 2 Lev. 80.

²³ See post, § 302.

²⁴ See *Egler v. Marsden*, 5 Taunt. 25; *Gibson v. Kirk*, 1 Q. B. 850; *McKeon v. Whitney*, 3 Denio (N. Y.) 452.

²⁵ *Wilkins v. Wingate*, 6 Term R. 62; *Gibson v. Kirk*, 1 Q. B. 850; *King v. Fraser*, 6 East, 348. See *Davies v. Edwards*, 3 Maule & S. 380.

²⁶ *Elger v. Marsden*, 5 Taunt. 25; *King v. Fraser*, 6 East, 348.

²⁷ *Thursby v. Plant*, 1 Wms. Saund. 237, 1 Lev. 259; *Marsh v. Brace*, Cro. Jac. 334; *Cross v. U. S.*, 81 U. S. (14 Wall.) 479, 20 Law. Ed. 721; *Greenleaf v. Allen*, 127 Mass. 248; *Union Pac. R. Co. v. Chicago*, R. I. & P. R. Co., 164 Ill. 88, 45 N. E. 488; *Russell v. Fabyan*, 28 N. H. 543, 61 Am. Dec. 629; *Taylor v. De Bus*, 31 Ohio St. 468; *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134.

²⁸ *Johnson v. Muzzy*, 45 Vt. 419, 12 Am. Rep. 214; *Hinsdale v. Humphrey*, 15 Conn. 433; *Trustees of Hocking County v. Spencer*, 7 Ohio (2d pt.) 149. See ante, § 49. But, as before stated, there are decisions to the effect that it is under the lessee's seal if it is under the lessor's seal and accepted by him. Ante, § 53 b.

the proper action on a written agreement to pay rent, not under seal, is *assumpsit*.²⁹

Not only will such an action lie in favor of the lessor against the lessee, but, as before stated,³⁰ it will lie in favor of a transferee of the reversion,³¹ or against an assignee of the leasehold,³² since the covenant for rent is one which runs with the land.³³ The liability of the assignee of the leasehold on the covenant is, in a sense, based on privity of estate, that is, it is imposed on such assignee as an incident of the leasehold estate passing to him,³⁴ and for this reason an action of covenant against him has been regarded as local.³⁵ On the other hand, such an action by the transferee of the reversion, if against the original lessee, has been regarded as based on privity of contract, on the theory that the privity of contract is transferred by the statute, 32 Hen. 8, c. 34, and has therefore been regarded as transitory,³⁶ as in an action on the covenant by the original lessor against the original lessee.³⁷

²⁹ Comyn, Landl. & Ten. 482. See article by Prof. J. B. Ames, and authorities there cited, 2 Harv. Law Rev. 378. But if the action was not on the promise, but merely for the rent reserved, debt was the proper action.

³⁰ See ante, §§ 180 b (1), 181 b.

³¹ Midgleys v. Lovelace, 12 Mod. 45; Thursby v. Plant, 1 Wms. Saund. 237; Outtoun v. Dulin, 72 Md. 536, 20 Atl. 134; Baldwin v. Walker, 21 Conn. 168; Webster v. Nichols, 104 Ill. 160; Main v. Feathers, 21 Barb. (N. Y.) 646.

³² Barker v. Damer, Carth. 182; Stevenson v. Lambard, 2 East, 575; Williams v. Rosanquet, 1 Brod. & B. 238; Howard v. Ramsay, 7 Har. & J. (Md.) 113; Bowdre v. Hampton, 6 Rich. Law (S. C.) 208; McMurphy v. Minot, 4 N. H. 251; Port v. Jackson, 17 Johns. (N. Y.) 239; Hannen v. Ewalt, 18 Pa. 9. And see cases cited ante, § 181 b, note 670.

³³ See ante, § 149 b (2).

³⁴ Barker v. Damer, Carth. 182; Stevenson v. Lambard, 2 East, 575; Copeland v. Stephens, 1 Barn. & Ald. 593, 607; Paul v. Nurse, 8 Barn. & C. 486; Bowdre v. Hampton, 6 Rich. Law (S. C.) 208; Salisbury v. Shirley, 66 Cal. 323, 5 Pac. 104; Hintze v. Thomas, 7 Md. 346; Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624.

³⁵ Barker v. Damer, Carth. 182; Stevenson v. Lambard, 2 East, 575; Thursby v. Plant, 1 Wms. Saund. 237; Bowdre v. Hampton, 6 Rich. Law (S. C.) 208; Lansing v. Van Alstyne, 2 Wend. (N. Y.) 561, note.

³⁶ Thursby v. Plant, 1 Wms. Saund. 237, 1 Lev. 259, and notes in 1 Wms. Saund. (Ed. 1871) 278, 307; Comyn, Landl. & Ten. 460; 1 Chitty, Pleading (7th Ed.) 283.

³⁷ Wey v. Yally, 6 Mod. 194; Henwood v. Cheeseman, 3 Serg. & R. (Pa.) 500; 1 Chitty, Pleading (7th Ed.) 283.

The distinction above indicated, between an action by the transferee of the reversion, as being based on privity of contract, and one against the assignee of the leasehold, as being based on privity of estate, is difficult to comprehend. In both cases, it would seem, the action is in a sense based on privity of contract as being brought on the covenant, while it is also in a sense based on privity of estate, in that the right of action or liability on the covenant arises from the ownership of an estate in the land.

c. **Assumpsit.** An action of special assumpsit may be maintained upon the lessee's express promise to pay a certain sum as rent, provided such promise is not under seal.³⁸ It may also be brought upon his express promise to pay a reasonable compensation for the use and occupation of land.³⁹ To be distinguished from such an action of special assumpsit is that of *indebitatus assumpsit*, which does not involve proof of an independent express promise, but is based on a legal inference, from the fact that the use and occupation of land is by permission, of a promise to pay the reasonable value thereof.⁴⁰

d. **Account.** In jurisdictions where the action of account still exists, it may, it seems, be under certain circumstances a proper form of action for the recovery of rent.⁴¹ And a statutory action on an account annexed will lie, it has in one state been decided, under circumstances in which formerly assumpsit for use and occupation was the remedy, that is, where there is a lease not under seal or a mere permissive occupation.⁴² In an-

³⁸ See cases cited in article by Conn. 425; Long v. Fitzimmons, 1 Prof. Ames, on Assumpsit for Use Watts & S. (Pa.) 530; Gunnison v. and Occupation, in 2 Harv. Law Bancroft, 11 Vt. 490; Scott v. Lance, Rev., at pp. 378. 379. And see, also, 21 Vt. 507. In Nedvidek v. Meyer, Hinsdale v. Humphrey, 15 Conn. 436 Mo. 600, it is said that "where 433; Rubens v. Hill, 213 Ill. 523, 72 parties have mutual dealings, and N. E. 1127; Trustees of Hocking rent from one to another becomes County v. Spencer, 7 Ohio (2d pt.) the subject of an account between 149; Burnham v. Best, 49 Ky. (10 them, it is recoverable in an action B. Mon.) 227; Sivem v. Sharretts, 48 on account." Citing the case last Md. 408; Johnson v. Muzzy, 45 Vt. above named.

419, 12 Am. Rep. 214.

³⁹ 2 Harv. Law Rev. 379.

⁴⁰ See post, § 302.

⁴¹ See Lockwood v. Lockwood, 22 30 N. E. 1021.

⁴² Bowen v. Proprietors of the South Building, 137 Mass. 274; Brown v. Magorty, 156 Mass. 209,

other state it has been held that the statutory action of account will lie for the value of the permissive occupation of the premises when there is no agreement as to the amount of rent to be paid,⁴³ and also when there is a written lease, and this is not produced.⁴⁴

§ 291. Under the code procedure.

In a large number of jurisdictions, the common-law forms of action having been by statute abolished, the statements made above as to the appropriate forms of action for the recovery of rent, and their distinguishing characteristics in this regard, have no longer any practical application, though an understanding of these characteristics is desirable for a full comprehension of the common-law view of rent. Likewise, in most states, the common-law distinctions, above referred to, between local and transitory actions for rent, have been superseded by statutes directing where suit shall be brought, as, for instance, by provisions that suit shall be brought in the county of the defendant's residence, or where he may be served with process,^{44a} and so if the rent is payable in a certain county, the venue may be determined by a provision that an action on a contract shall be brought at the place of performance.⁴⁵

§ 292. Proceedings in equity.

Equity has occasionally taken jurisdiction of a proceeding by the landlord for the recovery of rent on the ground that the remedy at law was inadequate. One case in which equity thus takes jurisdiction has been already referred to, that is, where the tenant has made a sublease, the court in such case compelling the subtenant to pay the rent to the chief landlord, on the theory that the rent should be discharged out of the profits of the land.⁴⁶ This theory, that the profits of the land are properly applicable to the payment of rent, and that equity alone can enforce such application, would seem to be the ground on which the jurisdiction of equity may most ordinarily be sought

⁴³ *Cameron v. Moore*, 10 Ga. 368.

⁴⁴ *Burch v. Harrell*, 93 Ga. 719, 20 S. E. 212.

^{44a} See *University of Vermont v. Joslyn*, 21 Vt. 52.

⁴⁵ See *Campbell v. Cates* (Tex. Civ. App.) 51 S. W. 268.

⁴⁶ See ante, § 181 c, at note 706.

and sustained. It cannot, however, be said that this reason for the assumption of jurisdiction clearly appears from the cases, unless it is to be inferred from the fact that the decisions sustaining the equitable jurisdiction have ordinarily been based on the nonavailability of the remedy by distress in the particular case, the effect of this being to deprive the tenant of one possible mode of securing the application on his rent of the profits of the land. Thus, jurisdiction has been assumed by equity when the remedy by distress was nonexistent owing to uncertainty as to the character of the rent,⁴⁷ or owing to uncertainty as to the boundaries of the land out of which the rent issued,⁴⁸ or because the rent was reserved out of incorporeal things or other property not subject to distress.⁴⁹ The fact that no sufficient distress was found on the premises has been decided to be insufficient ground for the interference of equity in the absence of fraud on the part of the tenant,⁵⁰ a view which has, however, been vigorously questioned.⁵¹ In the numerous jurisdictions in which the remedy by distress no longer exists, the absence of such remedy in a particular case cannot, it is plain, have any bearing upon the landlord's right to equitable relief, but the fact that he has or has not one of the statutory remedies substituted for distress, such as a lien on the chattels or crops on the premises,⁵² or a right of attachment,⁵³ would probably have a bearing on the question. The fact, in any case, that the landlord has, by statute, or by express stipulation, the right to resume possession of the premises on nonpayment of rent, might of itself, it

⁴⁷ *Collet v. Jacques*, 1 Ch. Cas. of incorporeal things. See ante, § 120; *Cocks v. Foley*, 1 Vern. 359; 169 a. In the third case cited, the *Leeds v. New Radnor*, 2 Brown Ch. rent was created by the king, and 338, 518. See *Lawrence v. Hammett*, 26 Ky. (3 J. J. Marsh.) 287. consequently a different rule was applied.

⁴⁸ *North v. Strafford*, 3 P. Wms. 148; *Holder v. Chambury*, 3 P. Wms. 256; *Bridgewater v. Edwards*, 4 Brown Parl. Cas. 139; *Benson v. Baldwyn*, 1 Atk. 598.

⁴⁹ *Thorndike v. Allington*, 1 Ch. Cas. 79; *Busby v. Salisbury*, Finch, 256; *Leeds v. Powell*, 1 Ves. Sr. 171. In the first two cases cited, what was termed a rent was really an annuity, since rent cannot issue out

⁵⁰ *Davy v. Davy*, 1 Ch. Cas. 144; *Champernoon v. Gubbs*, 2 Vern. 382. That equity will take jurisdiction if distress is prevented by fraud, see above cases, and also *Dawson v. Williams*, 1 Freem. Ch. (Miss.) 99.

⁵¹ See article by Prof. C. C. Langdell, 10 Harv. Law Rev. 93.

⁵² See post, § 321.

⁵³ See post, chapter XXXII.

seems, be ground for a refusal by a court of equity to take jurisdiction to aid in the collection of rent,⁵⁴ though in one case, perhaps, a different view has been expressed.⁵⁵

Equity will not assume jurisdiction in order to impose liability on one other than the lessee, on the ground that he was the actual beneficiary of the lease, and, as such, occupied the land while the lessee was merely his trustee, there being no such liability in the case of a third person not a party to the lease nor a legal assignee thereof.⁵⁶

The fact that the amount of rent payable by the defendant is uncertain, either because he is a tenant of but a part of the land subject to the lease,⁵⁷ or for other reasons,⁵⁸ seems to be regarded as ground for the interposition of equity. And the jurisdiction of equity was in one case upheld on the ground that the instrument of lease was lost.⁵⁹

⁵⁴ See 10 Harv. Law Rev. 91.

⁵⁸ *Livingston v. Livingston*, 4

⁵⁵ *Pennsylvania R. Co. v. St. Johns Ch. (N. Y.)* 287, 8 Am. Dec. Louis, A. & T. H. R. Co., 118 U. S. 290, 305, 30 Law. Ed. 83, where Mr. Justice Miller says: "Having a valuable contract in regard to the operation of the road for a great many years to come, plaintiff (the lessor) cannot be compelled to forfeit it and resume possession and sue for all its damages in one action." Here the equitable jurisdiction was sustained on the ground that there were numerous and complex issues, involving demands for an accounting, injunction and specific performance of the lessee's stipulations to keep the property in good condition.

562; *Van Rensselaer v. Layman*, 39 How. Pr. (N. Y.) 9. In *Dawson v. Williams*, 1 Freem. Ch. (Miss.) 99, it was held that the fact that the lease required the rent to be fixed yearly by appraisers was ground for equitable jurisdiction. In *Brennan v. Gale*, 56 App. Div. 4, 67 N. Y. Supp. 382, it was held that the landlord could ask for an accounting, where he was to have the surplus, above all profits made by the lessee, up to a certain sum. In *Jackson v. King*, 82 Ala. 432, 13 So. 232, it was held that the lessor could not sue at law where the compensation for the use of the land was to be a specific part of the crops for each year, and the lease was to continue until this amounted to sufficient to discharge a certain debt by the lessor to the lessee, the determination of this involving complicated accounts.

⁵⁶ *Walters v. Northern Coal Min. Co.*, 5 De Gex, M. & G. 629, disapproving *Clavering v. Westley*, 3 P. Wms. 402; *Borcherling v. Katz*, 37 N. J. Eq. (10 Stew.) 151. See *Ramage v. Womack* [1900] 1 Q. B. 116.

⁵⁷ *Swedesborough Church v. Shivers*, 16 N. J. Eq. (1 C. E. Green) 453.

⁵⁹ *Lawrence v. Hammett*, 26 Ky. (3 J. J. Marsh.) 287.

In some cases, equity has taken jurisdiction of a proceeding by the landlord for rent merely because of the tenant's failure to object to the jurisdiction by demurrer or by answer.⁶⁰ These decisions have been questioned.⁶¹

The tenant may file a bill of interpleader to ascertain the person entitled to the rent, when it is claimed by each of two persons, both of whom deduce title from the lessor,⁶² or one of whom so deduces his title, and the other of whom is the lessor himself.⁶³ The tenant has no right to file such bill as against the lessor, or one claiming under the lessor, and a third person asserting a claim against him under a title paramount to the lease, for the reason, in the first place, that the claim of the latter cannot be the same as that of the former, that is, for the rent reserved by the lease, and, in the second place, that even were the latter's claim valid, this would be no defense to the claim for rent.⁶⁴ Nor can one, who has taken leases of the same premises from two adverse claimants of the premises, compel them to litigate the title in an action by one of them for rent.⁶⁵

⁶⁰ *Livingston v. Livingston*, 4 165; *White Water Valley Canal Co. v. Johns. Ch. (N. Y.)* 287, 8 Am. Dec. 562; *Leeds v. New Radnor*, 2 *Brown Ch.* 338, 518; *North v. Strafford*, 3 *P. Wms.* 148. See *Holder v. Chambery*, 3 *P. Wms.* 256.

⁶¹ 1 *Story, Eq. Jur.* § 684 c.

⁶² *Cowtan v. Williams*, 9 *Ves. Jr.* 107; *Clarke v. Byne*, 13 *Ves. Jr.* 383; *Glaser v. Priest*, 29 *Mo. App.* 1; *Badeau v. Tylee*, 1 *Sandf. Ch. (N. Y.)* 270; *Seaman v. Wright*, 12 *Abb. Pr. (N. Y.)* 304; *McCoy v. McMurtie*, 12 *Phila. (Pa.)* 180. See 2 *Story, Eq.* § 811.

⁶³ *Clarke v. Byne*, 13 *Ves. Jr.* 383; *Ketcham v. Brazil Block Coal Co.*, 88 *Ind.* 515.

⁶⁴ *Dungey v. Angove*, 2 *Ves. Jr.* 310; *Clarke v. Byne*, 13 *Ves. Jr.* 383; *Johnson v. Atkinson*, 3 *Anstr.* 798; *Crawshay v. Thornton*, 2 *Mylne & C. 1*; *Crane v. Burntrager*, 1 *Ind. suit.*

⁶⁵ *Standley v. Roberts*, 8 *C. C. A.*

305, 59 *Fed.* 836, although the statute in terms required any person who has an interest in the controversy adverse to plaintiff, or who is a necessary party to a complete determination of the question involved, to be made a party to the

An injunction will not issue to restrain an action at law for the rent on a ground which may be asserted as a defense to the action.^{65a}

§ 293. Parties plaintiff.

a. **Persons beneficially interested.** The person entitled to sue for rent is ordinarily the person who is entitled to receive the rent, by reason of his ownership of the reversion, or of the rent without the reversion.^{65b} At common law, as before stated, rent can be reserved only to the lessor,^{65c} and consequently a third person to whom the lease attempts to reserve rent cannot sue therefor,^{65d} but by a few decisions in this country such third person may recover the rent, on the theory that the agreement to pay rent was made for his benefit.^{65e}

One in whom the legal title to the reversion is vested as trustee is ordinarily the proper person to recover rent incident to the reversion.^{65f} But in some jurisdictions, in which a right of recovery by a party beneficially interested has been strongly asserted, and the distinction between legal and equitable rights has been obscured, a right in the *cestui que trust* to recover rent reserved on a lease by the trustee might perhaps be recognized.

If a lease is made, by an instrument not under seal, by one person as agent for the owner of the premises, and the relation of agency is not disclosed on the face of the instrument, either the principal or the agent may sue on the lessee's contract to pay rent,⁶⁶ the same rule being applicable as in the case of other contracts made with an agent.⁶⁷ A disclosed principal may also sue, provided the lessee's contract to pay rent is not under seal,

^{65a} Slater v. Schwegler (N. J. Eq.) 21 Ind. App. 614, 52 N. E. 1012; 54 Atl. 937. Murphy v. Hoperoff, 142 Cal. 43, 75

^{65b} See Hecht v. Ferris, 45 Mich. Pac. 567; Bates v. Scheik, 47 Mo. App. 642.

^{65c} See ante, § 170, at notes 101-107. ⁶⁶ Nicoll v. Burke, 78 N. Y. 580,

^{65d} Southampton v. Brown, 6 34 Am. Rep. 561; Manete v. Simpson, 39 N. Y. St. Rep. 617, 15 N. Y. Supp. 448; Philadelphia Fire Extinguisher Co. v. Brainerd, 2 Wkly. Notes Cas. (Pa.) 473; Bryant v. Wells, 56 N. H. 152.

^{65e} See ante, § 170, at note 108-109.

^{65f} See Chapin v. Foss, 75 Ill. 280; Harms v. McCormick, 132 Ill. 104, 22 N. E. 511; Patterson v. Emerick, ⁶⁷ See ante, § 56 b.

and this is a *fortiori* the case if the principal is named in the instrument as the lessor.⁶⁸ And the agent for a disclosed principal may sue, it seems, provided the lease is made in the name of the agent and it can consequently be inferred that the contract was to pay rent to him.⁶⁹ In the case of an instrument of lease executed by an agent in his own name and under seal, he alone is authorized to sue for the rent,⁷⁰ and a statute authorizing actions by the real party in interest does not enable the principal to sue in such case, unless perhaps his title has been in some way recognized by the lessee.⁷¹

b. Transferees. In case of a transfer of the reversion, the transferee is the proper person to sue for rent thereafter accruing, as being the person entitled thereto,⁷² unless the person making the transfer reserves the rent, in which case the latter is the person to sue.⁷³ If the rent is transferred without the reversion, the transferee is the person entitled to sue.⁷⁴ The right to rent to accrue in the future was never regarded as a chose in action at common law, within the rule precluding the assignee of a chose in action from suing thereon in his own name, and consequently the transferee of the rent without the reversion could always sue therefor. But an installment of rent which is already due is a chose in action and nothing more, and, consequently, one taking an assignment of such an installment after it was due could not, at common law, sue therefor in his own name.⁷⁵

⁶⁸ Huffcut, Agency, §§ 164, 165. But see Harms v. McCormick, 132 Ill. 104, 22 N. E. 511.

⁶⁹ Huffcut, Agency, § 208.

⁷⁰ Harms v. McCormick, 132 Ill. 104, 22 N. E. 511; Melcher v. Kreiser, 28 App. Div. 362, 51 N. Y. Supp. 249. See Sanborn v. Randall, 62 N. H. 620, and ante, § 56 a.

⁷¹ Schaefer v. Henkel, 75 N. Y. 378. In Berkeley v. Hardy, 5 Barn. & C. 355, it was decided that, when the lease was made in the agent's name, the principal could not sue for the rent, though it was expressly made payable to him.

⁷² See ante, § 180 b.

⁷³ See ante, § 180 c (1).

⁷⁴ Pfaff v. Golden, 126 Mass. 402; Wineman v. Hughson, 44 Ill. App. 22; Willard v. Tillman, 2 Hill (N. Y.) 274; Moffatt v. Smith, 4 N. Y. (4 Comst.) 126; Hunt v. Thompson, 84 Mass. (2 Allen) 341; Bowman v. Keleman, 65 N. Y. 598; Demarest v. Willard, 8 Cow. (N. Y.) 206 (Action on covenant); Ards v. Watkin, Cro. Eliz. 637, 651; Allen v. Bryan, 5 Barn. & C. 512.

Marcum v. Hereford, 38 Ky. (8 Dana) 1, and Hicks v. Doty, 67 Mass. (4 Bush) 420, seem to take the view that one to whom rent thereafter to accrue is assigned cannot sue therefor, apart from statute.

⁷⁵ Lewes v. Ridge, Cro. Eliz. 863;

In most jurisdictions, however, the rule forbidding an assignee of a chose in action to sue thereon has been changed by statute, and so the assignee of rent already due may sue therefor in his own name, as may any other assignee of a chose in action.

c. **Persons jointly entitled.** If tenants in common make a joint demise for years, reserving one entire rent, they may, at common law, join as plaintiffs in an action of debt for the rent,⁷⁶ or each may, it seems, bring a separate action of debt for his share.⁷⁷ Tenants in common entitled to rent, not as being the original lessors but as having obtained the reversion by transfer from the lessor, must sever, it seems, for the purpose of an action of debt,⁷⁸ and this must be done by tenants in common who make separate demises of their undivided shares, with a moiety of the rent payable to each.⁷⁹

The question whether tenants in common, who join in making a lease, should join in an action on the covenant for rent, is determined by the same considerations as control in the case of any other contract made with two or more persons.^{79a} They must all join as plaintiffs if it is joint, while if it is a several covenant, that is, if it is in effect a separate covenant with each, they cannot join, but must sue separately.^{79b} Whether it is one or the other is to be determined by considering not only the language used, but also the interests of the parties.⁸⁰ Ordinarily a covenant to pay rent will, in such a case, be a joint covenant,

Canhan v. Rust, 8 Taunt. 227; Burden v. Thayer, 44 Mass. (3 Mete.) 76, 37 Am. Dec. 117; Demarest v. Willard, 8 Cow. (N. Y.) 206. See Lord v. Carnes, 98 Mass. 308.

⁷⁶ Midgley v. Lovelace, Carth. 289;

Martin v. Crompe, 1 Ld. Raym. 341; Decker v. Livingston, 15 Johns. (N. Y.) 479. See 1 Platt, Leases, 133.

⁷⁷ Midgley v. Lovelace, Carth. 289, Holt. 74; Martin v. Crompe, 1 Ld. Raym. 341; Harrison v. Barnby, 5 Term R. 246. See Powis v. Smith, 5 Barn. & Ald. 850, 1 Dow. & R. 490.

⁷⁸ Huntley's Case, 3 Dyer, 326 a,

1 And. 21; 1 Platt, Leases, 134. That each of several devisees of the

lessor may sue alone in debt for his share of the rent, see Hare v. Proudfoot, 6 U. C. Q. B. (O. S.) 617.

⁷⁹ Powis v. Smith, 5 Barn. & Ald. 851; Wilkinson v. Hall, 1 Bing. N. C. 713.

^{79a} Dicey, Parties, 112; Hammon, Contracts, 770.

^{79b} See Comyn, Landl. & Ten. 455; 1 Platt, Leases, 134; Eccleston v. Clipsham, 1 Wms. Saund. 153, and notes; Foley v. Addenbrooke, 4 Q. B. 197; Marys v. Anderson, 24 Pa. 272; Bryant v. Wells, 56 N. H. 152; Churchill v. Lammers, 60 Mo. App. 245.

⁸⁰ See ante, § 52.

in a suit on which all the covenantees must join, since a breach of the covenant as to one is a breach as to all, and, consequently, their interests in its performance are joint, and this has been held to be the case even when it is expressly stated what share of the rent is to be paid to each, as when it is reserved to them "according to their several and respective rights and interests."⁸¹ Tenants in common who are such by acquisition of undivided interests in the reversion from the original lessor or lessors may, it is held, either join or sever in suing on the covenants which run with the land, among which is that for rent,⁸² their contract being joint and their interests several.⁸³

In case of a demise by joint tenants, as distinct from tenants in common, reserving an entire rent, one of the lessors alone cannot sue therefor in debt,⁸⁴ and they must, it seems, like tenants in common, join in a suit on a joint covenant made with both or all of them, though it is otherwise if the covenant is several in its nature.⁸⁵

d. **On death of person entitled.** In case of the death of the landlord the right to rent already due passes to his personal

⁸¹ *Powis v. Smith*, 5 Barn. & Ald. 550; *Wallace v. McLaren*, 1 Man. & R. 516 (semble); *Tylee v. McLean*, 10 Wend. (N. Y.) 374; *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 61. This is in accordance with the general rule that a separation of interests of covenantees is not created by a statement as to the proportions to be taken by each. *Lane v. Drinkwater*, 1 Crompt. M. & R. 599; *Byrne v. Fitzhugh*, 1 Crompt. M. & R. 597. But a contrary view, to the effect that when the proportion of rent payable to each lessor is stated, each may sue separately therefor, is adopted in *Gray v. Johnson*, 14 N. H. 414.

⁸² *Midgley v. Lovelace*, Carth. 289; *Kitchen v. Buckley*, 1 Lev. 109; *Wormersley v. Dally*, 26 Law J. Exch. 219; *Harrison v. Barnby*, 5 Term R. 246. See *Martin v. Crompe*, 1 Ld. Raym. 341; *Marshall v. Moseley*, 21 N. Y. 280; 1 Platt, Leases, 135; *Addison, Contracts* (10th Ed.) 218. That each owner of the reversion may in such case sue separately, see *Cole v. Pattison*, 25 Wend. (N. Y.) 456; *Jones v. Felch*, 16 N. Y. Super. Ct. (3 Bosw.) 63; *Bowser v. Cox*, 3 Ind. App. 309, 29 N. E. 616; *Henniker v. Turner*, 4 Barn. & C. 157.

In *Cantwell v. Moore*, 44 Ill. App. 656, it was decided that grantees of the lessors could sue jointly, though the latter, at the time of making the joint lease, owned separate portions of the land, and each conveyed to one of the plaintiffs his separate portion.

⁸³ See *Roberts v. Holland* [1892] 1 Q. B. 665; Platt, Covenants, 130.

⁸⁴ Bac. Abr., Joint Tenants (K); 1 Platt, Leases, 127. See Litt. § 311; Co. Litt. 180 b.

⁸⁵ *Weinsteine v. Harrison*, 66 Tex.

representative, and that thereafter falling due ordinarily passes with the reversion to the heir or devisee, unless the reversion itself is personalty, when it passes to the personal representatives.^{86, 87} An action for the rent is properly brought by the person or persons so entitled.

In case of the death of one of two or more persons to whom the reversion belongs as tenants in common, his undivided interest, if freehold in character, passes to his heir or devisee,⁸⁸ and the right to recover a proportionate share of the rent passes to the latter along with such undivided interest,⁸⁹ and he may sue therefor in debt.⁹⁰ Whether the heir or devisee of the undivided interest of a tenant in common has a right of action in covenant, as well as in debt, that is, upon the privity of contract as well as upon that of estate, does not clearly appear from the cases, but that he may sue on the covenant would seem to be a necessary result of the principle that the covenant for rent runs with the land.⁹¹ In one case, however, it is apparently decided that, such a covenant being made jointly with all the tenants in common, upon the death of one the right of action vests exclusively in the survivor or survivors,⁹² this according with the rule which ap-

546, 1 S. W. 626; *Churchill v. Lamers*, 60 Mo. App. 244.

^{86, 87} See ante, § 180 g.

⁸⁸ *Roberts v. Holland* [1893] 1 Q. B. 665.

⁸⁹ *Beer v. Beer*, 12 C. B. 60; 1 Platt, Leases, 131.

⁹⁰ *Burne v. Cambridge*, 1 Moody & R. 539; *Beer v. Beer*, 12 C. B. 60.

⁹¹ That a covenant may run with an undivided interest in the reversion, see *Midgley v. Lovelace*, Carth. 289; *Thompson v. Hakewill*, 19 C. B. (N. S.) 713; *Roberts v. Holland* [1893] 1 Q. B. 665.

⁹² *Wallace v. McLaren*, 1 Man. & R. 516. The statement by Williams, J., in the later case of *Beer v. Beer*, 12 C. B. 73, that the remark, in the earlier case, that the survivor may sue for the whole, is unnecessary to the decision, seems questionable,

and the general language of the later case favors the view that the right of action on the covenant to pay rent vests in the survivor, to the exclusion of the heir or devisee of the deceased tenant in common. The language of Byles, J., in *Thompson v. Hakewill*, 19 C. B. (N. S.) 713, would seem to make it a question of construction whether the right to sue on a covenant in favor of tenants in common should, on the death of one, vest in the survivor, to the exclusion of the heir or devisee. In *Codman v. Hall*, 91 Mass. (9 Allen) 335, it is decided that, on the death of one of the three joint owners who made the lease, "the cause of action for rent, or for use and occupation, survived to the other two."

plies ordinarily in the case of a contract made with several persons jointly.⁹³

e. **Statutory provisions.** The common-law rules as to the proper persons to sue for rent, or to join in an action therefor, are modified in many of the states by the codes of procedure and the practice acts providing for the prosecution of all actions in the names of the real parties in interest, and authorizing the joinder as plaintiffs of all persons having an interest in the subject-matter of the action and in the relief sought to be obtained.

§ 294. Parties defendant.

a. **Joint or several liability.** At common law a covenant for rent is, like any other contract, in its nature joint as to the covenantors, unless it is so expressed as to be several, or joint and several, and the action must be brought against all the covenantors, except in certain cases, as when one of them is dead, or is out of the jurisdiction, or is bankrupt.⁹⁴ The covenant may, however, be so phrased as to impose on the covenantors a liability both joint and several, in which case the covenantee has the option of suing either one or all of the covenantors,⁹⁵ or it might be so expressed as to impose merely a several liability, in which case the covenantors must be sued separately.^{95a} A covenant is not several rather than joint because the demise is expressed to be to the covenantors "as tenants in common, and not as joint tenants," nor because they covenant that "they, or some or one of them, their executors, administrators or assigns," will pay the rent.⁹⁶

In a number of states it is provided by statute that contracts which would at common law be joint contracts shall be construed as joint and several contracts, and such a provision would presumably apply to a covenant for rent, as would, presumably, the provision found in many states authorizing the

⁹³ See Leake, *Contracts*, 376; ⁹⁵ Lilly v. Hodges, 8 Mod. 166; Hammon, *Contracts*, 763, and ante, Enys v. Donnithorne, 2 Burrow, § 55 b. 1190; Northumberland v. Errington,

⁹⁴ Dicey, *Parties*, 230; Hammon, 5 Term R. 522.

Contracts, 758, 769; 15 Enc. Pldg. ^{95a} See ante, § 52.

& Prac 548, 556; Comyn, *Landl. &* ⁹⁶ White v. Tyndall, 13 App. Cas. Ten. 457. 263.

joinder of two or more persons severally liable upon the same instrument or obligation.⁹⁷

b. **On assignment of leasehold.** In case of an assignment of the leasehold, either the lessee or the assignee is a proper party defendant to an action for rent, the first being liable by reason of privity of contract,⁹⁸ and the second by reason of privity of estate.^{98a} The landlord may at common law sue, at his election, either the lessee or the latter's assignee, the former in covenant, on the privity of contract,^{98b} the latter either in debt on the privity of estate,^{98c} or in covenant, on the privity of contract based on the privity of estate.⁹⁹ If, however, he sues both the lessee and the latter's assignee, he can issue execution against one of them only.¹⁰⁰

In case the lessee assigns the leasehold interest in part of the premises, the assignee is, as before stated, liable in proportion to the value of the premises of which he becomes the tenant, and is a proper defendant in an action to enforce such liability.¹⁰¹ He may be sued without the joinder of those who may be liable for the balance of the rent as being tenants of the other part of the premises,¹⁰² and it would seem that it is improper to join them, the liability of each for his share of the rent being several and independent of that of the others.¹⁰³

c. **On death of person liable.** In case of the death of a sole tenant of the premises, his personal representative is, subject to some limitations heretofore referred to,¹⁰⁴ liable for the rent thereafter accruing, and is consequently the proper party defendant to an action for rent.

At common law, if a lease is made to two or more persons, one of whom dies, no portion of the liability on the covenant for rent, regarded as a joint covenant by the lessees, passes to

⁹⁷ See 15 Enc. Pldg. & Prac. 741, 744.

⁹⁸ See ante, § 181 a, at note 653.

^{98a} See ante, § 181 b.

^{98b} See ante, § 181 a, at note 653.

^{98c} See ante, § 181 b, at note 665.

⁹⁹ See ante, § 181 b, at notes 670-673.

¹⁰⁰ See 2 Platt, Leases, 356; Comyn, Landl. & Ten. 270; Brett v. Cumberland, Cro. Jac. 523.

¹⁰¹ See ante, § 181 b, at notes 677, 678.

¹⁰² Van Rensselaer v. Bonesteel, 24 Barb. (N. Y.) 365.

¹⁰³ See Bowdre v. Hampton, 6 Rich. Law (S. C.) 208; Van Rensselaer v. Layman, 39 How. Pr. (N. Y.) 9. But Hannen v. Ewalt, 13 Pa.

9, is to the contrary.

¹⁰⁴ See ante, § 181 c.

the personal representative of the deceased, but the whole liability is imposed on the survivors, this being the general rule in case of the death of a joint contractor.¹⁰⁵ In a number of jurisdictions, however, this common-law rule, that the surviving contractor or contractors are liable, to the exclusion of the representatives of the deceased contractor, has been changed by statute; and even at common law, if the promise to pay rent can be construed as a several promise, or as a joint and several promise, a different rule applies, and the representative of the deceased promisor is liable thereon.¹⁰⁶

Though the personal representative of the deceased joint contractor is, under the above rule, not liable on the covenant for rent by reason of his possession of assets of the estate, nevertheless, if a part interest passes to him,¹⁰⁷ and he enters on the premises, he is, it seems, liable for a proportionate part of the rent as the assignee of an undivided interest in the term.¹⁰⁸

If the leasehold vests in two or more persons by assignment, and one of them thereafter dies, the liability for his share of the rent would seem to pass to his executor, as assignee of the term, provided the executor enters, of which liability, however, he may divest himself by an assignment to another.¹⁰⁹

d. *Persons asserting title.* It has been held that where the defendant in an action for rent has been sued for damages for his occupation of the premises by a third person claiming to be the real owner, such third person should be made a party, under a statute providing that when a complete determination of a controversy cannot be affected without the presence of other parties, the court must cause them to be brought in.¹¹⁰ But ordinarily a third person claiming under paramount title, even though the tenant has attorned to him, is not a proper party to an action

¹⁰⁵ See Hammon, Contracts, 761; Dicey, Parties, 237; White v. Tyndall, 13 App. Cas. 263, and ante, § 55 a, at note 84.

¹⁰⁶ White v. Tyndall, 13 App. Cas. 263; Enys v. Donnithorne, 2 Burrow, 1190. See Hammon, Contracts, 765, 767; Dicey, Parties, 238.

¹⁰⁷ That is, if the lessees, as they would ordinarily do at the present

day, took the leasehold interest as tenants in common, and not as joint tenants with the right of survivorship.

¹⁰⁸ See ante, § 181 c, at note 699.

¹⁰⁹ See ante, § 181 c, at notes 699,

¹¹⁰ McKesson v. Mendenhall, 64 N. C. 286.

against the tenant for rent, since the question of title is not an issue in such an action.¹¹¹

e. **Guarantors and sureties.** At common law, a guarantor of the performance by the lessee of his contract to pay rent cannot be joined with the lessee or tenant in an action for rent, the contract of guaranty being entirely separate from the contract for rent.¹¹² On the other hand, one who enters into a contract of suretyship for the lessee's performance of his covenant may be sued jointly with the latter, unless the liability of the principal and surety is expressly made several and not joint,¹¹³ and if it is joint, and not several, nor joint and several, they must be sued together, as must any joint contractors.¹¹⁴

The rule that a guarantor cannot be joined with the principal debtor as a joint defendant has in some states been regarded as changed by the statutory provision, frequently found, that two or more persons severally liable upon the same written instrument or obligation may all be included in one action at the option of the plaintiff,¹¹⁵ and it has accordingly been decided that under such a statute a lessor may join in one action the lessee and one who guaranteed the performance of the lessee's cove-

¹¹¹ *Hill v. Williams*, 41 S. C. 124, 19 S. E. 290. See *Standley v. Roberts*, 8 C. C. A. 305, 59 Fed. 836, and ante, at note 65a.

¹¹² *Virden v. Ellsworth*, 15 Ind. 144; *Cross v. Ballard*, 46 Vt. 415; *Turney v. Penn*, 16 Ill. 485; *Tourtellott v. Junkin*, 4 Blackf. (Ind.) 482. In the two latter cases, though the contract is spoken of as one of suretyship, it seems to have been one of guaranty, strictly speaking.

¹¹³ This is the general rule in the case of contracts of suretyship. *Castner v. Slater*, 50 Me. 212; *Lee v. Bolles*, 20 Mich. 46; *Oxford Bank v. Haynes*, 25 Mass. (8 Pick.) 423, 19 Am. Dec. 334; *Gaff v. Sims*, 45 Ind. 262; *McMillan v. Bull's Head Bank*, 32 Ind. 11, 2 Am. Rep. 323.

In *McLott v. Savery*, 11 Iowa, 323, where one joining in the execution

of the lease "guaranteed" the payment of rent as it fell due, it was held that he might be sued jointly with the lessee. This seems to have been properly a contract of suretyship rather than of guaranty, since the person so joining was a party to the original contract. In *Preston v. Huntington*, 67 Mich. 139, 34 N. W. 279, it was decided that one who, by an endorsement on the instrument of lease, executed on the same date, stated that he became surety for the punctual payment of the rent, and that in case of default he would pay the rent due, was a surety, and could be sued jointly with the principal.

¹¹⁴ *City of Philadelphia v. Reeves*, 48 Pa. 472.

¹¹⁵ See 16 Enc. Pldg. & Prac. 942.

nant by words to that effect in the instrument of lease, which was signed by him.¹¹⁶ But such a statute does not authorize an action against two sureties jointly if their liability is for different demands, as when each of two tenants is to pay half the rent, and each surety is liable for one tenant's share of the rent.¹¹⁷ It has been decided that a separate writing annexed to the instrument of lease does not impose a liability "upon the same written instrument" within the statute,¹¹⁸ though in another jurisdiction, where the statute authorized the joinder of persons severally liable upon the same obligation or instrument, "including sureties on the same instrument," one who guaranteed the lessee's contract by an endorsement on the lease could, it was held, be sued with him.¹¹⁹

§ 295. Pleading.

At common law, in an action of debt for rent, even though the rent was reserved by deed, it was unnecessary to set out or recite the deed in the declaration, it being regarded not as the gist of the action, but as merely inducement.¹²⁰ But if the declaration undertook to recite the important parts of the deed and the particulars of the demise, any substantial variance in this regard was fatal.¹²¹ It was necessary, in an action of debt, to allege the reservation of the rent¹²² and the time at which it became due.¹²³

In an action of covenant it was necessary to show that the writing upon which the action was brought was a deed, that is, was under seal,¹²⁴ it being sufficient, in this regard, however, to aver that it was an indenture.¹²⁵ It was also necessary, in

¹¹⁶ *Carman v. Plass*, 23 N. Y. 286;
Decker v. Gaylord, 8 Hun (N. Y.)
110.

¹¹⁷ *Southmayd v. Jackson*, 15 Misc.
476, 37 N. Y. Supp. 201.

¹¹⁸ *Phalen v. Dingee*, 4 E. D. Smith
(N. Y.) 379; *Tibbits v. Percy*, 24
Barb. (N. Y.) 39.

¹¹⁹ *Lucy v. Wilkins*, 33 Minn. 21,
21 N. W. 849.

¹²⁰ *Comyn, Landl. & Ten.* 430; 1
Wms. Saund. 276, note (1) to *Duppa*
v. Mayo.

¹²¹ *Bristow v. Wright*, 2 Doug. 665,
and note; *Sands v. Ledger*, 2 Ld.
Raym. 792.

¹²² *Parker v. Harris*, 1 Salk. 262;
Com. Dig., Pleader (2 W. 14).

¹²³ 2 *Chitty, Pleading* (13th Am.
Ed.) 433; *Gilbert, Debt*, 407.

¹²⁴ *Southwel v. Brown*, Cro. Eliz.
571.

¹²⁵ *Moore v. Jones*, 2 Ld. Raym.

such an action, to state the making of the lease, to set out the covenant for rent, and to aver the breach thereof.¹²⁶

The statement or suggestion occasionally made at the present day, that there must be an averment of a promise to pay the rent,¹²⁷ is no doubt correct if the action is covenant or assumpsit, or can be regarded as the statutory equivalent thereof. If, however, the action is one of debt, or can be regarded as the equivalent thereof, and there seems ordinarily no objection to so regarding it, no necessity exists of averring a promise, the action being based upon the reservation of the rent and enjoyment of the land.¹²⁸

The declaration or complaint must always, at the present day, as at common law, either by express statement or necessary implication, aver that the installment or installments of rent sued for are past due.¹²⁹

If the action is not between the original parties to the lease, the declaration or complaint must show how, by assignment or otherwise, the plaintiff became entitled to the rent or the defendant became liable therefor.¹³⁰ But it has been held that, though the landlord alleges an assignment of the leasehold in the whole premises, he may prove an assignment of the leasehold

¹²⁶ Comyn, Landl. & Ten. 463.

"In an action of covenant for non-payment of rent, it is sufficient to allege in the declaration that the plaintiff, on such a day and year, at such a place, by a certain indenture made between him of the one part and the defendant of the other part (which the plaintiff brings here into court), demised to the defendant certain premises particularly mentioned and described in the said indenture (instead of setting out the parcels, as is too frequently done) except as therein is excepted, to hold the same to the defendant, except, etc., for a certain term therein mentioned and still unexpired, yielding the rent of * * * payable on, etc., and then state the covenant for pay-

ment of the rent, the entry of defendant, and the breach in not paying so much rent due." 1 Wms. Saund. 233 a, note (2).

¹²⁷ Burgess v. American Mortg. Co., 115 Ala. 468, 22 So. 262; Vestal v. Craig, 25 Ind. App. 572, 58 N. E. 752; Ramsey v. Johnson, 7 Wyo. 392, 52 Pac. 1084, 40 L. R. A. 690.

¹²⁸ See ante, at notes 11, 12.

¹²⁹ See Mason v. Seitz, 36 Ind. 516; Elmer v. Land Creek Tp., 38 Ind. 56; Phelps v. Van Orden, 6 Johns. (N. Y.) 105; Van Rensselaer v. Bradley, 3 Denio (N. Y.) 135, 45 Am. Dec. 451; Ramsey v. Johnson, 7 Wyo. 392, 52 Pac. 1084, 40 L. R. A. 690.

¹³⁰ Willard v. Tillman, 2 Hill (N. Y.) 274; Comyn, Landl. & Ten. 430; 2 Chitty, Pleading (13th Am. Ed.) 564.

in part only, so as to impose a merely partial liability for rent upon the assignee.¹³¹

It is not necessary for the plaintiff to aver that he, or his predecessor in title, was the rightful owner of the premises at the time of the lease, since this has no bearing upon the liability for rent.¹³²

Since the liability for rent under an express reservation thereof, or under a covenant to pay rent, is not dependent upon occupancy by the lessee,^{132a} it is not necessary to allege such occupancy.¹³³ Nor is it necessary, in an action against an assignee of the lease, to allege that he took possession under the assignment, such taking of possession not being requisite for the imposition of liability on him.¹³⁴

It has been asserted that the declaration must state the time of the commencement and the duration of the lease.¹³⁵ Whether

¹³¹ *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643.

¹³² *Havemeyer v. Switzer*, 15 Misc. 629, 37 N. Y. Supp. 352; *Kiernan v. Terry*, 26 Or. 494, 38 Pac. 671; *Ayotte v. Johnson*, 25 R. I. 403, 56 Atl. 110; *Stephen*, Pleading (9th Am. Ed.) 327, and ante, § 78 c (3).

^{132a} See ante, § 182 b.

¹³³ *Bellasis v. Burbriche*, 1 Ld. Raym. 170; *Douglass v. Branch Bank of Mobile*, 19 Ala. 659, 54 Am. Dec. 207; *Marix v. Stevens*, 10 Colo. 261, 15 Pac. 350; *Mayer v. Lawrence*, 58 Ill. App. 194; *Havemeyer v. Switzer*, 15 Misc. 629, 37 N. Y. Supp. 352; *Weston v. Ryley*, 15 Misc. 638, 37 N. Y. Supp. 216; *Gilhooley v. Washington*, 4 N. Y. (4 Comst.) 217. In *Mulford v. Young*, 6 Ohio, 294, it is said that the declaration must state that the defendant enjoyed the premises, or that the lessor tendered him the enjoyment. No authority is cited for the statement. In *Bellasis v. Burbriche*, 1 Ld. Raym. 170, 1 Salk. 208, a tenancy at will is distinguished in this respect from a tenancy for years, it

being said that, as against a tenant at will, occupation must be averred, since it is by reason of such occupancy that he is liable. But this can be so only when "the tenant is chargeable merely in respect of his occupation." See *Comyn, Landl. & Ten.* 430. If a tenant at will has agreed to pay rent, he is, it seems, liable by his agreement, and his occupancy is necessarily immaterial. See ante, § 182 b, at notes 829, 829 a.

¹³⁴ *Comyn, Landl. & Ten.* 467; *Williams v. Bosanquet*, 1 Brod. & B. 238. The decision in *La Dow v. Arnold*, 14 Wis. 458, that an averment of occupation by the assignee is necessary, is based on the theory that such occupation is necessary to the imposition of liability on the assignee, a view which is not in accord with the authorities generally. See ante, § 158 a (2) (e).

¹³⁵ *Pendill v. Neuberger*, 64 Mich. 220, 31 N. W. 177. See *Post v. Blazewitz*, 13 App. Div. 124, 43 N. Y. Supp. 59.

As to averments in an action for

this was necessary at common law may be doubted, provided the declaration showed that the rent accrued during the tenancy.¹³⁶ It is, however, and always has been, a proper and usual averment, and a variance in the regard might be fatal, if not removed by amendment.¹³⁷

It is not, it seems, ordinarily necessary to state whether the lease, or the stipulation as to rent, was written or oral, even though a writing is necessary,^{138,139} but in a common-law action of covenant it is necessary to state, expressly or by implication, that the promise to pay rent was in writing and under seal.¹⁴⁰ Under some of the codes of procedure an averment in this regard might be necessary, and so it has been decided that when the statute requires a declaration on a written instrument to set out a copy, or the legal effect thereof, with proper averments to describe the cause of action, the declaration must allege whether the rent claimed is due under a written instrument.¹⁴¹

It was unnecessary, under the common-law system of pleading, to describe the premises, either in an action of debt or of covenant.¹⁴² Ordinarily, under the code procedure, a brief description of the premises leased is included in the complaint, if the lease is not set out therein *in extenso*, but such a description seems no more necessary in an action under the codes than at common law.¹⁴³ If the complaint does undertake to describe the

rent accrued during an extension of the lease, see *Crystal Ice Co. v. Morris*, 160 Ind. 651, 67 N. E. 502; *Kramer v. Cook*, 73 Mass. (7 Gray) 550.

¹³⁶ See *Comyn, Landl. & Ten.* 430, 463; *Turner v. Lamb*, 14 Mees. & W. 412.

The date of the lease, as named in the complaint, has been said to be immaterial. *Woodruff v. Butler*, 75 Conn. 679, 55 Atl. 167. But a different view is taken in *Locke v. Kennedy*, 171 Mass. 204, 50 N. E. 531.

¹³⁷ See *Locke v. Kennedy*, 171 Mass. 204, 50 N. E. 531.

^{138, 139} See *Browne, Stat. of Frauds*, § 505; 1 *Chitty, Pleading*, 303. An oral lease might, it has been sug-

gested, be proven under an averment of a written lease, or the misstatement might be cured by amendment. *Thomas v. Nelson*, 69 N. Y. 118.

¹⁴⁰ See *Platt, Covenants*, 546; 1 *Chitty, Pleading*, 364.

¹⁴¹ *Burnham v. Roberts*, 103 Mass. 379.

¹⁴² 1 *Wms. Saund.* 233; *Comyn, Landl. & Ten.* 430; *Davies v. Edwards*, 3 Maule & S. 380; *Van Rensselaer v. Bradley*, 3 Denio (N. Y.) 135, 45 Am. Dec. 451; *Miller v. Blow*, 68 Ill. 304.

¹⁴³ But a motion to make the complaint more definite in this respect might be entertained. See *Post v.*

premises, an error in this regard is fatal, unless corrected by amendment.¹⁴⁴

§ 296. Set-off, recoupment, and counterclaim.

Under the statutes of set-off and counterclaim existent in most jurisdictions, by which a defendant in an action on a contract is allowed to assert, in reduction of plaintiff's demand, a cross demand of a contractual character against the plaintiff, the defendant in an action for rent, regarding it as an action on the contract to pay, may no doubt assert cross demands of a contractual character, subject to the restrictions which may exist under the particular statute as regards unliquidated claims. That he may or may not do this seems, however, to have been rarely the subject of express decision,¹⁴⁵ and the discussion as to the right of the tenant to assert a cross demand has centered rather upon the question whether such demand is one which is so connected with the contract, transaction, or subject-matter involved in the suit, as to be a proper subject for "recoupment," as distinguished from "set-off," or its statutory equivalent.

The later cases in this country are practically in unison in holding that in an action for rent the defendant may, even apart from statute, recoup the damages caused by the plaintiff's breach of any covenant of the lease,¹⁴⁶ a doctrine which

Blazewitz, 13 App. Div. 124, 43 N. Y. Supp. 59; Gustaveson v. Otis, 57 N. Y. St. Rep. 797, 27 N. Y. Supp. 280.

¹⁴⁴ Hoar v. Mill, 4 Maule & S. 470; Morgan v. Edwards, 6 Taunt. 394; Miller v. Blow, 68 Ill. 304.

In *Morningstar v. Querens*, 142 Ala. 186, 37 So. 825, it was decided that when the complaint described the property as "the building which was on the date of the demise of said property occupied by A as a grocery store," not averring that A was the exclusive occupant, evidence of a lease which described the property as the building "which is now occupied in part by A as a grocery and B as a saloon" did not involve a variance.

¹⁴⁵ That he may do so is recognized in *Fillebrown v. Hoar*, 124 Mass. 580; *McVicker v. Dennison*, 45 Pa. 390; *Nickols v. Jones*, 166 Pa. 599, 31 Atl. 329; *Koegel v. Michigan Trust Co.*, 117 Mich. 542, 76 N. W. 74; *Hurst v. Benson*, 27 Tex. Civ. App. 227, 65 S. W. 76. Compare *Nichols v. Dusenbury*, 2 N. Y. (2 Comst.) 283.

¹⁴⁶ *Horton v. Miller*, 84 Ala. 537, 4 So. 370; *City of New York v. Mabie*, 13 N. Y. (3 Kern.) 157; *Kelsey v. Ward*, 38 N. Y. 83; *Ely v. Spiero*, 28 App. Div. 485, 51 N. Y. Supp. 124; *Elwood v. Forkel*, 35 Hun (N. Y.) 202; *Brittain v. Griggs*, 88 Ga. 232, 14 S. E. 609; *Crane v. Hardman*, 4 E. D. Smith (N. Y.) 339; *Hirsch v. Olmesdahl*, 38 Misc. 757, 78 N. Y. Supp. 832;

has been applied with especial frequency in the case of breach by the landlord of a covenant to repair the premises or to make improvements thereon.¹⁴⁷ Such a claim for breach of covenant has also been regarded as arising out of the contract or transaction set forth in the complaint and as connected with the subject of the action, within the meaning of the statute of counterclaim.¹⁴⁸ Likewise, damages for breach of a covenant for quiet

Stewart v. Lanier House Co., 75 Ga. Supp. 891; *Young v. Burhans*, 80 Wis. 582; *Pepper v. Rowley*, 73 Ill. 262; 438, 50 N. W. 343; *Wilkerson v. Bloodworth v. Stevens*, 51 Miss. 475; *Farnham*, 82 Mo. 672; *Meredith Mechanics' Ass'n v. American Twist Drill Co.*, 67 N. H. 450, 39 Atl. 330; *New York & Texas Land Co. v. Cruger* (Tex. Civ. App.) 27 S. W. 212; *Coleman v. Bunce*, 37 Tex. 171; *Breese v. McCann*, 52 Vt. 498; *Prescott v. Otterstatter*, 85 Pa. 534; *Cheuvront v. Bee*, 44 W. Va. 103, 28 S. E. 751; *Beardsley v. Morrison*, 18 Utah, 478, 56 Pac. 303, 72 Am. St. Rep. 795; *Westlake v. DeGraw*, 25 Wend. (N. Y.) 669; *Whitbeck v. Skinner*, 7 Hill (N. Y.) 53; *McCoy v. Oldham*, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208; *Deuster v. Mittag*, 105 Wis. 459, 81 N. W. 643.

Where the lessor covenants that the lessee shall have the right to remove fixtures annexed by him, the lessee may counterclaim for damages in case the lessor prevents their removal. *Bruce v. Welch*, 6 N. Y. St. Rep. 617. He cannot do so, it appears, if the lease contains no covenant on the subject, although the lessee has the right to remove them because they are trade fixtures, the lessee's claim for damages being in such case founded on tort. *City of New York v. Parker Vein Steamship Co.*, 21 How. Pr. (N. Y.) 289.

¹⁴⁷ *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134; *Vandegrift v. Abbott*, 75 Ala. 487; *Varner v. Rice*, 39 Ark. 344; *Lewis v. Chisolm*, 68 Ga. 40; *Lunn v. Gage*, 37 Ill. 19, 87 Am. Dec. 233; *Kiernan v. Germain*, 61 Miss. 498; *Myers v. Burns*, 35 N. Y. 269; *Reiner v. Jones*, 38 App. Div. 441, 56 N. Y. Supp. 423; *Uhlfelder v. Loughran*, 54 Misc. 593, 104 N. Y.

In *Union Water Power Co. v. Pingree*, 91 Me. 440, 40 Atl. 333, it was decided that when the lessor failed to reconstruct the thing leased after its destruction by fire, as required by his covenant, such breach of covenant could be set up by way of recoupment in an action for the rent, and that it would, in the absence of evidence to the contrary, be presumed that the rent for the period after the destruction and the damages accruing from failure to repair were equal.

¹⁴⁸ *Cook v. Soule*, 56 N. Y. 420; *Pioneer Press Co. v. Hutchinson*, 63 Minn. 481, 65 N. W. 938.

enjoyment are, by a number of decisions, the subject of recoupment.¹⁴⁹

While an eviction would ordinarily constitute a breach of the covenant for quiet enjoyment, express or implied, it has been decided in some jurisdictions that a mere trespass by the landlord does not arise from the contract or transaction which is the subject of the action for rent, and is consequently not available by way of recoupment.¹⁵⁰ In view of the ordinarily accepted doc-

¹⁴⁹ *City of New York v. Mabie*, 13 N. Y. (3 Kern.) 151, 64 Am. Dec. 538; *Riley v. Hale*, 158 Mass. 240, 33 N. E. 491.

Collins v. Lewis, 53 Minn. 78, 54 N. W. 1056, 19 L. R. A. 822; *Holbrook v. Young*, 108 Mass. 83, 11 Am. Rep. 310; *Eldred v. Leahy*, 31 Wis. 546; *Hanley v. Banks*, 6 Okl. 79, 51 Pac. 664; *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 595; *Abrams v. Watson*, 59 Ala. 524; *Harmont v. Sullivan*, 128 Iowa, 309, 103 N. W. 951; *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. Unoff. 340, 96 N. W. 487; *Moffat v. Strong*, 22 N. Y. Super. Ct. (9 Bosw.) 57; *Ludlow v. McCarthy*, 5 App. Div. 517, 38 N. Y. Supp. 1075.

In *McKesson v. Mendenhall*, 64 N. C. 286, it was decided that as the lease "implied an obligation on the part of the plaintiffs (the lessors) to secure the defendants (the lessees) the possession and enjoyment of the demised premises," the latter could set up, as a statutory counterclaim, that there was an outstanding paramount title whose owners had brought suit against them for damages for the occupation of the land by them. The filing of the counterclaim was apparently regarded as transforming the action into an equitable proceeding and the owner of the paramount title was ordered to be made a party.

The tenant is obviously under no obligation to assert the breach of the covenant by way of counterclaim

rather than by a separate action.

¹⁵⁰ So it has been decided that there can be no recoupment of a demand against the landlord on account of the overflow of the leased premises by reason of a leak in pipes in another part of the building (*Edgerton v. Page*, 20 N. Y. 281; *Hanley v. Banks*, 6 Okl. 79, 51 Pac. 664), on account of damage to the tenant's crops caused by the landlord (*Brown v. Alfriend*, 61 Ga. 12; *Hulme v. Brown*, 50 Tenn. [3 Heisk.] 679. *Contra*, *Johnson v. Aldridge*, 93 Ala. 77, 9 So. 513), or on account of the landlord's wrongful entry on the premises (*Bartlett v. Farrington*, 120 Mass. 284; *Livingston v. L'Engle*, 27 Fla. 502, 8 So. 728; *Dimmock v. Daly*, 9 Mo. App. 354; *Levy v. Bend*, 1 E. D. Smith [N. Y.] 169); unauthorized or negligent repairs by him (*Faber v. Phillips*, 26 Misc. 723, 56 N. Y. Supp. 1028; *Cram v. Dresser*, 4 N. Y. Super. Ct. [2 Sandf.] 120; *Goebel v. Hough*, 26 Minn. 252, 2 N. W. 847, 37 Am. Rep. 407), injuries wantonly done by him to personal property on the premises (*Drake v. Cockroft*, 4 E. D. Smith [N. Y.] 34; *Willis v. Branch*, 94 N. C. 142, 55 Am. Rep. 597), or the conversion by him of such property (*Ludlow v. McCarthy*, 5 App. Div. 517, 38 N. Y. Supp. 1075; *Willis v. Branch*, 94 N. C. 142, 55

trine, that damages for breach of the covenant of quiet enjoyment are the subject of recoupment, these decisions are to be regarded, it seems, as assuming that a trespass by the landlord, not constituting an eviction, is not a breach of the covenant for quiet enjoyment, ordinarily implied from the relation of tenancy,¹⁵¹ a view which would not everywhere be accepted.¹⁵² If a mere trespass by the landlord is to be regarded as a breach of such covenant, it would seem that damages therefor should be regarded as the subject of recoupment, provided it is properly pleaded as constituting a breach of covenant and not merely as a trespass, and there are occasional decisions apparently to that effect.¹⁵³

Damages arising from the fraud of the lessor in connection with the making and acceptance of the lease have been decided to be a subject for recoupment in an action for rent.¹⁵⁴

Am. Rep. 597; *Hembrock v. Stark*, 53 Mo. 588).

¹⁵¹ In *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680, it is explicitly stated that a mere trespass by the landlord, not being a breach of the implied covenant of quiet enjoyment, is not the subject of recoupment.

In *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170, it was decided that, there having been no relinquishment of possession by the tenant on account of acts of disturbance by the landlord, it could not be asserted that that there was a constructive eviction, and that there was, consequently, no breach of the covenant for quiet enjoyment, which could be asserted by way of counterclaim. To the same effect, see *George A. Fuller Co. v. Manhattan Const. Co.*, 44 Misc. 219, 88 N. Y. Supp. 1049.

¹⁵² See ante, § 79 d (1).

¹⁵³ In *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175, it was said that, though the tenant could not assert that he was evicted, since he remained in possession (ante, § 185 d), he

could set up, by way of recoupment, a claim for injury caused by the acts which would have justified an assertion of eviction had they been followed by abandonment. And *Abrams v. Watson*, 59 Ala. 524, is to the effect that a trespass, as by removal of fences, is the subject of recoupment. In *Goebel v. Hough*, 26 Minn. 252, 2 N. W. 847, 37 Am. Rep. 407, it is decided that a claim that the lessor wrongfully interfered with the lessee's enjoyment by entering without permission and making repairs during the time of the accrual of the rent sued for "is connected with the subject of the action within the statute of counterclaim." In *Newport News & O. P. R. & Elec. Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011, it was decided that a claim on account of trespasses by the landlord was "based upon matters directly connected with, and injuries growing out of, the contract sued on by plaintiff," so as to come within the local statute.

¹⁵⁴ *Allaire v. Whitney*, 1 Hill (N. Y.) 484; *Whitney v. Allaire*, 4 Denio, 554, 1 N. Y. (1 Comst.) 305; *Barr v. Kimball*, 43 Neb. 766, 62 N. W. 196.

Matters growing out of an agreement between the parties subsequent to the lease do not, it seems, arise out of the contract or subject-matter of the action, so as to be a proper subject of recoupment, and so it has been decided that damages for breach of a subsequent contract settling certain controversies could not be so made the subject of a cross demand.¹⁵⁵ A like decision has been made as to the tenant's claim on account of the landlord's promise to share the expense of repairs, provided the tenant would make them;¹⁵⁶ but in apparent opposition to this latter decision are several cases in which a cross demand, on account of the expenditures made by the tenant on the strength of the landlord's promise to pay therefor, has been allowed.¹⁵⁷ These latter cases are, perhaps, to be explained by reference to the statutes of set-off of the particular states, authorizing a cross demand against the plaintiff based on a contractual claim entirely disconnected with the subject of the action.

A breach of covenant on the part of the landlord need not, in order that it may be the subject of recoupment or counterclaim as against a claim for a particular installment of rent, have accrued during the time of accrual of such installment, and so the tenant, though he has paid one or more installments of rent since the breach, may assert such breach in an action by the landlord for a subsequent installment.¹⁵⁸ And so the tenant may assert a breach of the covenant for quiet enjoyment in an action for an installment of rent which accrued before such breach.¹⁵⁹ If the covenant by the landlord is continuous in its nature, and consequently susceptible of repeated breaches, distinct breaches may be asserted in successive actions for separate installments of rent.¹⁶⁰

See *Cage v. Phillips*, 38 Ala. 382; *Sisson v. Kaper*, 105 Iowa, 599, 75 N. W. 490.

¹⁵⁵ *Collins v. Karatovsky*, 36 Ark. 316.

¹⁵⁶ *Phillips v. Sun Dyeing Bleach & Cal. Co.*, 10 R. I. 458. And see *Powers v. Cope*, 93 Ga. 248, 18 S. E. 815, apparently to the same effect.

¹⁵⁷ *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641; *Jeffers v. Bantley*, 47 Hun (N. Y.) 90; *Hausman v. Mulheran*, 68 Minn. 48, 70 N. W. 866; *Wil-*

kerson v. Farnham, 82 Mo. 672 (semble); *Trathen v. Kipp*, 15 Colo. App. 426, 62 Pac. 962 (semble). See *Mann v. Fuller*, 63 Kan. 664, 66 Pac. 627, 55 L. R. A. 560, 88 Am. St. Rep. 256. ¹⁵⁸ *Cook v. Soule*, 56 N. Y. 420; *McAlester v. Landers*, 70 Cal. 79, 11 Pac. 505. And see *Benkard v. Babcock*, 25 N. Y. Super. Ct. (2 Rob.) 175, 17 Abb. Pr. 421, 27 How. Pr. 391.

¹⁵⁹ *Tiley v. Moyers*, 43 Pa. 404. And see cases cited ante, note 149.

¹⁶⁰ *Block v. Ebner*, 54 Ind. 544.

It has been decided that there can be no recoupment if the breach by the landlord of his contract occurred after the commencement of the action for rent.¹⁶¹ But the statute of the particular jurisdiction may justify a contrary view.¹⁶²

To what extent, in an action for rent by a transferee of the reversion or of the rent, the tenant may assert a right of set-off or recoupment which he might have asserted against the transferor, does not clearly appear from the decisions. In cases where a demand by the defendant against an assignor is asserted in an action by an assignee, as being the subject of a set-off rather than by way of recoupment, that is, on the theory, not that the two demands arise from the same contract or transaction, but rather that they are mutual demands between the parties concerned in the action, the general rule is that the claim assigned, as well as that which is asserted by way of set-off, must have been due at the time of the assignment.¹⁶³ This rule has been held to prevent a lessee from asserting, as against an assignee of rent to become due, a debt due from the assignor to the lessee at the time of the assignment,¹⁶⁴ and the same rule would seem to apply in the case of an action by the transferee of the reversion to which the rent is incident.¹⁶⁵ But when the claim

¹⁶¹ *Harger v. Edmonds*, 4 Barb. (N. Y.) 256.

¹⁶² *Hyman v. Jockey Club Wine, Liquor & Cigar Co.*, 9 Colo. App. 299, 48 Pac. 671.

¹⁶³ See *Bradley v. Smith's Sons*, 98 Mich. 449, 57 N. W. 576, 23 L. R. A. 305, 39 Am. St. Rep. 565; *Richards v. La Tourette*, 53 Hun (N. Y.) 623; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312. But this rule has been said not to be applicable if the assignor is insolvent, since, if the set-off is not allowed in such case, the defendant will lose his claim. *Armstrong v. Warner*, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466; *Pomeroy, Remedies*, § 163.

¹⁶⁴ *Koegel v. Michigan Trust Co.*, 117 Mich. 542, 76 N. W. 74. But *Adams v. Leavens*, 20 Conn. 73, is apparently contra.

¹⁶⁵ This is, it seems, necessarily implied in *Benedict v. Citizens' Bank*, 54 Neb. 113, 74 N. W. 407, when the transferee of the reversion was held to be entitled to the entire rent accruing after the transfer, without deduction, though at the date of the lease the lessor owed the lessee more than the aggregate rent for the whole term. The question actually discussed in this case was whether the purchaser of the reversion was bound by a provision in the lease that the monthly rent should be paid by the lessee's crediting the lessor on its books with the amount of the rent.

In *Strousse v. Bank of Clear Creek County*, 9 Colo. App. 478, 49 Pac. 260, it was decided that although the lessee has, by the terms of the lease, a right to set off, against

asserted by the defendant is one growing out of the contract or transaction which is the subject of the action, as, for instance, when the lessee asserts, in an action for rent by a transferee of the reversion, a breach by the original lessor of a covenant to make improvements, it may perhaps be questioned whether there is any such requirement, as in the former case, that both the claim sued on and that asserted by defendant must have been due at the time of the assignment or transfer, since the defendant's right to assert his claim by a cross demand might be regarded as based upon the common-law doctrine of recoupment, which is itself formulated on and governed by equitable principles, and not upon the statutes of set-off or counterclaim, on the language of which the decisions previously cited seem to be based, and it might be considered as inequitable that by the transfer of the right to rent the lessee should be deprived of this *pro tanto* defense.¹⁶⁶ A cross demand existing against a transferor of the reversion, based upon a stipulation of which the transferee has neither actual notice nor constructive notice from the record or otherwise, would apparently not be available as against the transferee, at least if a purchaser for value, since such a purchaser of an interest in land is not affected by secret equities.¹⁶⁷ In a majority of cases, perhaps, the covenant for the breach of which the tenant undertakes to assert a right to recoup would be a continuing covenant, such as one for repair, so that the right

the rent which may become due, indebtedness of the lessor to him, then or thereafter existing, he cannot set off, as against a purchaser under a trust deed given by the lessor, indebtedness contracted after he, the lessee, knew of the trust deed. This seems to be an application of the rule that a set-off, to be available against an assignee, must be due and payable at the time when the defendant received notice of the assignment. See 25 Am. & Eng. Enc. Law (2d Ed.) 530.

In *Bell v. Ritner*, 33 Ind. App. 6, 70 N. E. 549, it was decided that the lessee could not set off, as against a claim for rent accruing after the

transfer of the reversion, a claim for improvements made by him under a contract with the original lessor.

¹⁶⁶ See *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312. In *Abrams v. Watson*, 59 Ala. 524, it is apparently asserted that the alienees of the lessor take subject to the right of recoupment on account of the lessor's acts, but the opinion is decidedly obscure.

The lessee may obviously recoup as against the lessor's executor to the same extent as against the lessor. *Green v. Bell*, 3 Mo. App. 291.

¹⁶⁷ See *Juvenal v. Patterson*, 10 Pa. 282.

of recoupment would exist against the transferee of the reversion or of the rent, as for breaches occurring in his time, without reference to any breaches that may have occurred in the time of the transferor.

§ 297. Limitations.

The right of action for rent may be barred by limitations. The question of the applicability of a general statute of limitations in such a case is obviously a question of the construction of the particular statute. That an action for rent is not one for the recovery "of real property and of the rents and profits" within a limitation statute is unquestionable.¹⁶⁸

The provisions of the English statute of limitations, fixing the time for the bringing of a suit "for arrearages of rent," were held not to apply when the rent was reserved by a lease under the seal of the lessee,¹⁶⁹ and the same view has been taken in this country of a local statute similarly expressed.¹⁷⁰ An action of debt for use and occupation has been regarded as one of "debt for arrearages of rent," within a statute on the subject.¹⁷¹ Even in the absence of a statute of limitations applicable to an action for rent, payment of rent may be presumed after the lapse of twenty years.¹⁷² But a mere delay in enforcing the claim by suit, if not within the statute of limitations, will not affect his right of action.¹⁷³

§ 298. No prior demand necessary.

The rule ordinarily applicable to contracts for the payment of money, that it is the duty of the debtor to seek out the creditor and tender him the money, and that no demand on the part of

¹⁶⁸ *Tibbetts v. Morris*, 42 Iowa, 120. *Hiester*, 33 Pa. 435, 75 Am. Dec. 612.

¹⁶⁹ *Freeman v. Stacy*, Hutton, 109; ¹⁷¹ *Elder v. Henry*, 34 Tenn. (2 2 Wms. Saund. 65 a, note (8) to *Sneed*) 81.

Hodsden v. Harridge; *Angell*, Limitations, § 87.

¹⁷⁰ *Davis v. Shoemaker*, 1 Rawle (Pa.) 135; *Buffum v. Deane*, 70 Mass. (4 Gray) 385; *Bailey v. Jackson*, 16 Johns. (N. Y.) 210, 8 Am. Dec.

¹⁷² *Lyon v. Odell*, 65 N. Y. 28; *Bank of Troy v. Hedorn*, 48 N. Y. 260; *St Mary's Church v. Miles*, 1 Whart. (Pa.) 229. See ante, § 177 a, at notes 401-403.

¹⁷³ *Ahrns v. Chartiers Valley Gas Co.*, 188 Pa. 249, 41 Atl. 739.

See *St. Mary's Church v. Miles*, 1 Whart. (Pa.) 229; *McQuesney v.*

the creditor is necessary to fix the liability of the debtor for non-payment, applies in full force in connection with the claim for rent, and no demand is necessary before the commencement of an action to recover the rent,¹⁷⁴ and this is the case when the rent is payable by the furnishing of supplies or the performance of services as well as when it is payable in money.^{175, 176} No doubt a contrary intention may be shown by or inferred from the wording of the lease.

§ 299. Joinder of causes of action and defenses.

Even at common law a cause of action for breach of a covenant to pay rent might be joined with a cause of action against the same defendant for breach of another covenant of the lease, the general rule being that causes of action might be joined when the same plea might be pleaded and the same judgment rendered as to each. Such joinder is obviously allowable under modern code provisions authorizing the joinder of all causes of action *ex contractu*, and under these provisions a cause of action for rent may presumably be joined with other causes of action to an extent not authorized at common law.¹⁷⁷ It has been decided that under a statute providing that several causes of action may be joined if they arise out of contracts, express or implied, a cause of action for rent may be joined with one for recovery of money paid by mistake,¹⁷⁸ or with one for breach of covenant to make repairs.¹⁷⁹ A claim by the landlord for rent and one for advances to the tenant have been regarded as so similar in character as to justify their joinder.¹⁸⁰

¹⁷⁴ Gilbert, Rents, 142; Grobham v. Van Rensselaer v. Gallup, 5 Denio Thornborough, Hob. 82; Clarke v. (N. Y.) 454.

Charter, 128 Mass. 483; Wineman v. ¹⁷⁷ An action for rent and one to Hughson, 44 Ill. App. 22 (action by assignee of rent); McMurphy v. not be joined, it has been held, the Minot, 4 N. H. 251; Burnham v. claims being inconsistent. Owens v. Dunklee, 34 N. H. 334; Farley v. Hickman, 2 Disn. (Ohio) 471.

Craig, 11 N. J. Law (6 Halst.) 262; ¹⁷⁸ Olmstead v. Dauphiny, 104 Cal. Gruhn v. Gudebrod Bros. Co., 21 635, 38 Pac. 505.

Misc. 528, 47 N. Y. Supp. 714; Royer ¹⁷⁹ Von Berg v. Goodman, 85 Ark. v. Ake, 3 Pen. & W. (Pa.) 461. 605, 109 S. W. 1006, 16 L. R. A. (N.

^{175, 176} Livingston v. Miller, 11 N. S.) 984.
Y. (1 Kern.) 80; Remsen v. Conklin, ¹⁸⁰ Ragsdale v. Kinney, 119 Ala. 18 Johns. (N. Y.) 447; Packer v. 454, 24 So. 443.

Cockayne, 3 G. Greene (Iowa) 111;

There have been occasional decisions as to whether two or more defenses to one action for rent could be asserted together.¹⁸¹

§ 300. Actions for successive installments.

An action can be brought for those installments of rent only which are due and payable at the time of bringing suit.¹⁸² But it has been decided that, under a statute allowing the filing of a supplemental petition alleging material facts happening since the former pleading was filed, judgment may be asked for rent falling due after the commencement of the suit.¹⁸³

After bringing an action for one installment of rent, and even after recovery of a judgment therefor, an action for another installment or for other installments, falling due after the commencement of the previous action, may be brought.¹⁸⁴ But all the installments of rent already due constitute but a single cause of action, and if suit is brought for but a portion of the installments due, a subsequent action cannot be brought for the balance.¹⁸⁵

¹⁸¹ See *Hausman v. Mulheran*, 68 Minn. 48, 70 N. W. 866; *Minneapolis Co-operative Co. v. Williamson*, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473; *Kline v. Hanke*, 14 Mont. 361, 36 Pac. 454.

¹⁸² *Duryee v. Turner*, 20 Mo. App. 34; *Stanley v. Turner*, 68 Vt. 315, 35 Atl. 321; *Miller v. Lancaster* (Tex. Civ. App.) 41 S. W. 198.

¹⁸³ *Sigler v. Gordon*, 68 Iowa, 441, 27 N. W. 372.

That an amendment cannot be made on appeal to the county court for the purpose of claiming such additional rent, see *Williams v. Houston Cornice Works* (Tex. Civ. App.) 101 S. W. 839.

¹⁸⁴ *Cross v. U. S.*, 81 U. S. (14 Wall.) 479, 20 Law. Ed. 721; *Allen v. Saunders*, 6 Neb. 436; *Epstein v. Greer*, 85 Ind. 372; *Webb v. Bailey*, 17 Ky. Law Rep. 1117, 23 S. W. 935; *Brennan v. Blath*, 3 Daly (N. Y.) 478; *Smith v. Lehigh Zinc & Iron Co.*, 59 Hun, 618, 13 N. Y. Supp.

449; *Schuricht v. Broadwell*, 4 Mo. App. 160; *Barnes v. Black Diamond Coal Co.*, 101 Tenn. 354, 47 S. W. 498; *Bath v. Lindenmeyer*, 1 Wyo. 240; *Racke v. Anheuser-Busch Brew. Ass'n*, 17 Tex. Civ. App. 167, 42 S. W. 774; *Underhill v. Collins*, 60 Hun, 585, 15 N. Y. Supp. 495; *Holthausen v. Kells*, 18 App. Div. 80, 45 N. Y. Supp. 471. See *Binz v. Tyler*, 79 Ill. 248.

When the rent is reserved under different leases, separate actions can of course be brought. *McLendon v. Pass*, 66 Miss. 110, 5 So. 234.

As the tenant cannot bring separate actions for separate installments, all of which are due, so *a fortiori* he cannot bring separate actions for different portions of the same installment. See *Warren v. Comings*, 60 Mass. (6 Cush.) 103; *Stanley v. Turner*, 68 Vt. 315, 35 Atl. 321. And see ante, § 176 a, at note 376.

¹⁸⁵ *Burritt v. Belfy*, 47 Conn. 323, 36 Am. Dec. 79; *Love v. Waltz*, 7

§ 301. Stipulations for attorney's fees.

There are occasional decisions recognizing the validity of a provision of the lease for the recovery by the lessor of expenditures by him on account of attorney's fees, in case it becomes necessary to sue by reason of the lessee's default,¹⁸⁶ and, in the absence of a statute bearing on the subject, there is evidently no objection to such a stipulation. It has been decided that a stipulation for the recovery of attorney's fees, in case it should become necessary to bring an action for rent, did not apply when, by reason of a counterclaim, nothing could be recovered by the lessor.¹⁸⁷

Cal. 250; *Smith v. Dittenhoefer*, 1 Cal. 250; *Smith v. Dittenhoefer*, 1 City Ct. R. (N. Y.) 143; *Drexler v. Cohen*, 108 N. Y. Supp. 680; *Campbell v. Hatchett*, 55 Ala. 548; *Casselberry v. Forquer*, 27 Ill. 170; *Jex v. Jacob*, 19 Hun (N. Y.) 105, 7 Abb. N. C. 452. In *Fox v. Althorp*, 40 Ohio St. 322, where separate suits for separate installments had been instituted at one time by the lessor, it was held that a judgment in his favor in one suit could not be asserted as a defense to the other, defendant having made no objection, in either suit, to the severance of the cause of action.

In *McDole v. McDole*, 106 Ill. 452, it was decided that separate actions may be brought to enforce liability upon a bond for separate installments of rent, although both installments are due at the time of bringing the first action.

¹⁸⁶ *Richards v. Bestor*, 90 Ala. 352, 8 So. 30; *Talbott v. English*, 156 Ind. 299, 59 N. E. 857.

¹⁸⁷ *Taylor v. Lehman*, 17 Ind. App. 585, 46 N. E. 84, 47 N. E. 230.

CHAPTER XXX.

ACTIONS FOR USE AND OCCUPATION.

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§ 302. Nature and history of the action.

Upon an express promise by the lessee of the premises to pay rent therefor, if not under seal, the action of assumpsit will lie,¹

¹Acton v. Simonds, W. Jones, 364, v. Surget, 18 Miss. (10 Smedes & M.) Cro. Car. 414, 1 Rolle's Abr. 8, pl. 154; Providence Christian Union v. 10; Johnson v. May, 3 Lev. 150; Elliott, 13 R. I. 74, and cases cited Swem v. Sharretts, 48 Md. 408; Stier ante, § 290 c, note 38.

as in any other case of an express promise not under seal. To be distinguished from such an action of "express assumpsit" is the action for "use and occupation."

At common law, assumpsit for rent did not lie in any case unless there was, at the time of the lease, an express promise by the lessee to pay the rent reserved, or unless there was an express promise to pay a reasonable compensation for the use and occupation of the land, and if plaintiff asserted such a claim for a reasonable compensation, not naming any agreed amount, he was liable to be nonsuited for a variance, in case the evidence showed a demise for a sum certain. Furthermore, in those cases in which this form of action did lie, the action was on an express promise.² The statute 11 Geo. 2, c. 19, § 14, however, contained the following provisions: "To obviate some difficulties that many times occur in the recovery of rents, where the demises are not by deed, * * * it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, and hereditaments, held or occupied by the defendant or defendants, in an action on the case, for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered." The effect of this statute was to allow one to recover, in *indebitatus assumpsit*, the reasonable value of the use and occupation of the premises, without any allegation or proof of an express promise by the defendant, and without reference to whether a certain rent had been reserved, provided only there was not a demise under seal.³

The question whether *indebitatus assumpsit* for use and occupation, as distinct from that on a promise declared in express terms, would lie before the statute, has occasionally been the subject of consideration in cases in this country, when in the particular jurisdiction the English statute could not be regarded as in

² See the learned article, "Assumpsit for Use and Occupation" by Kline v. Jacobs, 68 Pa. 57; Atkinson Professor Ames, 2 Harv. Law Rev. 377.

³ See Naish v. Tatlock, 2 H. Bl. 323; v. Winters, 47 W. Va. 226, 34 S. E. 834; 2 Harv. Law Rev. 377.

force, and there was no equivalent local statute, and in several cases it was decided, on a somewhat forced construction of the English cases, it would seem, that it did so lie at common law.⁴

In this action rent, as such, is not recovered, but merely a reasonable satisfaction for the use of the premises; and the recovery is based on the theory that a contract to pay such reasonable satisfaction is to be inferred from the circumstances, in conformity with the intention of the parties.⁵ If one person gives another permission to occupy certain land, and the other occupies the land by virtue of that permission, it is, in the ordinary case, a reasonable inference that the former expects the latter to pay the value of the occupation and that the latter expects to pay it, and the law recognizes the reasonability of this inference, and enforces a contract so inferred. It is in this sense only that, as is frequently stated, "the law implies an obligation" to pay the value of the use and occupation, the obligation not being implied by law without reference to the presumed intention of the parties, as in the case of a *quasi* contract. That the implication is one of fact rather than of law is apparent from the consideration that the particular circumstances attending the permissive occupation, such as the pre-existing relations between the parties, may exclude the inference of a contract for pecuniary compensation.⁶

⁴ *Gunn v. Scovil*, 4 Day (Conn.) 228, 4 Am. Dec. 208; *Eppes v. Cole*, 4 Hen. & M. (Va.) 161, 4 Am. Dec. 512; *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Crouch v. Briles*, 30 Ky. (7 J. J. Marsh.) 255, 23 Am. Dec. 404; *Hogsett v. Ellis*, 17 Mich. 351; *Heidelberg v. Slader*, 1 Handy (Ohio) 457. That it did not lie, apart from the statute, see *Bell v. Ellis' Heirs*, 1 Stew. & P. (Ala.) 294; *Byrd v. Chase*, 10 Ark. 602; *Long v. Bonner*, 33 N. C. 27.

⁵ That the action is based on privity of contract and not on privity of estate, see *Birch v. Wright*, 1 Term R. 378; *Churchward v. Ford*, 2 Hurl. & N. 446; *Corporation of New York v. Dawson*, 2 Johns. Cas. (N. Y.) 335;

Low v. Hallett, 2 Caines (N. Y.) 374; *Rogers v. Coy*, 164 Mass. 391, 41 N. E. 652; *Barron v. Marsh*, 63 N. H. 107, 56 Am. Rep. 496; *Dalton v. Laudahn*, 30 Mich. 349; *Henwood v. Cheeseman*, 3 Serg. & R. (Pa.) 500; *St. Louis, I. M. & S. R. Co. v. Hart*, 38 Ark. 112. In view, however, of the necessity that the relation of landlord and tenant exist, in most cases, in order to support the action (post, § 304), the action might, to some extent, it seems, be regarded as based on privity of estate as well.

⁶ See post, § 317.

In *Story v. McCormick*, 70 Kan. 323, 78 Pac. 819, it is apparently assumed that the liability in use and occupation, if based merely on the

In some states the English statute 11 Geo. 2, c. 19, § 14, is to be regarded as in force.⁷ In some there is a specific statutory provision more or less similar to that statute.⁸ Occasionally the statute in terms gives a right to recover a reasonable satisfaction for the use and occupation only when there is no express agreement for rent,⁹ and in one state only when "the contract" is not in writing.¹⁰ In a number of states the action for use and occupation has been decided to exist independently of any statute.¹¹

§ 303. The subject of the use and occupation.

Under the English statute, allowing the action for the use and occupation of "lands, tenements or hereditaments," it has been held to lie for the use of incorporeal as well as corporeal things, such as rights of fishing,¹² of shooting,¹³ to take minerals,¹⁴ and water rights;¹⁵ and in this country a right to recover in use and occupation for the use of land for a right of way,^{15a}

presumption of a contract to pay the value of the use and occupation, without any direct evidence of an intention on the part of the occupant to pay, is in *quasi contract*. The court, however, considered the evidence in that particular case bearing on the existence of an express contract.

⁷ E. g., in Maryland (see Alexander's Brit. St. at p. 750) and Pennsylvania (see Pott v. Leshner, 1 Yeates, 576; Kline v. Jacobs, 68 Pa. 57).

⁸ *Arkansas*, Kirby's Dig. St. 1904, §§ 4698, 4699; *Delaware* Rev. Code 1893, p. 867; *Florida* Gen. St. 1906, § 2236; *Illinois*, Hurd's Rev. St. 1905, c. 80, § 1; *Missouri* Rev. St. 1899, § 4113; *New Jersey*, 2 Gen. St. p. 1915, § 3; *New York* Real Prop. Law, § 190; *South Carolina* Civ. Code 1902, § 2417; *Virginia* Code 1904, § 2787; *West Virginia* Code 1906, § 2400; *Wisconsin* Rev. St. 1898, § 2196.

⁹ *Alabama* Code 1907, § 4753; *Mississippi* Code 1906, § 2876; *North Carolina* Revisal 1905, § 1986.

¹⁰ *Kentucky* St. 1903, § 2300. In *North Carolina* Revisal 1905, § 1986, a right of recovery is given against one occupying under "a parol lease which is void."

¹¹ *Gunn v. Scovil*, 4 Day (Conn.) 228, 4 Am. Dec. 208; *Lockwood v. Lockwood*, 22 Conn. 425; *Crouch v. Briles*, 30 Ky. (7 J. J. Marsh.) 255, 23 Am. Dec. 404; *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Hogsett v. Ellis*, 17 Mich. 351; *Heidelberg v. Slader*, 1 Handy (Ohio) 457; *Gould v. Thompson*, 45 Mass. (4 Metc.) 224; *Eppes v. Cole*, 4 Hen. & M. (Va.) 161, 4 Am. Dec. 512, *Howard v. Ransom*, 2 Aiken (Vt.) 252.

¹² *Holford v. Pritchard*, 3 Exch. 793.

¹³ *Dawes v. Dowling*, 31 Law. T. (N. S.) 65.

¹⁴ *Jones v. Reynolds*, 4 Adol. & E. 805.

¹⁵ *Davis v. Morgan*, 4 Barn. & C. 8.

^{15a} *Ledyard v. Morey*, 54 Mich. 77, 19 N. W. 754.

as well as for the enjoyment of ferry rights,^{15b} has been recognized.

Assumpsit for use and occupation has been allowed, without any suggestion as to the propriety of so doing, in favor of the owner of a building, placed on another's lands under such circumstances as to retain its chattel character, against one who occupied the building under an agreement.¹⁶ Such an action for the use of a chattel seems, however, distinct from an action for the use and occupation of land.

§ 304. Necessity of relation of tenancy.

To sustain an action for use and occupation, it is said with great frequency, the relation of landlord and tenant must exist between the parties.¹⁷ and this is no doubt true in the great majority of cases. That is, one is not ordinarily liable for use

^{15b} *Walker v. Tipton*, 33 Ky. (3 Dana) 3. *Rogers v. Libbey*, 35 Me. 200; *Central Mills Co. v. Hart*, 124 Mass. 123;

¹⁶ *Watson v. Brainard*, 33 Vt. 88. *Hogsett v. Ellis*, 17 Mich. 351; *Baron v. Marsh*, 63 N. H. 107, 56 Am. Rep. 496; *McFarlan v. Watson*, 3 N. Y. (3 Comst.) 286; *Pott v. Leshner*, 1 Yeates (Pa.) 576; *Peters v. Elkins*, 14 Ohio, 344; *Rosenberg v. Sprecher*, 74 Neb. 176, 103 N. W. 1045; *Clark v. Clark's Estate*, 58 Vt. 527, 3 Atl. 508; *Fender v. Rogers*, 97 Ill. App. 280; *Janouch v. Pence*, 3 Neb. Unoff. 867, 93 N. W. 217; *Rogers v. Wiggs*, 51 Ky. (12 B. Mon.) 504; *Hall v. Jacobs*, 70 Ky. (7 Bush) 595; *Pittsburgh, C. & St. L. R. Co. v. Thornburgh*, 98 Ind. 201; *Cambridge Lodge v. Routh*, 163 Ind. 1, 71 N. E. 148; *Benedict v. Jennings*, 47 Misc. 135, 93 N. Y. Supp. 464; *Wilmarth v. Palmer*, 34 Mich. 347. But see, as to the Indiana law, *Winings v. Wood*, 53 Ind. 187, and *Burns' Ann. St.* 1901, § 7103, which provides that the occupant, without special contract, of any lands, shall be liable for the rent to any persons entitled there.

¹⁷ See, e. g., *Carpenter v. U. S.*, 84 U. S. (17 Wall.) 489; *Hamby v. Wall*, 48 Ark. 135, 2 S. W. 705, 3 Am. St. Rep. 218; *Emerson v. Weeks*, 58 Cal. 439; *Barnes v. Shinholster*, 14 Ga. 131; *Nance v. Alexander*, 49 Ind. 516; *Richmond & Lexington Turnpike Road Co. v. Rogers*, 70 Ky. (7 Bush) 532; *De Young v. Buchanan*, 10 Gill & J. (Md.) 149, 32 Am. Dec. 156; *Aull Sav. Bank v. Aull's Adm'r*, 80 Mo. 199; *Scales v. Anderson*, 26 Miss. 94;

and occupation to another unless his possession is based upon a demise from that other, or from his predecessor in title. The language of the English statute, as previously quoted, evidently contemplates the case of a "demise" or holding by "agreement," and so the state statutes authorize a recovery by a "landlord,"^{17a} or against one holding "by permission,"^{17b} or in terms apply to the case of a "demise"^{17c} or "agreement."^{17d}

Applying the requirement that the relation of tenancy exist, one who has entered on land as a trespasser, and without any recognition of another's right in the land, is not liable in an action for use and occupation by such other,¹⁸ and it is immaterial that the entry was under an assertion of paramount title.¹⁹ So one who enters under a lease from one person is not liable in use and occupation to another, who claims adversely, even though the latter has a good title to the land,²⁰ though on the other hand one who enters and holds under a demise from another, provided it is not under seal, is liable to such other in this form

^{17a} See statutes of Kentucky, Mississippi, New Jersey, New York, South Carolina, Virginia, West Virginia, Wisconsin.

^{17b} See statutes of Delaware, Florida, North Carolina.

^{17c} See statute of Alabama.

^{17d} See statutes of Arkansas, Missouri, New Jersey, New York.

¹⁸ *Hathaway v. Ryan*, 35 Cal. 188; *Lathrop v. Standard Oil Co.*, 83 Ga. 307, 9 S. E. 1041; *Carrigg v. Mechanics' Sav. Bank* (Iowa) 111 N. W. 329; *Dixon v. Ahern*, 19 Nev. 422, 14 Pac. 598; *Stockett v. Watkins' Adm'rs*, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438; *Hurd v. Miller*, 2 Hilt. (N. Y.) 540; *Brolasky v. Ferguson*, 48 Pa. 434; *Jackson v. Mowry*, 30 Ga. 143; *Biglow v. Biglow*, 75 App. Div. 98, 77 N. Y. Supp. 716; *Janouch v. Pence*, 3 Neb. Unoff. 867, 93 N. W. 217; *Curtis v. Treat*, 21 Me. 525; *Edmondson v. Kite*, 43 Mo. 176; *Phillips v. Homfray*, 24 Ch. Div. 439, 461.

¹⁹ *Cripps v. Blank*, 9 Dowl. & R.

480; *Tow v. Jones*, 13 Mees. & W. 12; *Lloyd v. Hough*, 42 U. S. (1 How.) 153; *Pico v. Phelan*, 77 Cal. 86, 19 Pac. 186; *Howe v. Russell*, 41 Me. 446; *Folsom v. Carli*, 6 Minn. 420, 80 Am. Dec. 456; *Inman v. Morris*, 63 Miss. 347; *Wiggin v. Wiggin*, 6 N. H. 298; *Swift v. New Durham Lumber Co.*, 64 N. H. 53, 5 Atl. 903; *Butler v. Cowles*, 4 Ohio, 205, 19 Am. Dec. 612; *City of Cincinnati v. Walls*, 1 Ohio St. 222; *Ryan v. Marsh*, 2 Nott & McC. (S. C.) 156.

²⁰ *Shumake v. Nelms*, 25 Ala. 126; *Stringfellow v. Curry*, 76 Ala. 394, 52 Am. Rep. 339; *Lankford v. Green*, 52 Ala. 103; *Kieth v. Paulk*, 55 Iowa, 260, 7 N. W. 588; *Kittredge v. Peaslee*, 85 Mass. (3 Allen) 235; *Allen v. Thayer*, 17 Mass. 299, 9 Am. Dec. 145; *Lathrop v. Standard Oil Co.*, 83 Ga. 307, 9 S. E. 1041; *Mackey v. Robinson*, 12 Pa. 170; *Adsit v. Kaufman*, 58 C. C. A. 33, 121 Fed. 355; *Osborne v. Jones*, 15 U. C. Q. B. 296; *Thompson v. Bennett*, 17 U. C. C. P. 380.

of action, without reference to whether the latter had title at the time of making the demise.²¹ The action has been held not to lie against a railroad company which entered on the land in spite of warnings from the owner, who took no further action merely because he anticipated condemnation proceedings by the company,²² and a widow who remained in possession of the homestead after the expiration of the statutory period has been regarded as a disseisor, and so not liable.²³ Likewise, an officer attaching goods on certain premises and leaving them there is not liable in such an action,²⁴ nor is one entering under an invalid judicial or execution sale.²⁵ So if a tenant at will undertakes to lease to another, the latter is upon entry a trespasser merely,²⁶ and is consequently not liable to the landlord in use and occupation.²⁷ It is a good defense to the action that not the defendant, but her husband, was the person in possession of the land under the plaintiff.²⁸

The decisions above referred to, that the owner of land cannot sue a trespasser in this form of action, are evidently in effect that he cannot waive the tort and sue in *assumpsit*, and so it has been in a number of cases expressly stated that the owner of land cannot, after another has entered thereon by way of trespass, transform such other into a tenant so as to render him liable in use and occupation, by electing to regard him as a tenant.²⁹

²¹ See *Cobb v. Arnold*, 49 Mass. (8 Metc.) 398; *Phipps v. Sculthorpe*, 1 Barn. & Ald. 50; *Dolby v. Iles*, 11 Adol. & E. 335, and ante, § 78 c (4). ²⁹ *Peters v. Elkins*, 14 Ohio, 344; *Richey v. Hinde*, 6 Ohio, 371; *Hurley v. Lamoreaux*, 29 Minn. 138, 12 N. W. 447; *Thompson v. Fox*, 21 Misc. 298, 47 N. Y. Supp. 176; *Dixon v. Ahern*, 19 Nev. 422, 14 Pac. 598; *Ackerman v. Lyman*, 20 Wis. 456; *Churchward v. Ford*, 2 Hurl. & N. 446.

²² *Marquette, H. & O. R. Co. v. Harlow*, 37 Mich. 554, 557, 26 Am. Rep. 538.

²³ *Emery v. Emery*, 87 Me. 281, 32 Atl. 900.

²⁴ *Leonard v. Kingman*, 136 Mass. 123.

²⁵ *Nance v. Alexander*, 49 Ind. 516.

²⁶ See ante, § 15 b, at note 587.

²⁷ *Atlanta, K. & N. R. Co. v. McHan*, 110 Ga. 544, 35 S. E. 634; *Janouch v. Pence*, 3 Neb. Unoff. 867, 93 N. W. 217.

²⁸ *Fludder v. Vaughan*, 24 R. I. 471, 53 Atl. 636.

A statute providing that in all cases where a party has a right of action for the taking of timber, or other trespass on lands, it shall be lawful for the party having such right of action to waive the tort and bring *assumpsit*, was held not to authorize such an action to recover damages for occupation by a trespasser. *Lockwood v. Thunder Bay*

On this same principle, it seems, a mere notification to the person so in possession, that if he remains he must pay rent, to which the latter makes no response, should not render him liable as tenant from the time of such notification, and there are decisions to that effect,³⁰ though there are also contrary decisions.³¹ The fact even that after such notice the person in possession enters into negotiations as to the rent to be paid should not, it seems, render him a tenant of the other, unless these negotiations are themselves such as to amount to an attornment by him.³² If

River Boom Co., 42 Mich. 536, 4 N. W. 292. required to pay rent thereby becomes liable for the rent does not apply

³⁰ Lockwood v. Thunder Bay River Boom Co., 42 Mich. 536, 4 N. W. 292; Henderson v. City of Detroit, 61 Mich. 378, 28 N. W. 123 (compare Thompson v. Sanborn, 52 Mich. 141, 17 N. W. 730; Ducey Lumber Co. v. Lane, 58 Mich. 520, 25 N. W. 568); Galveston Wharf Co. v. Gulf, C. & S. F. R. Co., 72 Tex. 454, 10 S. W. 537; Biglow v. Biglow, 75 App. Div. 98, 77 N. Y. Supp. 716; Swift v. New Durham Lumber Co., 64 N. H. 53, 5 Atl. 903. where the possession is adverse and hostile to such owner and has been so from the beginning. These cases are not in accord with Illinois Cent. R. Co. v. Thompson, 116 Ill. 159, 5 N. E. 117, 56 Am. Rep. 769, supra.

³¹ Illinois Cent. R. Co. v. Thompson, 116 Ill. 159, 5 N. E. 117, 56 Am. Rep. 769; Sanborn v. Haynes, 26 Ill. App. 335; Boley v. Barutio, 24 Ill. App. 515; Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 234; Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440 (semble); Sadlier v. Riggs, 15 Daly, 522, 8 N. Y. Supp. 473; Gillespie v. Henderson, 98 Mo. App. 622, 73 S. W. 361; Loring v. Taylor, 50 Mo. App. 80. See Head v. Pryor, 29 Ky. Law Rep. 719, 96 S. W. 465; Lucier v. Marsales, 133 Mass. 454, and ante, § 17, notes 35, 36. In United Merchants Realty & Imp. Co. v. Roth, 107 N. Y. Supp. 11, it seems to be held that a tenancy is created if the person entitled notifies the wrongful holder that if he remains in possession he must pay a certain rent. The opinion cites Despard v. Walbridge, 15 N. Y. 374, where, however, the notice was given by the landlord to a tenant holding over, and Preston v. Hawley, 139 N. Y. 296, 34 N. E. 906, where the person in possession "admitted that he ought to pay something."

³² It is so decided in Gallagher v. Himelberger, 57 Ind. 63; Center Creek Min. Co. v. Frankenstein, 179 Mo. 564, 78 S. W. 785. See, also, Dixon v. Ahern, 21 Nev. 65, 24 Pac. 337, 9 L. R. A. 59, 37 Am. St. Rep. 478; Victory v. Stroud, 15 Tex. 373. In Gregg v. Tamsen, 42 App. Div. 138, 58 N. Y. Supp. 1026, and Preston v. Hawley, 139 N. Y. 296, 34 N. E. 906, cited in last preceding note, there were words spoken by the occupant

In Fender v. Rogers, 97 Ill. App. 280, and Hill v. Coal Valley Min. Co., 103 Ill. App. 41, it is said that the rule that one who continues to occupy premises after notification by the owner that he will be re-

a mere notice from the person entitled to the possession of the land could thus render the person in possession his tenant, the same doctrine should apply in favor of a person having no title, who gives such a notice to the person in possession, since the question of the existence of a tenancy is, for the purpose of maintaining an action for use and occupation, independent of the question whether the asserted landlord has title to the land.³³ A person who enters wrongfully on another's land is a disseisor and has an estate in fee simple by wrong,³⁴ and the suggestion that the disseisee can make the disseisor's holding subordinate to him, the disseisee, and change the disseisor's wrongful estate in fee simple to a leasehold estate, by merely notifying him to pay rent, finds no support in the common-law principles of the subject.

In refusing the owner of the land the privilege of waiving the tort and suing a trespasser in *assumpsit*, the courts have refrained from applying the ordinary rule that if a person enriches himself by wrongfully taking or using the property of another, the owner may waive the tort and sue in *assumpsit* for the value of that which has been tortiously taken or used, a rule upon which the theory of liability in *quasi* contract is to a great extent based.³⁵ The failure to apply the same rule in the case of wrongful occupancy of land is primarily owing, it seems, to the language of the English statute, upon which the action of *indebitatus assumpsit* for use and occupation was originally based, and which confines recovery to the case of occupation by agreement.³⁶

It would seem that, if the occupancy is wrongful, the fact that the occupant believes that it is right should not render him liable as on an implied contract. He is still an adverse claimant and trespasser. And so it has been decided that where an illegitimate son of the owner continued in possession after his father's death, on the supposition that he was legitimate, and therefore entitled to a share in the property, there was no relation of tenancy between him and the rightful heirs, so as to support the action.³⁷ But elsewhere it has been decided that where a town,

which might be regarded as showing an acknowledgment that he held under the person asserting the claim.

³³ See ante, § 78 a, c (4), k.

³⁴ See ante, § 78 a.

³⁵ See Keener, *Quasi Contracts*, 1en) 217.

³⁶ See 2 Harv. Law Rev. p. 380, article by Professor Ames; Keener,

Quasi Contracts, 191.

³⁷ Flood v. Flood, 83 Mass. (1 Al-

intending to erect a structure on an alley, erected it by mistake partly on an adjoining lot, it was liable to the owner of the lot for use and occupation.³⁸ In one case where the children of a deceased owner made an oral partition of the land, and took possession accordingly, under the impression that they were joint heirs, one of them, who was the sole devisee under a will subsequently found, was allowed to recover against the others in use and occupation.³⁹ And in another case, one who gave up possession to another, under a mistaken belief as to the state of litigation in regard to the property, was held to be entitled to recover from such other in use and occupation.⁴⁰ In both these latter cases, however, the occupation was permissive, and consequently the relation of tenancy existed, though there might have been some difficulty, it would seem, in inferring from the circumstances an agreement to pay compensation for the occupancy.

The relation of landlord and tenant has in England been regarded as unnecessary when a tenant assigns his leasehold interest, reserving rent, and in such case, though the assignor is not the landlord of the assignee,⁴¹ he may there, it seems, sue in use and occupation to recover damages equivalent to the rent reserved.⁴²

In two or three states in this country, the action has been regarded as lying against one who is in fact a trespasser. Thus, in Alabama it has been held that it will lie against one who takes possession of vacant land, admitting at the time that he has

³⁸ *Beardsley v. Town of Nashville*, 64 Ark. 240, 41 S. W. 853. Compare *Ettlinger v. Degnon-McLean Contracting Co.*, 42 Misc. 215, 85 N. Y. Supp. 394.

³⁹ *Jordan v. Jordan*, 4 Me. (4 Greenl.) 175, 16 Am. Dec. 249.

⁴⁰ *Hull v. Vaughan*, 6 Price, 157. This, and that one having an equitable title only may sue in use and occupation, seems to have been the only questions decided in this case, though *dicta* therein go further, and these have been frequently cited in this country in support of extending the right of action in use and occupation.

⁴¹ See ante, § 151.

⁴² *Pollock v. Stacy*, 9 Q. B. 1033. But in this case the transfer by the lessee, though in terms of his whole interest, could not take effect as an assignment, for the reason that it was by parol, and consequently the transferee, having entered, could not well be regarded otherwise than as a tenant of the transferor. The court refers to the intention of the parties to create the relation of landlord and tenant, and also to the invalidity of the transaction as an assignment. See the references to this case in *Beardman v. Wilson*, L. R. 4 C. P. 57.

no title and expressing a willingness to pay rent to the rightful owner,⁴³ and the Mississippi statute providing that "any landlord, where the agreement is not in writing, or when there is no contract, may recover a reasonable satisfaction for the lands, * * * held or occupied by the defendant, in an action for the use and occupation of what was so held or enjoyed," has been regarded as making an occupant so liable to the owner, though he occupies without the latter's permission, or knowledge even, provided he recognizes the latter's title thereto.⁴⁴ In Arkansas the local statute, providing that, where lands and tenements are held and occupied without any special agreement for rent, the owner may recover a fair compensation for such use and occupation, has been held to authorize a recovery against one who made a peaceable entry on another's land without any agreement, the latter having made no objection to the entry.⁴⁵ In Kansas also it has been decided that, in view of the local statute providing that the occupant, without special contract, of any lands, shall be liable for rent to any person entitled thereto, and in view also of the tendency of the courts to imply a contract where one commits a tort for the benefit of his own estate, a trespasser may be held liable in an action for use and occupation.⁴⁶ And in Kentucky it has apparently been decided that assumpsit for use and occupation will lie though the relation of landlord and tenant does not exist, provided the plaintiff makes out his title as he would in ejectment.⁴⁷ In Washington the statute explicitly provides that one obtaining possession of land without the consent of the person entitled shall be liable for a reasonable rent.⁴⁸ In other states, also, where the line between the different forms of action has become obscured by statutory enactments, a trespasser may, it seems, be made liable for the rental value of the land under allegations of use and occupation by him.⁴⁹ But in these latter cases the action cannot

⁴³ *Smith's Ex'rs v. Houston*, 16 Ala. 111. the relation of landlord and tenant was asserted. *Rogers v. Wiggs*, 51

⁴⁴ *Newberg v. Cowan*, 62 Miss. 570. Ky. (12 B. Mon.) 504; *Hall v. Jacobs*, 70 Ky. (7 Bush) 595.

⁴⁵ *Dell v. Gardner*, 25 Ark. 134. ⁴⁶ *Missouri Pac. R. Co. v. Atchison*, 43 Kan. 529, 23 Pac. 610. ⁴⁸ *Ball. Ann. Codes & St.* 1897, § 4571. And see the Indiana statute referred to ante, note 17.

⁴⁷ *Illinois Cent. R. Co. v. Ross*, 26 Ky. Law Rep. 1251, 83 S. W. 635. ⁴⁹ See *Lindt v. Linder*, 117 Iowa, 110, 90 N. W. 596; *Bowie v. Herring*,

be regarded as the equivalent of assumpsit for use and occupation, but is more properly an action of trespass for *mesne* profits, according to the common-law nomenclature.

The action will not lie against one to whom land has been conveyed in fee, though a reservation of rent in the conveyance has failed to take effect, since there is no room for the inference of a promise by one to pay for the occupation of his own land.⁵⁰

§ 305. Tenancy created by attornment.

Though a person enters without permission, if he afterwards recognizes another as his landlord, he may be made liable to the latter for use and occupation.⁵¹ A promise by him to pay rent is sufficient recognition for this purpose,⁵² and by some decisions the fact that he enters into negotiations for the payment of rent to another who claims the land has been regarded as evidence to go to the jury to establish the relation of landlord and tenant,⁵³ though by other decisions this is regarded as immaterial, so long as the negotiations are not completed.⁵⁴

If a tenant under a lease from A transfers the possession to

116 Iowa, 209, 89 N. W. 976; Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479, 55 Am. St. Rep. 844; Parkinson v. Shew, 12 S. D. 171, 80 N. W. 189; Long Bell Lumber Co. v. Martin, 11 Okl. 192, 66 Pac. 328; Hidden v. Jordan, 57 Cal. 184; Lamb v. Lamb, 146 N. Y. 317, 41 N. E. 26; Meeker v. Gardella, 1 Wash. St. 139, 23 Pac. 837. In Texas the statute (Rev. St. 1895, art. 5273) expressly provides that, in an action of trespass to try title, there may be a recovery of damages for use and occupation.

⁵⁰ Arrison v. Harmstead, 2 Pa. 191.

⁵¹ Curtis v. Treat, 21 Me. 525; Steele v. Thayer, 36 Minn. 174, 30 N. W. 758; Ackerman v. Lyman, 20 Wis. 454. But it has been decided in Maine that one disseised cannot recover in use and occupation against the tenant of the disseisor, although such tenant attorns to him,

the person disseised, unless such person has re-entered. Proprietors of Roxbury v. Huston, 39 Me. 312.

⁵² Dell v. Gardner, 25 Ark. 134; Shumake v. Nelms, 25 Ala. 126; Dolby v. Iles, 11 Adol. & E. 335. And see cases cited ante, § 78 k (1), notes 377-383.

⁵³ Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 234; Turner v. Cameron's Coalbrook Steam Coal Co., 5 Exch. 932. That plaintiff wrote twice to defendant demanding rent and that defendant replied to one letter, objecting merely to the amount, was held to be evidence of a tenancy to go to the jury. Preston v. Hawley, 139 N. Y. 296, 34 N. E. 906.

⁵⁴ Lathrop v. Standard Oil Co., 83 Ga. 307, 9 S. E. 1041; Gallagher v. Himelberger, 57 Ind. 63; Ballentine v. McDowell, 3 Ill. (2 Scam.) 28.

another, without making an assignment of the lease, the new occupant, if he is recognized by A as his tenant, and recognizes A as his landlord, may be made liable in use and occupation.^{55, 56}

§ 306. Particular classes of persons.

a. **Person entering under contract for lease.** If one enter under a contract for a lease,⁵⁷ or merely with a view to a lease,⁵⁸ he is at least a tenant at will,⁵⁹ and may be made liable in use and occupation, unless, perhaps, the failure to obtain a lease is the fault of the proposed lessor.^{60, 61} Accordingly it was held that where, an intended subtenant having entered, the superior landlord procured an injunction to restrain the making of a sublease, the former was liable to the intending sublessor for the occupation from the time of the injunction, if he still retained possession.⁶²

b. **Person entering under contract of sale.** A vendee of land entering, by reason of his contract, before the conveyance to him has been executed, is, as we have before seen in a number of jurisdictions, not regarded as a tenant of the vendor,⁶³ and in such jurisdictions he can evidently not be held liable in an action of use and occupation at the suit of the latter.⁶⁴ In jurisdictions in which he is regarded as the tenant of the vendor, he has, under particular circumstances, hereafter specified, been regarded as so liable, but even in those jurisdictions he would ordinarily be regarded as free from such liability if the conveyance is eventually made in pursuance of the contract, for the reason that "the price agreed upon is presumed to be a sufficient consideration for the intermediate occupation of the land, as well as the ultimate con-

^{55, 56} Phipps v. Sculthorpe, 1 Barn. & Ald. 50; Darch v. McLeod, 16 U. C. Q. B. 614; Blackburn v. Lawson, 2 Ont. App. 215 (semble). Compare Hyde v. Moakes, 5 Car. & P. 42, where it was said, at *nisi prius*, that there must be an "express substitution of the defendant for the original lessee as tenant." What this means does not appear.

⁵⁷ Dunne v. Trustees of Schools, 39 Ill. 578; Little v. Martin, 3 Wend. (N. Y.) 219, 20 Am. Dec. 688; Greton

v. Smith, 33 N. Y. 245; Forbes v. Smiley, 56 Me. 174; Lyon v. Cunningham, 136 Mass. 532.

⁵⁸ Coggan v. Warwicker, 3 Car. & K. 40.

⁵⁹ See ante, § 65, at note 49.

^{60, 61} Rumball v. Wright, 1 Car. & P. 589, per Best, C. J.

⁶² Fawkner v. Booth, 10 Times Law R. 83.

⁶³ See ante, § 43 a.

⁶⁴ See ante, § 304.

veyance of the title of it."⁶⁵ Likewise, in case the contract of sale is not carried out, owing to the fault of the vendor, as when his title is defective, or he refuses to make the conveyance, the purchaser is not, it is generally agreed, liable for use and occupation, since the entry and possession cannot be regarded as upon an understanding that compensation was to be paid in such an event.⁶⁶ And a like view has been adopted when the contract of sale was rescinded by agreement.⁶⁷

Upon the question whether, when the contract fails to be carried out by reason of the purchaser's failure to comply therewith, he is to be made liable for the time of his occupancy as upon a promise, inferred from the circumstances, to pay therefor, the cases are by no means in unison. A number of cases support the view that such a promise may be inferred,⁶⁸ and the fact that the contract of sale is oral and so unenforceable by reason of the Statute of Frauds appears to be immaterial in this

⁶⁵ *Dennett v. Penobscot Fair Ground Co.*, 57 Me. 425; *Carpenter v. U. S.*, 84 U. S. (17 Wall.) 489. To the same effect, see dictum in *Gould v. Thompson*, 45 Mass. (4 Metc.) 224. And see *Johnson v. Beauchamp*, 39 Ky. (9 Dana) 124.

⁶⁶ *Winterbottom v. Ingham*, 7 Q. B. 611; *Bishop v. Clark*, 82 Me. 532, 20 Atl. 88; *Dodgen v. Camp*, 47 Ga. 328; *Hough v. Birge*, 11 Vt. 190, 34 Am. Dec. 682; *Way v. Raymond*, 16 Vt. 371; *Little v. Pearson*, 24 Mass. (7 Pick.) 301, 19 Am. Dec. 289; *Knox v. Spratt*, 19 Fla. 817; *Thompson v. Bower*, 60 Barb. (N. Y.) 463; *Sylvester v. Ralston*, 31 Barb. (N. Y.) 286; *Jones v. Tipton*, 32 Ky. (2 Dana) 295; *Johnson v. Beauchamp*, 39 Ky. (9 Dana) 124; *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *In re Kaas' Estate*, 2 Pa. Co. Ct. R. 55; *Garvin v. Jennerson*, 20 Kan. 371; *Appeal of Bardsley* (Pa.) 10 Atl. 39. But it has been held that even in such case the vendee is liable from the time that the ven-

dor notifies him that if he remains in possession he must pay rent. *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105.

⁶⁷ *Miles v. Elkin*, 10 Ind. 329; *Mariner v. Burton*, 4 Har. (Del.) 69.

⁶⁸ *Patterson v. Stoddard*, 47 Me. 355, 74 Am. Dec. 490; *Clough v. Horsford*, 6 N. H. 231; *Woodbury v. Woodbury*, 47 N. H. 11, 90 Am. Dec. 555; *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Davidson v. Ernest*, 7 Ala. 817; *Smith's Ex'rs v. Houston*, 16 Ala. 111; *Smith v. Wooding*, 20 Ala. 324; *Gould v. Thompson*, 45 Mass. (4 Metc.) 224; *Dunham v. Townsend*, 110 Mass. 440 (dictum); *Sievers v. Brown*, 34 Or. 454, 56 Pac. 170, 45 L. R. A. 642. But see *Tucker v. Adams*, 52 Ala. 254; *Lyon v. Cunningham*, 136 Mass. 532; *King v. Johnston*, 73 Mass. (7 Gray) 239, to the effect that there is no personal liability in such case upon the vendee for the value of the use and occupation.

connection.⁶⁹ In other cases it has been decided that the defaulting vendee is not liable in an action for use and occupation, but that the vendor's remedy is by an action of trespass for mesne profits.⁷⁰ In some cases it is broadly stated that no such promise or liability to pay for use and occupation can be asserted against a purchaser in possession, without any suggestion being made that the result would be affected by the purchaser's breach of his contract.⁷¹ In one case it was decided that a purchaser, who rescinded the contract of sale on account of the destruction of the building on the premises, was so liable for the time during which he was in possession.⁷²

It has been decided that if the purchaser, having entered under the contract of purchase, continues, by the vendor's permission, to occupy after the contract "goes off," he is liable in use and occupation for the period then beginning,⁷³ while if he

⁶⁹ See *Doe d. Whitney v. Cochran*, 18 N. J. Law (3 Har.) 214; *Byrd v. 2 Ill. (1 Scam.) 209*; *Pierce v. Pierce*, Chase, 10 Ark. 602; *Newby v. Vestal*, 25 Barb. (N. Y.) 243, and cases cited 6 Ind. 412; *Coffman v. Huck*, 19 Mo. 435, 440.

⁷⁰ *Smith v. Stewart*, 6 Johns (N. Y.) 46, 5 Am. Dec. 186; *Bancroft v. Wardwell*, 13 Johns (N. Y.) 489, 7 Am. Dec. 396; *McNair v. Schwartz*, 16 Ill. 24; *Vandenheuvel v. Storrs*, 3 Conn. 203; *Tucker v. Adams*, 52 Ala. 254; *Denver, T. & W. Co. v. Swem*, 8 Colo. 111, 5 Pac. 836; *Stacy v. Vermont Cent. R. Co.*, 32 Vt. 551; *Brown v. Randolph* (Tex. Civ. App.) 62 S. W. 981. In *Clough v. Hosford*, 6 N. H. 231, and *Woodbury v. Woodbury*, 47 N. H. 11, 90 Am. Dec. 555, it was held that either action would lie at the vendor's option.

⁷¹ *Pomeroy v. Bell*, 118 Cal. 635, 50 Pac. 683; *Barnes v. Shinholster*, 14 Ga. 131; *Fall v. Hazelrigg*, 45 Ind. 573, 15 Am. Rep. 278; *Hopkins v. Ratliff*, 115 Ind. 213, 17 N. E. 288; *Hogsett v. Ellis*, 17 Mich. 351; *Carpenter v. U. S.*, 84 U. S. (17 Wall.) 489 (dictum); *Bancroft v. Wardwell*, 13 Johns. (N. Y.) 489, 7 Am. Dec. 396; *Brewer v. Conover's Adm'r*,

⁷² *Gould v. Thompson*, 45 Mass. (4 Metc.) 224. In *Lyon v. Cunningham*, 136 Mass. 532, it is remarked that *Hull v. Vaughan*, 6 Price, 157, cited in *Gould v. Thompson*, 45 Mass. (4 Metc.) 224, supra, does not support the view that a vendee is liable for use and occupation. See ante, note 40.

⁷³ *Howard v. Shaw*, 8 Mees. & W. 118. See *Michael v. Curtis*, 60 Conn. 363, 22 Atl. 949. In the first of the above cases the contract "went off" because of a quarrel between the different vendors, the purchaser then demanding back his deposit, and continuing in possession because he failed to receive it. Whether, if the purchaser had not thus shown an election to abandon the contract, he would have been held liable for use and occupation, does not appear. There seems no more reason for imposing liability when the purchaser's failure to ob-

so continues in possession without permission, he is liable as a trespasser,⁷⁴ and whether there is such permission to continue his occupancy has been regarded as a question for the jury.⁷⁵ In one place it was even decided that the owner of a building, who removed it on another's land by permission, pending negotiations for the sale of the building to the latter, was liable to him by reason of his occupancy of the land by the building after the negotiations had failed, and he had been notified to remove the building.⁷⁶ A vendor disaffirming the contract on the ground that he was not of full age at the time of making it has been regarded as entitled to recover for the vendee's occupation.⁷⁷

Occasionally the contract of sale contains an express stipulation in this regard, and such a stipulation is binding.⁷⁸ Thus, it may be validly provided that the purchaser shall be liable for rent during the period of his occupation,⁷⁹ even though the contract fails owing to defects in the vendor's title,⁸⁰ or, conversely, the purchaser may be exempted from liability to make compensation

tain a conveyance is because of a quarrel between his vendors than when it is because of a failure of his vendors' title. See ante, note 66. *Howard v. Shaw*, 8 Mees. & W. 118, is cited in *Crouch v. Tregonning*, L. R. 7 Exch. 88, where it was decided that one who entered under an assignment of a leasehold, which was invalid because not under seal and because not assented to by the landlord, was not liable in use and occupation to his assignor, although the latter continued to pay the rent.

⁷⁴ *Markey v. Coote*, 10 Ir. R. C. L. 149. There the contract "went off" because the vendee failed to perform a certain condition, whereupon the vendor "rescinded" the contract, and the purchaser was held liable from the time of such rescission. See, also, *Belger v. Sanchez*, 137 Cal. 614, 70 Pac. 738.

⁷⁵ *Markey v. Coote*, 10 Ir. R. C. L. 149.

⁷⁶ *Michael v. Curtis*, 60 Conn. 363, 20 Atl. 949.

⁷⁷ *Weaver v. Jones*, 24 Ala. 420.

⁷⁸ See *Vick v. Ayres*, 56 Miss. 670.

⁷⁹ *Saunders v. Musgrave*, 6 Barn. & C. 524; *Yeoman v. Ellison*, 36 Law J. C. P. 326. It was in one case held that use and occupation was maintainable against a purchaser upon his failure to complete his payments, the contract stipulating that he should hold the premises from its date as a tenant at sufferance, subject to removal on a default in an installment of purchase money, and that he should pay the taxes and keep the premises in repair. *Wright v. Roberts*, 22 Wis. 161.

If the vendors have no legal interest in common, the fact that, in the contract of each with the purchaser, it is provided that the latter shall pay rent, does not enable them to sue jointly. *Seaton v. Booth*, 4 Adol. & El. 528.

⁸⁰ See *Barnes v. Shinholster*, 14 Ga. 131.

for his occupancy although he would otherwise be so liable as being in default.⁸¹ Not infrequently there is an express provision that if the vendee fails to pay installments of price when due, he shall become liable for rent.⁸²

In a few states the statute provides for the recovery, in certain cases, of a reasonable satisfaction from the vendee for the use and occupation of the land, in case the contract fails of consummation.⁸³

As appears from the decisions above referred to, the authorities bearing upon the question of the liability for use and occupation of one who, having a contract for the sale of land to him, enters thereon previous to the making of the conveyance, are in considerable confusion. The view has been previously expressed that such vendee is properly, as being in possession by the vendor's permission, to be considered a tenant of the vendor,⁸⁴ and conceding this to be the case, the only question is whether the circumstances are such as to justify the inference of a promise to pay compensation for the occupation. That they are not sufficient for this purpose, if the contract is eventually performed by the making of a conveyance, has been decided,⁸⁵ and it appears to be settled that they are not so suffi-

⁸¹ *Welch v. Andrews*, 50 Mass. (9 Metc.) 78, where a bond was given for a conveyance to be made on payment of a certain sum in three years, with interest, the obligee to have the right to possession without paying rent, and it was held that, in view of this latter clause, the obligee was not liable for use and occupation for the last of the three years, though he failed to pay interest for such year, as well as the principal, and though he relinquished possession at the end of the year, notifying the obligor that he would not take the premises.

⁸² See ante, § 43 c.

⁸³ *Alabama* Code 1896, § 2715 (When defendant is let into possession upon a supposed sale of the lands which, by reason of the act of defendant, is not consummated);

Delaware Rev. Code 1893, p. 867, § 14 (Action lies against person who entered under contract of purchase which is void or which is, before the action, avoided by consent of the parties, or otherwise than by default of the vendor); *Illinois*, Hurd's Rev. St. 1905, c. 80, § 1 (When possession obtained under agreement, written or verbal, for purchase of the premises and before deed given, the right to possession is terminated by forfeiture or noncompliance with the agreement, and possession is wrongfully refused or neglected to be given on demand in writing). See *Hadley v. Morrison*, 39 Ill. 392.

Arizona Rev. St. 1901, § 2692, is substantially the same as the *Illinois* statute.

⁸⁴ See ante, § 43 a, at notes 19-21.

⁸⁵ See ante, at note 65.

cient if the conveyance is not made by reason of the vendor's default.⁸⁶ The presumption which ordinarily obtains, that one in possession by permission has promised to pay compensation therefor,⁸⁷ would seem, however, sufficient to support the imposition of liability on one who obtains possession by entering into an agreement of purchase, and who then refuses to perform such agreement, and, from this point of view, the fact that the agreement is unenforceable, by reason of the Statute of Frauds or otherwise,^{87a} seems rightly to be regarded as immaterial.

c. **Person retaining possession after judicial sale.** There is not ordinarily, it seems clear, any such relation of tenancy as will support the action in favor of a purchaser at execution, judicial, or foreclosure sale, against one previously in possession who holds over after the sale,⁸⁸ and that such person was a tenant under a lease subsequent to the lien under which the sale was made is not, it is conceived, sufficient to show such relation.⁸⁹

A person who purchases land at a judicial or execution sale, which is invalid, is not the tenant of the person whose land was thus sold, so as to be liable to him in use and occupation.⁹⁰

d. **Tenant holding over.** A tenant holding over after the end of his term, even though without the assent of the landlord, has been held liable in this form of action for the time of such holding over.⁹¹ The fact that the original lease was under seal

⁸⁶ See ante, at note 66.

⁸⁷ See post, at note 209.

^{87a} See ante, at note 69.

⁸⁸ See Wyman v. Hook, 2 Me. (2 Greenl.) 337; O'Donnell v. McMurdie, 25 Tenn. (6 Humph.) 134. In Illinois (Hurd's Rev. St. 1905, c. 80, § 1) and in Arizona (Rev. St. 1901, § 2692), the statute provides for a recovery by the purchaser at such sale of a reasonable satisfaction as against a person refusing to relinquish possession.

⁸⁹ Peters v. Elkins, 14 Ohio, 344, is to this effect. See, also, ante, §§ 73 c, 147, 180 h, at note 637. In Mozart Bldg. Ass'n v. Friedjen, 12 Phila. (Pa.) 515, it is decided that a tenant under such a lease is so liable.

But this is by force of the Pennsylvania statute, presumably. See ante, § 147, at notes 59-62. In Heibelbach v. Slader, 1 Handy (Ohio) 457, it is considered that a notice by such purchaser to the tenant, requiring the rent to be paid to him, the purchaser, to which notice the tenant makes no reply, is sufficient to establish the relation for the purpose of the action. Compare cases cited ante, notes 30, 31.

⁹⁰ Powell v. New England Mortg. Security Co., 89 Ala. 490, 8 So. 136, 18 Am. St. Rep. 145; Nance v. Alexander, 49 Ind. 516.

⁹¹ Bayley v. Bradley, 5 C. B. 396; Leigh v. Dickeson, 15 Q. B. Div. 60; Jenner v. Clegg, 1 Moody & R. 213;

does not prevent such liability for the time of holding over after the term of the lease, since such holding over is not under the lease.⁹² The expired lease is always admissible as evidence bearing on the amount of recovery,⁹³ though not, it seems, conclusive in this regard.⁹⁴

That the tenant, departing from the premises at the end of the term, leaves his furniture thereon with a subsequent tenant,⁹⁵ or leaves a few other articles thereon with the intention of abandoning them,⁹⁶ does not, it has been held, involve a holding over such as to impose liability for use and occupation. Nor is there such a holding over merely because the tenant has accepted a lease to commence at the end of the prior term, he having relinquished possession during such term,⁹⁷ nor because, though he abandons possession at the end of his term, he subsequently resumes possession under a claim of title adverse to his landlord.⁹⁸ There is a holding over by the tenant for the purpose of imposing liability on him, if his subtenant refuses to relinquish possession,⁹⁹ but a joint lessee is not so liable, it has been decided, because the other lessee holds over without his consent.¹⁰⁰ There

Weaver v. Southern Oregon Co., 31 Or. 14, 48 Pac. 167; Osgood v. Dewey, 13 Johns. (N. Y.) 240; Poole v. Engelke, 61 N. J. Law, 124, 38 Atl. 823; Schwoebel v. Fugina, 14 N. D. 375, 104 N. W. 848. And see cases cited ante, § 211, note 119.

⁹² Abeel v. Radcliff, 13 Johns. (N. Y.) 297, 7 Am. Dec. 377; Carter v. Collar, 1 Phila. (Pa.) 339 (semble); McFarlane v. Buchanan, 12 U. C. C. P. 591.

⁹³ Weaver v. Southern Oregon Co., 31 Or. 14, 48 Pac. 167; Atkinson v. Winters, 47 W. Va. 226, 34 S. E. 834.

⁹⁴ See ante, § 211, note 123-124. And see post, note 232.

⁹⁵ Lore v. Pierson, 10 Daly (N. Y.) 272.

⁹⁶ Beeston v. Yale, 75 App. Div. 388, 78 N. Y. Supp. 158. Compare cases cited ante, § 207, notes 14, 15; § 209 c, note 38. In the above cited case, the court refers to the accept-

ance of the tenant's "surrender" at the end of the term as precluding the landlord from asserting a holding over. "Surrender" is here evidently used as meaning the relinquishment of possession, which the parties chose to evidence by a written document. There evidently cannot be a surrender at the end of the term, using the word in its technical sense, since there is no leasehold estate remaining to be surrendered.

⁹⁷ Wood v. Wilcox, 1 Denio (N. Y.) 37.

⁹⁸ Douglass v. Geiler, 32 Kan. 499, 4 Pac. 1039.

⁹⁹ Ibbs v. Richardson, 9 Adol. & E. 849.

¹⁰⁰ Draper v. Crofts, 15 Mees. & W. 166; Christy v. Tancred, 9 Mees. & W. 438, 12 Mees. & W. 316. Crosswell v. Crane, 7 Barb. (N. Y.) 191, is contra.

is a decision that if the tenant under a lease, upon the expiration of his term, renounces the title of the landlord, assumpsit for the subsequent use and occupation cannot be maintained.¹⁰¹

While the view that a tenant under a lease who holds over his term is liable in use and occupation is supported by numerous cases, and accords with the theory which is frequently asserted that a tenant at sufferance is a tenant of the person entitled to the possession,¹⁰² it seems on principle open to considerable question. Such a tenant holding over his term is primarily a wrongdoer, and would, no doubt, be liable as such in trespass for *mesne* profits,¹⁰³ and to hold that a wrongdoer may be subjected to liability in an action for use and occupation is undoubtedly contrary to the great weight of authority, as appears from cases previously cited.^{103a} The courts have, however, apparently without any question, undertaken to give this remedy against a tenant so holding over, and they will no doubt continue to do so.^{103b}

It has occasionally been decided that if one holding originally under a lease from a life tenant continues in possession, under the terms of his lease, after the death of a life tenant, he is liable in use and occupation to the remainderman.¹⁰⁴ These decisions are

¹⁰¹ *City of Boston v. Binney*, 28 Mass. (11 Pick.) 1, 22 Am. Dec. 353. *Schwoebel v. Fugina*, 14 N. D. 375, 104 N. W. 848, is contra, apparently. The opinion in this latter case states that "the defendant's denial of his landlord's title was in law a repudiation and termination of the tenancy, dispensing with notice to quit, and the landlord might treat it as a disseisin, as has been done by commencing this suit to recover, not the agreed rent, but the value of the use and occupation." That the action of use and occupation is based on the theory of a disseisin, to the exclusion of that of a permissive occupation, is obviously contrary to all the authorities.

¹⁰² See ante, § 15 a, at notes 568-575.

¹⁰³ See ante, § 212.

^{103a} See ante, § 304.

^{103b} It has, however, been decided that if the landlord brings ejectment against the tenant holding over, he cannot recover in use and occupation for the time subsequent to the demise laid in the declaration, since this would involve an attempt to treat him at the same time as a wrongdoer and as one in rightful possession. *Birch v. Wright*, 1 Term R. 378.

¹⁰⁴ *Guthmann v. Vallery*, 51 Neb. 824, 71 N. W. 734, 66 Am. St. Rep. 475; *Hoagland v. Crum*, 113 Ill. 365, 55 Am. Rep. 424. In *Carman v. Mosier*, 105 Iowa, 367, 75 N. W. 323, "a suit in equity" by the remainderman "for the use and occupation of the land" was sustained.

difficult to sustain on principle. One so holding over is within the definition of a tenant at sufferance,¹⁰⁵ but he cannot well be regarded as the tenant of the remainderman, with whom he has undertaken to enter into no relations, and who is in no privity with the person who made the lease.^{105a} The person so holding over is an entire stranger to the remainderman, and the relation of landlord and tenant is nonexistent in such case.

e. **Grantor retaining possession.** The question whether a grantor remaining in possession after making the conveyance can be held liable to the grantee in use and occupation would depend primarily upon whether he can be regarded as a tenant of the latter,¹⁰⁶ and this would depend, it is conceived, on whether he retains possession by permission or does so wrongfully.¹⁰⁷ It being conceded in the particular case that he is a tenant under the grantee, the question would then remain whether the circumstances are such as to exclude the inference of a promise to pay for the use and occupation.¹⁰⁸

§ 307. Liability of assignee.

There are decisions apparently to the effect that the assignee of a lease is not liable in use and occupation to the landlord, unless he has entered into an agreement with the landlord, equivalent to a new demise.¹⁰⁹ There are, however, other cases to the effect that the assignee of a lease, who enters under the assignment, is so liable without any new agreement,¹¹⁰ and it is difficult to see why this should not be so, since the relation of tenancy exists, and the fact that the assignee holds under the lease would be ground for an inference of a contract by him to pay for the use and occupation.¹¹¹ An assignee, however, who

¹⁰⁵ See ante, § 15 a, at notes 572, v. Chapman, 1 Car. & K. 14; Bedford 573. v. Terhune, 30 N. Y. 453, 86 Am. Dec. 394.

^{105a} See ante, § 69 c.

¹⁰⁶ See *Greenup v. Vernor*, 16 Ill. 26; *Preston v. Hawley*, 101 N. Y. 586, 5 N. E. 770; *Id.*, 139 N. Y. 296, 34 N. E. 906; *Larrabee v. Lumbert*, 34 Me. 79; *Tew v. Jones*, 13 Mees. & W. 12. ¹¹⁰ *Wittman v. Milwaukee, L. S. & W. R. Co.*, 51 Wis. 89, 8 N. W. 6; *De Pere Co. v. Reynen*, 65 Wis. 271, 22 N. W. 761; *Journeay v. Brackley*, 1 Hilt. (N. Y.) 447; *Electric Tel. Co. v. More*, 2 Fost. & F. 363.

¹⁰⁷ See ante, § 44.

¹⁰⁸ See post, § 317.

¹⁰⁹ *Theater Royal Drury Lane Co.*

¹¹¹ See post, at note 209.

does not actually enter under the assignment, cannot be regarded as occupying or holding over, so as to be liable under the statute,¹¹² and he cannot, it seems, thus be made liable for any time previous to such entry.

An assignee of the lease, who has assigned over, is not, it seems, liable for subsequent use and occupation,¹¹³ his liability in use and occupation being thus no greater than on the covenant for rent.¹¹⁴ Presumably, even though he retains possession, he would not continue liable, since his assignee, and not he, is the tenant under the original lease,¹¹⁵ and, if still to be regarded as a tenant, his holding would be under his assignee as a subtenant, and not under such lease.

In one case it is apparently decided that one obtaining possession during the term of the lease is to be presumed to be holding as assignee and tenant of the lessor, for the purpose of supporting recovery against him.¹¹⁶ This corresponds with the ordinary presumption as to an assignment.¹¹⁷ But in another case it was held that one purchasing improvements from a tenant and going into possession, without any knowledge of the tenancy, was not liable in use and occupation.¹¹⁸

§ 308. Liability of executor or administrator.

The executor or administrator of a deceased tenant is liable in his representative character, in an action for use and occupation, for the time the possession is retained by him after the tenant's death,¹¹⁹ but for this purpose the compensation must, it has been decided, be alleged to be due under a contract with the testator, as otherwise he can be made liable only personally.¹²⁰ When sued personally for use and occupation, the executor or administrator may show that he entered only in his representative capacity, that he has no assets, and that the value of the land is less than the rent, he being liable only for the amount of the profits of the

¹¹² *How v. Kennett*, 3 Adol. & E. 659; *Nation v. Wozer*, 1 Crompt. M. & R. 172.

¹¹³ See *Camden v. Batterbury*, 5 C. B. (N. S.) 808.

¹¹⁴ See ante, § 180 b.

¹¹⁵ See ante, § 158 a (2) (n) (cc).

¹¹⁶ *Page v. McGlinch*, 63 Me. 472.

¹¹⁷ See ante, § 153.

¹¹⁸ *Bailey v. Campbell*, 2 Ill. (1 Scam.) 110.

¹¹⁹ *Atkins v. Humphrey*, 2 C. B. 654.

¹²⁰ *Wigley v. Ashton*, 3 Barn. & Ald. 101; *Nixon v. Quin*, 2 Ir. R. C.

L. 248.

land,¹²¹ and he may do the same when sued in his representative capacity.¹²²

In order to impose liability in use and occupation on the executor or administrator in his representative capacity, it is not necessary that he actually enter, the entry of the decedent being sufficient for this purpose,¹²³ but in order that he be made liable personally, he must have entered, and must have done so as assignee of the term and not merely in his representative capacity.¹²⁴ An entry by one of several executors will not operate as an entry by all, so as to make them jointly liable in their personal capacity.¹²⁵

§ 309. Election by plaintiff against tenancy.

Although the relation of landlord and tenant originally existed between the parties, such relation is regarded as having ceased upon the election by the landlord to treat the tenant as a trespasser, as indicated by the bringing of an action of ejectment by the former against the latter, so as to prevent recovery for the use and occupation subsequent to the commencement of the action,¹²⁶ or, under the old practice in ejectment, subsequent to the date of the demise named in the declaration;¹²⁷ while his right to recover for the use and occupation before that time is conceded.¹²⁸ A judgment for the landlord in the action of ejectment has, in two cases, been regarded as precluding any subsequent recovery for use and occupation, the theory being that the value of the use could have been recovered in that action under a claim for *mesne* profits.¹²⁹

A mere threat by the landlord to treat the tenant as a trespasser has been held not to prevent a recovery for subsequent occupation,¹³⁰ and the same view has been taken with reference to

¹²¹ Hopwood v. Whaley, 6 C. B. 1 Wend. (N. Y.) 134; Larrabee v. 744; Patten v. Reid, 6 Law T. (N. Lumbert, 34 Me. 79 (writ of entry). S.) 281.

¹²² 1 Wms. Saund. (Ed. 1871) 124, 378; Butler v. Cowles, 4 Ohio, 205, notes to Dean of Bristol v. Guyse. 19 Am. Dec. 612.

¹²³ Atkins v. Humphrey, 2 C. B. 128 Birch v. Wright, 1 Term R. 378; National Oil Refining Co. v. 654.

¹²⁴ Remnant v. Bremridge, 8 Bush, 88 Pa. 335. Taunt. 191.

¹²⁵ Nation v. Tozer, 1 Crompt. M. & Strong v. Garfield, 10 Vt. 502. R. 172.

¹²⁶ Featherstonhaugh v. Bradshaw, Bush, 88 Pa. 335.

¹²⁹ Goddard v. Hall, 55 Me. 579;

¹³⁰ National Oil Refining Co. v.

his denial of the existence of the relation.¹³¹ But in another jurisdiction a threat by the landlord to expel the tenant and the assumption by him of control of the premises have been regarded as precluding such recovery even for the time prior to the adoption of such course of conduct.¹³²

§ 310. Effect of existing lease to a stranger.

It has been said that the existence of an outstanding lease to a third person precludes a recovery in use and occupation,¹³³ but this is not always so. If one, after making a lease to one person, makes a lease to another, the existence of the first lease does not affect his right of recovery against the tenant under the second lease, since a defect in the lessor's title at the time of making the lease is no defense to an action for use and occupation,¹³⁴ and so, while it has been decided that a firm occupying a store by virtue of a lease to one partner cannot be held liable to the lessor in use and occupation, so long as that lease is still outstanding, even though the lessor has a right to rescind such lease for fraud in its procurement,¹³⁵ this, it would seem, is because the firm are not the tenants of the lessor, rather than because of the outstanding lease, and it is submitted that if, after the discovery of the fraud and before the rescission of the lease, the members of the firm had agreed to hold as tenants of the lessor, they might have been held liable in use and occupation. And likewise, while it has been decided that, so long as a lease to joint lessees remains in force, the lessor cannot recover in use and occupation against one of such lessees and another person,¹³⁶ this, it would seem, is because such other has never become a tenant of the lessor, and not because the plaintiff in the action has previously made a lease to another person. And so, though the fact that a subtenant is in possession gives no right to the lessor in chief to sue such subtenant in use and occupation,¹³⁷ it seems that if the subtenant

¹³¹ *Chambers v. Ross*, 25 N. J. Law (1 Dutch.) 293.

¹³² *Gretton v. Smith*, 33 N. Y. 245.

¹³³ *Lenney v. Finley*, 118 Ga. 718, 45 S. E. 593; *Journeay v. Brackley*, 1 Hilt. (N. Y.) 447; *Holman v. De Lin-River-Finley Co.*, 30 Or. 428, 47 Pac. 708. This appears to be assumed in *People v. Gilbert*, 64 Ill. App. 203.

¹³⁴ *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394; *Rogers v. Coy*, 164 Mass. 391, 41 N. E. 652. See ante, § 78 c (4).

¹³⁵ *Brooks v. Allen*, 146 Mass. 201, 15 N. E. 584.

¹³⁶ *Doty v. Gillett*, 43 Mich. 203, 5 N. W. 89.

¹³⁷ *Gage v. Smith*, 14 Me. 466; *Bedford v. Terhune*, 30 N. Y. 453, 86

should attorn to such lessor as his immediate landlord, he might be held liable by the latter in use and occupation, even though he is also liable to his immediate lessor.¹³⁸

§ 311. Persons who may sue.

One who is merely a trustee may sue in use and occupation, provided a contract with him to pay for the occupancy can be inferred,¹³⁹ but he cannot so sue if the only contractual relation of the occupant is with the *cestui que trust*.¹⁴⁰

One who has merely the equitable title may recover in this form of action, provided the relation of tenancy exists and the circumstances sustain an implication of a contract to pay him for the value of the occupancy, as when the occupant entered by his permission,¹⁴¹ or thereafter paid rent to him.¹⁴² One who enters under a demise from the legal owner cannot thus be made liable to the holder of the equitable title, there being no contractual relation on which to base the recovery,¹⁴³ though it might be otherwise if the former can be considered to have acted as agent for the latter.¹⁴⁴ It is on this principle, apparently, that it was decided that the heir of a ward could not recover against one occupying under a lease from the guardian.¹⁴⁵⁻¹⁴⁷

The action for use and occupation may be by the transferee of a lessor against the tenant under the lease, as well as by the lessor himself, the effect of such assignment being to substitute the transferee as landlord.¹⁴⁸ It seems, however, that the transferee

Am. Dec. 394; Jennings v. Alexander, 1 Hilt. (N. Y.) 154. See Way v. Holton, 46 Vt. 184; Krider v. Ramsay, 79 N. C. 354.

¹³⁸ This may be the theory of the decision in McFarlan v. Watson, 3 N. Y. (3 Comst.) 286, the opinion in which is very obscure. It seems, however, that there was a surrender by operation of law in this case, though the court does not mention "surrender."

¹³⁹ See Chapin v. Foss, 75 Ill. 280.

¹⁴⁰ Churchward v. Ford, 2 Hurl. & N. 446.

¹⁴¹ Hull v. Vaughan, 6 Price, 157.

¹⁴² Dolby v. Iles, 11 Adol. & E. 335.

¹⁴³ Grady v. Ibach, 94 Ala. 152, 10 So. 287.

¹⁴⁴ See Morgell v. Paul, 2 Man. & R. 303.

¹⁴⁵⁻¹⁴⁷ Welles v. Cowles, 4 Conn. 182, 10 Am. Dec. 115.

¹⁴⁸ Green v. London Cemetery Co., 9 Car. & P. 6; Standen v. Christmas, 10 Q. B. 135; Peckham v. Leary, 13 N. Y. Super. Ct. (6 Duer) 494; Ryerss v. Farwell, 9 Barb. (N. Y.)

615; Stewart v. Gregg, 42 S. C. 392, 20 S. E. 193; Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 234.

cannot recover for use and occupation for a period prior to his assignment, since during that time the implication was of a contract to pay the value of the occupancy to the assignor only.¹⁴⁹

The heir, and not the personal representative, is the one to bring the action on account of an occupation after the former owner's death,¹⁵⁰ provided the decedent's interest was a freehold interest. In one case it was decided that, although the defendant had been the tenant of plaintiff's father, if he denied the title of plaintiff, who sued as his father's heir, defendant thereby became a disseisor as to him, and so was not liable in assumpsit.¹⁵¹ This, it seems, must refer to a denial of the plaintiff's right of succession, since defendant cannot deny the validity of the lessor's title at the time of the demise.

An assignee of the rent alone, without the reversion, has been regarded as entitled to recover, in assumpsit for use and occupation, the equivalent of the rent reserved.¹⁵² This, however, seems questionable, since the assignor, who retains the reversion, remains the landlord, and the assignee of the rent cannot properly be regarded as such.

In case the tenant remains in possession after his term by the permission, not of his former landlord, but of one to whom the latter has made a lease to commence at the end of such former term, his liability is not to his former landlord, but to the new lessee,¹⁵³ and the same view as to his liability to the new lessee appears to have been taken when he held over without any express permission.¹⁵⁴

Tenants in common may join in an action for use and occupa-

¹⁴⁹ *Mortimer v. Preedy*, 3 Mees. & W. 602.

¹⁵⁰ *Shouse v. Krusor*, 24 Mo. App. 279.

¹⁵¹ *Burdin v. Ordway*, 88 Me. 375, 34 Atl. 175.

¹⁵² *Moffatt v. Smith*, 4 N. Y. (4 Comst.) 126.

¹⁵³ *Walker v. Tipton*, 33 Ky. (3 Dana) 3.

¹⁵⁴ *Pendergast v. Young*, 21 N. H. 234. It is difficult to see how a first lessee who, after the end of his term, thus wrongfully excludes the second lessee, can properly be regarded as a tenant of the latter, but that he is liable to him for use and occupation is perhaps a necessary consequence of the view (ante, § 306 d) that one wrongfully holding over is so liable to his lessor in the absence of a second lease. By transferring his right of possession to another, he vests such other with all rights based on the wrongful possession of a prior lessee.

tion.¹⁵⁵ In case of the death of one of such tenants in common who joined in the demise, the right of action is in the survivor,¹⁵⁶ in accordance with the general rule that in the case of a contract made with two or more persons jointly, the right of action is in the survivor or survivors.^{156a}

§ 312. As between tenants in common.

Since the action of assumpsit for use and occupation is ordinarily maintainable only when the relation of landlord and tenant exists,¹⁵⁷ and no such relation ordinarily exists between tenants in common and joint tenants, the action will not usually lie in favor of one such cotenant against another, although the latter alone occupies the common property.¹⁵⁸ Were the law otherwise, one cotenant could, by refraining from taking possession, subject the other to the alternative of refraining from taking possession or of being subjected to a pecuniary liability. Occasionally it is stated, or intimated, that one tenant in common becomes liable for use and occupation in case he excludes the other from possession,¹⁵⁹ but this liability is properly a liability for *mesne* profits, since the exclusion of one cotenant by the other cannot make the latter a tenant of the former.¹⁶⁰ Furthermore, in some states, an action of account, or an equivalent equitable proceeding, may be maintained by one cotenant against another, under the con-

¹⁵⁵ Cobb v. Kidd, 19 Blatchf. 560, 8 Fed. 695; Porter v. Bleiler, 17 Barb. (N. Y.) 149.

¹⁵⁶ Cobb v. Kidd, 19 Blatchf. 560, 8 Fed. 695; Fesmire v. Brock, 25 Ark. 20; Dell v. Gardner, 25 Ark. 134.

^{156a} See ante, § 55 b, at note 93.

¹⁵⁷ See ante, § 304.

¹⁵⁸ Fielder v. Shields, 73 Ala. 576; Porter v. Hooper, 11 Me. 170; Reynolds v. Wilmeth, 45 Iowa, 693; Belknap v. Belknap, 77 Iowa, 71, 41 N. W. 568; Hamby v. Wall, 48 Ark. 135, 2 S. W. 705, 3 Am. St. Rep. 218; Everts v. Beach, 31 Mich. 136, 18 Am. Rep. 169; Webster v. Calef, 47 N. H. 289, 93 Am. Dec. 433; Kline v. Jacobs, 68 Pa. 57; Wilbur v. Wilbur, 54 Mass. (13 Metc.) 404, 46 Am. Dec.

739. In Gage v. Gage, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829, there is a suggestion that the action does lie, and it is said that, however this may be, a declaration in this form may be amended by filing a bill in equity. There is a strong dissenting opinion.

¹⁵⁹ See Badger v. Holmes, 72 Mass. (6 Gray) 118; Austin v. Ahearne, 61 N. Y. 6; Reynolds v. Wilmeth, 45 Iowa, 693; Belknap v. Belknap, 77 Iowa, 71, 41 N. W. 568; Holmes v. Williams, 16 Minn. 164; Thompson v. Jones, 77 Tex. 626, 14 S. W. 222.

¹⁶⁰ Porter v. Hooper, 11 Me. 170; Cook v. Webb, 21 Minn. 428; Wilmarth v. Palmer, 34 Mich. 347.

struction there placed upon the statute of 4 & 5 Anne, c. 16, with reference to accounting as between cotenants, or by reason of a local statute of a more or less similar nature.^{160a} This is sometimes referred to as an action for use and occupation, but it is evidently entirely distinct from the action based on the relation of landlord and tenant which is the subject of the present chapter.

Though the relation of landlord and tenant does not ordinarily exist between cotenants, it is possible, as we have before stated,¹⁶¹ for one cotenant to make a lease to another, and in such case, provided the lease is not under seal, the action of use and occupation may be maintained.¹⁶²

Since one to whom a cotenant makes a lease of his undivided interest is, for the term of the lease, himself a cotenant, he is not a tenant of the owner of the other undivided interest, and is consequently not liable to him in an action for use and occupation.¹⁶³

§ 313. In case of lease under seal.

The English statute gives a right of action only "where the agreement is not by deed," and the state statutes¹⁶⁴ ordinarily contain a similar provision. It has accordingly been held that, if there is a demise under seal, the proper form of action is debt or covenant, and that assumpsit for use and occupation will not lie.¹⁶⁵

^{160a} Freeman, Cotenancy (2d Ed.)
§§ 276-284.

¹⁶¹ See ante, § 71 c.

¹⁶² Chapin v. Foss, 75 Ill. 280; Boley v. Barutio, 24 Ill. App. 515; Id., 120 Ill. 192, 11 N. E. 393; Kites v. Church, 142 Mass. 586, 8 N. E. 743; Kline v. Jacobs, 68 Pa. 57; Cahoon v. Kinen, 42 Ohio St. 190. In Wilbur v. Wilbur, 54 Mass. (13 Metc.) 404, 46 Am. Dec. 739, and Gowen v. Shaw, 40 Me. 56, it is said that an express promise is necessary to create the liability.

¹⁶³ Badger v. Holmes, 72 Mass. (6 Gray) 118; Austin v. Ahearn, 61 N. Y. 6. But Nott v. Owen, 86 Me. 98, 29 Atl. 943, 41 Am. St. Rep. 525, is apparently *contra*.

¹⁶⁴ See references to statutes ante, note 8. In Alabama the statute (Code 1907, § 4753) expressly provides that a reasonable satisfaction may be recovered, if no specific rent agreed on, "when there has been a demise by deed or by parol."

¹⁶⁵ West v. Cartledge, 5 Hill (N. Y.) 488, 40 Am. Dec. 364; Kiersted v. Orange & R. R. Co., 69 N. Y. 343, 25 Am. Rep. 199; North v. Nichols, 37 Conn. 375; Codman v. Jenkins, 14 Mass. 93; Hawkes v. Young, 6 N. H. 300; Trustees of Donations v. Street-er, 64 N. H. 106, 5 Atl. 845; Blume v. McClurken, 10 Watts (Pa.) 380; Dungey v. Angove, 2 Ves. Sr. 307; Boulton v. Defries, 2 U. C. Q. B. 432.

The Arkansas statute (Kirby's

And in Massachusetts it has been decided that, though the distinctions between the different forms of action are abolished, since the plaintiff is required to set forth the substantive facts constituting his cause of action, there cannot be a recovery of rent under a sealed lease in an action in terms for use and occupation.¹⁶⁶ In Michigan it is held that, in view of the local statute authorizing assumpsit on contracts under seal, an action for use and occupation may be maintained in the case of such a lease.¹⁶⁷

In one case it is apparently decided that the clause in the statute prohibiting the action in case "the agreement is by deed" does not apply in case the rent is apportioned as to quantity, so that the recovery can be of a portion only of the rent reserved.¹⁶⁸ Such a view has never been suggested in any other case, and the view indicated in the opinion, that the effect of such apportionment is to substitute a parol agreement for that under seal, appears most questionable.

The fact that one holds by reason of an executory agreement under seal for the making of a lease does not, it has been decided, prevent recovery in assumpsit for use and occupation,¹⁶⁹ a view which is apparently justified, unless the instrument itself provides

Dig. St. 1904, § 4700), authorizing the recovery of fair and reasonable compensation by action on the case if lands are occupied without any special agreement for rent, has been held not to authorize such action in case of a demise under seal, since the previous sections, giving a right of action upon agreements "except by deed," would otherwise be rendered nugatory. *Byrd v. Chase*, 10 Ark. 602.

In *Edmunds v. Missouri Elec. L. & P. Co.*, 76 Mo. App. 610, the majority opinion seems to consider that the fact that the instrument is under seal does not make it a "deed" within the statutory provision, this partly for the reason that seals have been abolished in that state, but that whether the instrument is a deed is a question of construction.

It would seem that, after the presence of a seal has become immaterial by reason of the abolition of seals, the provision of the statute as to an agreement "by deed" becomes meaningless and might be disregarded.

¹⁶⁶ *Warren v. Ferdinand*, 91 Mass. (9 Allen) 357; *Smiley v. McLauthlin*, 138 Mass. 363.

¹⁶⁷ *Dalton v. Laudahn*, 30 Mich. 349; *Beecher v. Duffield*, 97 Mich. 423, 56 N. W. 777.

¹⁶⁸ *McCardell v. Miller*, 22 R. I. 96, 46 Atl. 184. It does not clearly appear that the demise was under seal, but presumably it was so, since had it not been under seal the objection would not have been made that the action should be in covenant and not in assumpsit.

¹⁶⁹ *Elliott v. Rogers*, 4 Esp. 59.

for the immediate possession of the intended lessee. Though one originally held under a sealed lease, he is not regarded as so holding if he continues in possession after the term, and for such subsequent period he may be made liable in this form of action.¹⁷⁰

§ 314. Necessity of actual occupancy.

An action for use and occupation does not lie against one who has not entered upon the premises in person or by others.¹⁷¹ Entry by one of several persons jointly entitled will, however, be sufficient to impose liability on all.¹⁷² And in the case of an action against executors in their representative capacity, entry by their testator is equivalent to entry by them.¹⁷³

It has been decided that the cleaning of the premises by an agent of defendant is a sufficient entry to make defendant liable, if this is an act of possession, while it does not have this effect if merely preliminary to further investigation before taking a lease.¹⁷⁴ Likewise, the digging of holes in the soil merely to determine its fitness for mining purposes is not an entry for this purpose,¹⁷⁵ while putting up a "to let" notice,¹⁷⁶ and taking rent from some of the occupants and procuring attornments from others, have each been regarded as imposing liability on a lessee so doing,¹⁷⁷ the entry in the latter case being "constructive," as being made through the subtenants.¹⁷⁸ It has likewise been held that there was a constructive occupation by a lessee when, at the time of taking the lease, he arranged with a tenant under a pre-

¹⁷⁰ *Abeel v. Radcliff*, 13 Johns. (N. Y.) 297, 7 Am. Dec. 377. See ante, 657; *Kendall v. Carland*, 59 Mass. § 306 d; *Carter v. Collar*, 1 Phila. (Pa.) 339 (semble). ¹⁷³ *Atkins v. Humphrey*, 2 C. B.

¹⁷¹ *Lowe v. Ross*, 5 Exch. 553; *Edge v. Strafford*, 1 Crompt. & J. 391; *Tully v. Dunn*, 42 Ala. 262, 94 Am. Dec. 646; *Wood v. Wilcox*, 1 Denio (N. Y.) 37; *Maitland v. Wilcox*, 17 Pa. 231. So it was held that one who promised to pay rent for his parents, who alone were in occupation, was not liable in this form of action. *Tobie v. Smith*, 28 Me. 106. ¹⁷⁴ *Lewis v. Havens*, 40 Conn. 363; *Smith v. Twoart*, 2 Man. & G. 841. ¹⁷⁵ *Jones v. Reynolds*, 7 Car. & P. 335. ¹⁷⁶ *Sullivan v. Jones*, 3 Car. & P. 579. ¹⁷⁷ *Neal v. Swind*, 2 Crompt. & J. 377. ¹⁷⁸ See, also, *Bull v. Sibbs*, 8 Term

¹⁷² *Glen v. Dungey*, 4 Exch. 61; *Elec. Tel. Co. v. Moore*, 2 Fost. & F. R. 327.

vious lease from the same lessor, whose term had not expired, that during the residue of the term such previous lessee should hold under him.¹⁷⁹ The question whether there has been an entry within this requirement is one of fact.¹⁸⁰

If the time of occupation is specified, as when one enters under a lease for a fixed term, he remains liable until the term comes to an end, although he relinquishes possession at a time prior thereto.¹⁸¹ In such cases he "holds" within the meaning of the statute, which imposes liability "for the use and occupation of what was held and enjoyed,"¹⁸² and it has been decided that even an amendment of the statute omitting the word "held" did not alter the rule in this regard.¹⁸³ The original tenant has been regarded as "holding" and so liable under the statute, even though he has assigned his leasehold interest, provided the assignee has not been accepted as tenant by the landlord.¹⁸⁴ But one who enters under a lease does not "hold" under a lease made to him which is to begin after the previous lease, if he relinquishes possession before the commencement of such subsequent lease, and he is consequently not liable in use and occupation after the term of the first lease.¹⁸⁵

¹⁷⁹ McGunnagle v. Thornton, 10 Serg. & R. (Pa.) 251.

¹⁸⁰ Franklin Tel. Co. v. Pewtress, 43 Conn. 167; Bacon v. Parker, 137 Mass. 309. And see cases cited in preceding notes.

It has been held that, to show that one has had the use and occupation of the premises, evidence that he owned the personal property thereon is admissible. P. P. Emory Mfg. Co. v. Rood, 182 Mass. 166, 65 N. E. 58.

¹⁸¹ Westlake v. DeGraw, 25 Wend. (N. Y.) 669; Tully v. Dunn, 42 Ala. 262, 94 Am. Dec. 646; Lockwood v. Lockwood, 22 Conn. 425; McGunnagle v. Thornton, 10 Serg. & R. (Pa.) 251; Bessell v. Landsberg, 7 Q. B. 638; Pinero v. Judson, 6 Bing. 206; Gibson v. Courthope, 1 Dowl. & R. 205; Hughes v. Brooke, 43 U.

C. Q. B. 609. In Carroll v. Finnegan, 1 Cranch, C. C. 234, Fed. Cas. No. 2,453, the contrary opinion is expressed, with some diffidence and no discussion. In Beach v. Gray, 2 Denio (N. Y.) 84, it was held that the lessee was not liable from the time of the making of a lease by the landlord to another, upon the original lessee's relinquishment of possession. There was here, it seems, a surrender by operation of law. See ante, § 190 d.

¹⁸² Walker v. Furbush, 65 Mass. (11 Cush.) 366, 59 Am. Dec. 148.

¹⁸³ Hall v. Western Transp. Co., 34 N. Y. 284; Hoffman v. Delihanty, 13 Abb. Pr. (N. Y.) 388.

¹⁸⁴ Shine v. Dillon, 1 Ir. R. C. L. 277.

¹⁸⁵ Wood v. Wilcox, 1 Denio (N. Y.) 37.

As a tenant for years, although he relinquishes possession, remains liable until the tenancy is properly terminated, so a tenant at will or periodic tenant should, it seems, remain liable until the tenancy is legally terminated by the giving of the required notice to quit, irrespective of whether the tenant retains or relinquishes possession. There are decisions to that effect,¹⁸⁶ while by one decision the relinquishment of possession is regarded as terminating the tenant's liability, no amount of rent having been specified at the time of the demise, though a specific rent was paid and accepted through a series of months.^{187, 188}

The holding or occupation referred to by the statute must be of the same exclusive nature as exists in any other case of a several tenancy, and, consequently, one who merely uses the land occasionally by permission,¹⁸⁹ or one who merely boards with the occupant of the land,¹⁹⁰ or one who is allowed by the owner to occupy jointly with him in consideration of a share in his business,¹⁹¹ is not liable in this form of action. A tenant who left his furniture on the premises with a subsequent tenant was held not to be in possession so as to be subject to liability,¹⁹² and it is difficult to see how, in any case, the mere fact that one has goods on the premises, the exclusive right to the possession of which is in another, can be regarded as making him a tenant of such other, and so liable in use and occupation. It has, however, been decided that where machinery was left on the premises by one who had conveyed the premises to another, and such grantor failed to remove it upon notice from the grantee to do so, he was liable in use and occupation,¹⁹³ a decision which can, it seems, be supported only

¹⁸⁶ *Walker v. Furbush*, 65 Mass. (11 Cush.) 366, 59 Am. Dec. 148; *Currier v. Perley*, 24 N. H. 219; *Bessell v. Landsberg*, 7 Q. B. 638; *Smallwood v. Sheppards* [1895] 2 Q. B. 627.

^{187, 188} *Sanford v. Johnson*, 26 Minn. 314, 4 N. W. 43.

¹⁸⁹ *Hogsett v. Ellis*, 17 Mich. 351.

¹⁹⁰ *Theological Inst. v. Barbour*, 70 Mass. (4 Gray) 329. So it was held that one who lives with the lessee of land as a member of his

family is not liable as "occupant" under a state statute providing that the occupant, without special contract, of any land, shall be liable for rent. *Tinder v. Davis*, 88 Ind. 99.

¹⁹¹ *Carver v. Palmer*, 33 Mich. 342.

¹⁹² *Lore v. Pierson*, 10 Daly (N. Y.) 272. See *Beeston v. Yale*, 75 App. Div. 388, 78 N. Y. Supp. 158, ante,

note 96. And compare ante, § 207, notes 14, 15; § 209 c, note 38.

¹⁹³ *Grove v. Barclay*, 106 Pa. 155.

on the theory that such failure to remove the machinery was evidence of a demise to the grantor.

§ 315. Rent reserved in kind.

It has, in Canada, been decided that there is no right of action for use and occupation when, by the terms of the lease, the rent is to be paid in produce, since this negatives any contract to pay in money.¹⁹⁴ A statute authorizing one to whom rent is due, where the demise is not by deed, or where the deed does not specify the amount of rent, to recover a reasonable satisfaction for the tenement, has been decided not to authorize a recovery in this form of action when there is an agreement for rent to be paid in specific articles, the value of which does not appear from the agreement.¹⁹⁵ On the other hand, it has been decided in Arkansas that if a tenant, who is to pay rent by making repairs, fails to make them, the owner may consider the contract as "re-scinded," and sue for use and occupation;¹⁹⁶ and in Ohio it is said that a landlord entitled to a certain portion of the crop may recover the market value of such portion under a count for use and occupation.¹⁹⁷

§ 316. Pleading.

The declaration on the common count for use and occupation formerly contained allegations that the defendant was, at a certain date, indebted in a certain sum for the use and occupation of certain premises of the said plaintiff by the said defendant, at his special instance and request, and by the sufferance and permission of plaintiff, and that afterwards in consideration thereof, on said date, the said defendant undertook and faithfully promised to pay said sum of money.¹⁹⁸ It was unnecessary to give a particular description of the premises,¹⁹⁹ or to state the particulars

¹⁹⁴ Wallis v. Harrold, 23 U. C. Q. seq., giving forms taken from the earlier editions of Chitty's Pleading. B. 279.

¹⁹⁵ Oswald v. Gadbold, 20 Ala. 811; Also Archbold's Landl. & Ten. (53 Eastland v. Sparks, 22 Ala. 607. Law Library) 150.

¹⁹⁶ Tate v. McClure, 25 Ark. 168.

¹⁹⁹ Guest v. Caumont, 3 Camp.

¹⁹⁷ Butler v. Baker, 50 Ohio St. 235; Kirtland v. Pounsett, 1 Taunt. 584. 570; Plummer v. Bowle, 76 Me. 496;

¹⁹⁸ See 18 Enc. of Forms, p. 609 et Comyn, Landl. & Ten. 452.

of the demise.²⁰⁰ By the English Common Law Procedure Act of 1852, the form of all the common counts was simplified, and thereunder a count for use and occupation was sufficient if in form for money payable by the defendant to the plaintiff, for the defendant's use and occupation, by the plaintiff's permission, of a certain tenement, or of certain lands, of plaintiff, or for money payable for the use and occupation of a certain tenement hired of the plaintiff by the defendant.²⁰¹

The question of the sufficiency of the pleading in this form of action has but seldom arisen in this country. The declaration or complaint should show that the occupation or holding by defendant was by permission of, or in subordination to, the plaintiff.²⁰² But, under the code system of pleading, it is unnecessary to allege a promise to pay, it has been decided, provided the facts giving rise to the inference of a promise are stated,²⁰³ and it has even been held sufficient to aver that defendant used and occupied premises with the permission of plaintiff's transferor, thereby becoming his tenant and indebted to him for the use and occupation thereof, in such sums as the same was worth, alleged to be a sum named.²⁰⁴⁻²⁰⁶

§ 317. Evidence and presumptions.

There are authorities to the effect that one occupying land belonging to another is to be presumed, for the purpose of supporting an action for use and occupation, to be the tenant of such other;²⁰⁷ while there are occasional decisions to the contrary, that the plaintiff in such action has the burden of showing the relation of tenancy.²⁰⁸

²⁰⁰ *Wilkins v. Wingate*, 6 Term R. 62.

²⁰¹ See 2 Chitty, Pleading (16th Am. Ed.) 184.

²⁰² *Hall v. Southmayd*, 15 Barb. (N. Y.) 32; *Bradley v. Davenport*, 6 Conn. 1; *Hunton v. Powers*, 38 Mo. 353. See ante, § 304.

²⁰³ *Wills v. Wills*, 34 Ind. 106; *Morris v. Niles*, 12 Abb. Pr. (N. Y.) 103.

²⁰⁴⁻²⁰⁶ *Walker v. Mauro*, 18 Mo. 564.

²⁰⁷ *Hellier v. Silcox*, 19 Law J. Q

B. 295, as explained in *Churchward v. Ford*, 2 Hurl. & N. 446; *Oakes v. Oakes*, 16 Ill. 106; *Alexander v. Alexander*, 52 Ill. App. 195; *Lathrop v. Standard Oil Co.*, 83 Ga. 307, 9 S. E. 1041; *Skinner v. Skinner*, 38 Neb. 756, 57 N. W. 534; *Hogsett v. Ellis*, 17 Mich. 351; *Page v. McGlinch*, 63 Me. 472; *Sterrett v. Wright*, 27 Pa. 259.

²⁰⁸ *Preston v. Hawley*, 101 N. Y. 586, 5 N. E. 770; *Alt v. Gray*, 26 Misc. 843, 56 N. Y. Supp. 657; *Marlatt v. Marlatt*, 4 Penny. (Pa.) 91.

Assuming that, in the particular case, the permissive possession necessary to sustain the action exists, the question then arises as to the existence of a promise to pay for the use and occupation. The cases are generally to the effect that there is a presumption in favor of the existence of such a promise,²⁰⁹ and it is in this sense only, it seems, that the promise can be said to be implied by the law. The law implies the promise in the absence of evidence to show a contrary understanding.

That one occupying by another's permission does so under such circumstances as to preclude any inference of a promise to pay compensation therefor may always be shown as a matter of fact.²¹⁰ So the fact that one occupied premises upon the request of the owner that he move thereon in order to look after them has been held to exclude any inference of a promise to pay for the occupation,²¹¹ as was the fact that the defendant had taken possession under a stipulation that he should not be liable for rent till certain conditions were fulfilled, they being yet unfulfilled.²¹²

The fact that the occupant is a near relative of the owner will not, it has been decided, necessarily exclude the inference of a promise to pay for the occupancy, though it no doubt is evidence bearing on the question;²¹³ and it has been decided in one case

²⁰⁹ *Carpenter v. U. S.*, 84 U. S. (17 442, 21 N. E. 114; *Lamb v. Lamb*, Wall.) 489; *Cobb v. Kidd*, 19 Blatchf. 146 N. Y. 317, 41 N. E. 26; *Thompson* 560, 8 Fed. 695; *Chambers v. Ross*, v. Cox, 20 Misc. 421, 45 N. Y. Supp. 25 N. J. Law, 293; *Henwood v.* 1046; *Becker v. Davis*, 87 N. Y. Supp. *Cheeseman*, 3 Serg. & R. (Pa.) 500; 422; *Loague v. City of Memphis*, 75 *Marlatt v. Marlatt*, 4 Penny. (Pa.) Tenn. (7 Lea) 67; *Chamberlin v.* 91; *Wilkinson v. Wilkinson*, 62 Mo. Donohue, 44 Vt. 57.

App. 249; *Ackerman v. Lyman*, 20 ²¹¹ *Fleming v. Hughes* (Miss.) 6 Wis. 454; *Wittman v. Milwaukee, L.* So. 842; *Strickland v. Hudson*, 55 S. & W. R. Co., 51 Wis. 89, 8 N. W. Miss. 235; *Middleton's Ex'rs v.* 6; *Chamberlin v. Donahue*, 44 Vt. Middleton, 35 N. J. Eq. (8 Stew.) 57. In *Watson v. Brainard*, 33 Vt. 141.

88, it is said that when the occupation is by permission, a promise to ²¹² *Toronto Hospital Trustees v.* Heward, 8 U. C. C. P. 84.

pay is inferred from slight circumstances. ²¹³ *Story v. McCormick*, 70 Kan. 323, 78 Pac. 819; *Sterrett v. Wright*, 27 Pa. 259; *Appeal of Spackman*, 4 Penny. (Pa.) 171; *Oakes v. Oakes*, 16 Ill. 106; *Harlan v. Emery*, 46 Iowa, 538. Compare *Lamb v. Lamb*, 146 N. Y. 317, 41 N. E. 26.

H. 124; *Collyer v. Collyer*, 113 N. Y.

that, in view of the modern statutes placing the husband and wife, as regards their property rights, in the position of strangers to each other, a husband who lives apart from his wife and is in exclusive possession of the wife's land, with her knowledge, is presumed to be her tenant and liable to her for compensation for his occupancy.²¹⁴

The fact that one who enters on land without permission from another expressly refuses to hold under such other or to pay any rent to him for the land, precludes any liability on his part,²¹⁵ and so it was held that in the case of an attaching officer, who expressly refuses to assume responsibility for rent, though he leaves the goods on the premises, a promise on his part cannot be inferred.²¹⁶

There are decisions to the effect that if the owner tells another that he can occupy the land at a certain rent, and thereafter the latter enters and occupies, he is to be regarded as having accepted the terms proposed and as liable accordingly,²¹⁷ even though he expressly objects to such terms.²¹⁸

As before stated,²¹⁹ plaintiff's lack of title is no defense to an action for use and occupation, and any statement to the contrary seems due to misapprehension.²²⁰ The only respect in which title

²¹⁴ *Skinner v. Skinner*, 38 Neb. 756, 57 N. W. 534.

²¹⁵ See *Keyes v. Hill*, 30 Vt. 759.

²¹⁶ *Cook v. Medbury*, 150 Mass. 499, 23 N. E. 225.

²¹⁷ *Dickson v. Moffatt*, 5 Colo. 114; *Coit v. Planer*, 4 Abb. Pr. (N. S.) 140; *Id.*, 30 N. Y. Super. Ct. (7 Rob.) 413.

²¹⁸ *Thompson v. Sanborn*, 52 Mich. 141, 17 N. W. 730. But a different decision was rendered when defendant had refused the terms proposed and entered under a lease from another. *Hennessy v. Hoag*, 16 Colo. 460, 27 Pac. 1061.

²¹⁹ See ante, § 78 c (4).

²²⁰ In *Preston v. Hawley*, 101 N. Y. 586, 5 N. E. 770, it is said to be necessary to prove not only that the title to the premises is in plaintiff,

but that the conventional relation of landlord and tenant exists. The cases cited in support of this statement do not assert the necessity of showing title. In *Churchward v. Ford*, 2 Hurl. & N. 446, *Bramwell, B.*, says that "in *Standen v. Christmas*, 10 Q. B. 135, Lord Denman appears to have been mistaken in supposing that the statute (of 11 Geo. 2, c. 19) gave a right of action to the owner of the land. The word 'landlord' does not mean the lord of the soil, but the person between whom and the tenant the relation of landlord and tenant exists." In the statement in *Douglass v. Geiler*, 32 Kan. 499, 4 Pac. 1039, that there can be no recovery for use and occupation without proof of title, the phrase "use and occupation" is used, it

can be material in such an action would seem to be in connection with the doctrine before referred to,²²¹ that one occupying another's land is presumed, for the purpose of this action, to be in as tenant, it resulting that, if plaintiff seeks to recover without direct proof of the relation of tenancy, he must prove his title, that is, his right to the possession of the land except as against defendant.

§ 318. Amount of recovery.

a. **When no rent reserved.** The plaintiff must, it appears, in the absence of a contract for a specific rent, give some evidence of the value of the use and occupation.²²² In case there is no express agreement as to rent, the *quantum* of recovery is the reasonable value of the occupation which has actually been enjoyed,²²³ or, as it has been otherwise expressed, the rental value of the land,²²⁴ and this rule was applied when the parties thought they had agreed on the rent, but they had not done so.²²⁵ In case of an occupancy for part of the year only, the recovery is of the value of the occupation for that time, and not a *pro tanto* part of the yearly value.²²⁶

The value of the occupancy of a house built on the premises by the tenant during his occupancy cannot, it has been decided, be included in the recovery,²²⁷ and if a demise expressed to be of particular land is not proven the recovery can be only for that actually occupied.²²⁸

The purpose for which the property is used is, it is said, to be considered,²²⁹ but if the premises are adapted for a particular use the tenant must, it has been decided, be held liable with reference to that use, though he utilizes them in such a way as to make them

seems, as equivalent to "*mesne profits*."

²²¹ See ante, at note 207.

²²² Ambrose v. Hyde, 145 Cal. 555, 79 Pac. 64.

²²³ Town of Thetford v. Tyler, 8 Q. B. 95; Newell v. Sanford, 13 Iowa, 191.

²²⁴ Robbins v. Voss (Tex. Civ. App.) 64 S. W. 313; Blackman v. Kessler, 110 Iowa, 140, 81 N. W. 185.

²²⁵ Scrantom v. Booth, 29 Barb. (N. Y.) 171.

²²⁶ Hanes v. Worthington, 14 Ind 320.

²²⁷ Newell v. Sanford, 13 Iowa, 191.

²²⁸ Missouri Pac. R. Co. v. Atchison, 43 Kan. 529, 23 Pac. 610; Steele v. Thayer, 36 Minn. 174, 30 N. W. 758.

²²⁹ Lindt v. Linder, 117 Iowa, 110, 90 N. W. 596.

less valuable.²³⁰ The fact that the premises are particularly valuable to him, and that, if not occupied by him, they would have been vacant, has been regarded as immaterial.²³¹ The rent of the premises in previous years may be considered,²³² but not the selling value of the premises.²³³

The question seems not to have been discussed whether one who, under a demise of particular land, which fails, however, to name any rent, enters on and occupies a part only of such land, is liable for the reasonable value of the occupation of the whole land. Presumably he would be so liable, on the theory that his entry on part is to be regarded as constructively an entry on all.

Interference by the landlord with the tenant's enjoyment, even if it does not amount to an eviction, may be considered in determining the value of the beneficial enjoyment, it has been decided.²³⁴

b. When specific rent reserved. The language of the English statute 11 Geo. 2, c. 19, § 14, as well as that of the American statutes based thereon, expressly makes the demise or agreement, if not under seal, evidence bearing on the amount of the recovery.^{234a} This provision of the statute has been regarded as making the demise conclusive in this regard,^{234b} and this seems

²³⁰ Lindt v. Linder, 117 Iowa, 110, 90 N. W. 596.

²³¹ Newberg v. Cowan, 62 Miss. 570.

²³² Fogg v. Hill, 21 Me. 529.

²³³ Cahoon v. Kineon, 46 Ohio St. 590.

²³⁴ Boston & W. R. Corp. v. Ripley, 95 Mass. (13 Allen) 421.

^{234a} That the express contract or demise may be admitted as evidence in this regard, see Warne v. Prentiss, 9 Mo. 544; Kline v. Jacobs, 68 Pa. 57; Burnham v. Best, 49 Ky. (10 B. Mon.) 227; Stockett v. Watkins, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438; Sargent v. Ashe, 23 Me. 201; Perrine v. Hankinson, 11 N. J. Law (6 Halst.) 181; Goshorn v. Steward, 15 W. Va. 657. But in Shiner v. Abbey, 77 Tex. 1, 13 S. W. 613, it is

decided that where the pleading states an implied contract, no evidence of an express contract is admissible, and there is an intimation to that effect in Maurer v. Grimm, 84 App. Div. 575, 82 N. Y. Supp. 760.

^{234b} King v. Woodruff, 23 Conn. 56, 60 Am. Dec. 625; North v. Nichols, 37 Conn. 375; Holmes v. Stockton, 26 N. J. Law (2 Dutch.) 93; Goshorn v. Steward, 15 W. Va. 657; Gretton v. Mees, 7 Ch. Div. 839 (semble). There is a *dictum contra* in Cleves v. Willoughby, 7 Hill (N. Y.) 83; and in Hermann v. Curiel, 3 App. Div. 511, 38 N. Y. Supp. 343, it was decided that one entering into part only of the premises leased was not liable for the whole amount of the rent reserved, but only for the value of the use of that part, the oth-

to be the meaning of the statement occasionally found that, in case there is an express contract, no other can be implied.²³⁵ It seems reasonable that the compensation recoverable for the holding and occupation of the premises under an express demise should not be allowed to vary as the landlord may elect to sue for rent under the express agreement or reservation, or for the value of the use and occupation.

In accordance with this view, that the recovery in use and occupation must be the same as if the action were brought upon the reservation of, or covenant to pay, rent, are decisions that circumstances suspending or terminating the liability for rent as such have the effect of preventing or restricting the recovery in an action for use and occupation. Thus, it has been decided that where the tenant has surrendered his term between rent days, the rent not being apportionable, the landlord cannot, in an action of use and occupation, any more than in debt or covenant, recover compensation for the unexpired period,²³⁶ and that if the lessor terminates the tenancy during a rent period, under a power reserved in the lease, he cannot recover in use and occupation for the previous portion of that period,²³⁷ and there are decisions in other connections that the landlord cannot, by adopting this form of action, recover the equivalent of an apportioned part of the rent,²³⁸ There are indeed *dicta* to the effect that, in case of an eviction by title paramount, there can be a recovery in this form of action for occupation since the last rent day,²³⁹ but these have been questioned,²⁴⁰ and there is a decision directly to the contrary;²⁴¹ and since there cannot be a recovery of an

er part being accessible only by a separate entrance. 35 Am. Dec. 600. And so in case of the landlord's termination of a tenancy at will during a rent period.

²³⁵ Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 234; North v. Nichols, 37 Conn. 375; Grimman v. Legge, 8 Barn. & C. 324; Stockett v. Watkins, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438.

²³⁶ Grimman v. Legge, 8 Barn. & C. 324; Hall v. Burgess, 5 Barn. & C. 332. ²³⁷ Nicholson v. Munigle, 88 Mass. (6 Allen) 215, disapproving *dictum* in Zule v. Zule, 24 Wend. (N. Y.) 76, 422, 19 Atl. 910, 8 L. R. A. 568.

²³⁸ Collett v. Curling, 10 Q. B. 785; Stanley v. Turner, 68 Vt. 315, 35 Atl. 321.

²³⁹ Fitchburg Cotton Mfg. Corp. v. Melven, 15 Mass. 268; Wheeler v. Shed, 1 D. Chip. (Vt.) 208.

²⁴⁰ Nicholson v. Munigle, 88 Mass. (6 Allen) 215.

²⁴¹ Anderson v. Robbins, 82 Me.

apportioned part of the rent *qua* rent,²⁴² it seems difficult to sustain the recovery of compensation for occupation equivalent to such apportioned rent.

As, by suing in use and occupation, the landlord cannot obtain in effect an apportionment of rent to which he would not be entitled if suing for rent itself, so, it is submitted, he cannot, by adopting that form of action, obtain a reduction of the rent merely because the premises are not so desirable as anticipated. There are indeed decisions in England to the effect that it is a good defense, in an action for use and occupation against one holding under a parol demise, that he has had no beneficial occupation owing to the condition of the premises as regards repairs, or to the presence of a nuisance thereon,²⁴³ but these decisions have been overruled.²⁴⁴ In one state in this country these decisions have been referred to without disapproval,²⁴⁵ and in another their doctrine has apparently been adopted,²⁴⁶ but generally, it is believed, the courts will not permit the tenant, by choosing this form of action, thus in effect to impose obligations on the landlord, which do not otherwise exist, as to the condition of the premises.²⁴⁷ In accordance with this view are the cases in which, though the action was for use and occupation, the right of recovery was regarded as unaffected by the previous destruction of the buildings on the premises,²⁴⁸ though the decisions would

²⁴² See ante, § 182 e (2) (a), notes 874-878.

²⁴³ Edwards v. Etherington, Ryan & M. 268; Cowie v. Goodwin, 9 Car. & P. 378; Collins v. Barrow, 1 Moody & R. 112; Salisbury v. Marshal, 4 Car. & P. 65.

²⁴⁴ Sutton v. Temple, 12 Mees. & W. 52; Hart v. Windsor, 12 Mees. & W. 68; Manchester Bonded Warehouse Co. v. Carr, 5 C. P. Div. 507. See ante, § 86 a. In these cases the earlier decisions, cited in the preceding note, are regarded as laying down a general rule as to the landlord's obligation as to the condition of the premises, and the question whether the action is for use and occupation or for rent seems to be regarded as immaterial.

²⁴⁵ Gilhooley v. Washington, 4 N. Y. (4 Comst.) 217.

²⁴⁶ Kline v. Jacobs, 68 Pa. 57, which latter case cites 3 Stephen's Nisi Prius 2722, which is based on the English decisions above referred to.

²⁴⁷ In Potter v. Truitt, 3 Har. (Del.) 331, the fact that the landlord had failed to comply with his covenant to repair, and so rendered the occupancy less beneficial, was regarded as a factor in determining the amount of recovery.

²⁴⁸ Izon v. Gorton, 5 Bing. N. C. 501; Baker v. Holtzaffell, 4 Taunt. 45. In Holmes v. Stockton, 26 N. J. Law, 93, it was decided that the recovery was not to be diminished because buildings on the adjoining

presumably have been different had there been no express provision as to rent.

In the case of an eviction by title paramount from part of the premises, as the tenant is, in an action for rent, entitled to an apportionment as to quantity,²⁴⁹ so, in an action for use and occupation, he is liable for the reasonable value of that part of the premises only which he has enjoyed without interruption.²⁵⁰ If the partial eviction is by the landlord, he cannot recover in use and occupation for the part retained by the tenant,²⁵¹ as he cannot do so in an action for rent.²⁵²

The fact that the demise is invalid under the Statute of Frauds does not affect its admissibility for the purpose of fixing the value of the occupation,²⁵³ it being recognized that if the parties under-

land made the premises less desirable than at the time of the lease.

In *Smith v. Eldridge*, 15 C. B. 236, the tenants were held liable for use and occupation, though the lessor had not made repairs as agreed, and though the making of such repairs was expressly made precedent to the recovery of rent. The opinion says that "if the defendants did not enter under the agreement, there was evidence whence it might be inferred that they, by their tenant B, entered under an implied agreement to pay so much as the occupation was reasonably worth." The statement of facts says that the defendants, by their tenant B, took possession "under the agreement." If the decision means that if one takes possession under a lease which reserves rent to be paid only after the making of repairs by the lessor, he is liable for use and occupation even before such repairs are made, it seems to be opposed to the cases above cited (*ante*, note 234 b) as to the conclusiveness of the express contract as to rent.

²⁴⁹ See *ante*, § 182 e (2) (b).

²⁵⁰ *Tomlinson v. Day*, 2 Brod. &

B. 680, 5 Moore, 558, as explained in *Neale v. McKenzie*, 1 Mees. & W. 747; *McFadin v. Rippey*, 8 Mo. 738. And a total eviction excludes all further liability. *Welch v. Adams*, 42 Mass. (1 Metc.) 494.

²⁵¹ *Christopher v. Austin*, 11 N. Y. (1 Kern.) 216. Compare *Lawrence v. French*, 25 Wend. (N. Y.) 443, 7 Hill, 519.

²⁵² See *ante*, § 182 e (1) (b).

²⁵³ *Zachry v. Nolan*, 14 C. C. A. 253, 66 Fed. 467; *Crawford v. Jones*, 54 Ala. 459; *Walker v. Shackelford*, 49 Ark. 503, 5 S. W. 887, 4 Am. St. Rep. 61; *King v. Woodruff*, 23 Conn. 56, 60 Am. Dec. 625; *Evans v. Winona Lumber Co.*, 30 Minn. 515, 16 N. W. 404; *Nash v. Berkmeir*, 83 Ind. 536; *Barlow v. Wainwright*, 22 Vt. 88, 52 Am. Dec. 79; *Calvert v. Simpson*, 24 Ky. (1 J. J. Marsh.) 547; *Herrmann v. Curiel*, 3 App. Div. 511, 38 N. Y. Supp. 343; *Hellams v. Patton*, 44 S. C. 454; *De Medina v. Polson*, Holt, N. P. 47; *Vanderbilt v. Perse*, 3 E. D. Smith (N. Y.) 428; *Porter v. Bleiler*, 17 Barb. (N. Y.) 149. *Contra*, *Ragsdale v. Lander*, 80 Ky. 61, 44 Am. Rep. 463.

take to proceed as landlord and tenant under such a demise, they are bound by the stipulations thereof.²⁵⁴ So when the lease was insufficient for other reasons connected with its form or execution, the lessee occupying thereunder has been held to be liable at the agreed rate,²⁵⁵ but a different view has been taken when the lease was absolutely void because made on Sunday.²⁵⁶

When a tenant holding over his term is sued for the use and occupation during the period of such holding over, the original lease has been regarded as admissible upon the question of the value of the use and occupation, though not regarded, it seems, as conclusive in that regard.²⁵⁷

§ 319. Debt for use and occupation.

Even before the passage of the statute 11 Geo. 2, c. 19, an action of debt for use and occupation, as distinguished from assumpsit for use and occupation, would lie,²⁵⁸ though this does not appear to have been clearly or generally understood until after this statute. In this action, as in assumpsit, it is not necessary in the declaration to describe the premises or the particulars of the demise, it being sufficient to state that the defendant is indebted to plaintiff for the use and occupation of certain premises of the

²⁵⁴ See ante, § 25 g (2).

²⁵⁵ It was so held where the description of the premises was insufficient (*Appleton v. O'Donnell*, 173 Mass. 398, 53 N. E. 882), and where the lease was invalid because not recorded (*Anderson v. Critcher*, 11 Gill & J. [Md.] 450, 37 Am. Dec. 72). In *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131, it was held that a corporate lessee which failed properly to execute the lease, having taken possession, was liable in use and occupation, but it was not said whether the rent named in the lease was the measure of recovery.

²⁵⁶ *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787; *Ainsworth v. Williams*, 111 Wis. 17, 86 N. W. 551.

²⁵⁷ See ante, at notes 93, 94.

In *Conger v. Ensler*, 85 App. Div. 564, 83 N. Y. Supp. 419, the lease provided for a renewal, or, at the option of the landlord, payment by him for the tenant's improvements at a valuation to be fixed by arbitration. The parties having chosen arbitrators, the tenant refused to permit the one chosen by him to proceed, and it was held that, from the end of the term until such refusal, the tenant was liable at the rate fixed by the lease, and thereafter at the reasonable value of the occupation.

²⁵⁸ *Gibson v. Kirk*, 1 Q. B. 850; *King v. Fraser*, 6 East, 348; *Armstrong v. Clark*, 17 Ohio, 495.

plaintiff at the request of the defendant, by him occupied for a long time,²⁵⁹ and it is unnecessary to allege the character in which plaintiff sues, whether as assignee of the reversion or otherwise.²⁶⁰ Debt for use and occupation, it has been held, will lie even though there is a demise under seal.²⁶¹

²⁵⁹ See *Wilkins v. Wingate*, 6 Term R. 62; *King v. Fraser*, 6 East, 495.

348; *Walker v. Mauro*, 18 Mo. 564; ²⁶¹ *Fuller v. Ruby*, 76 Mass. (10 Gray v. Johnson, 14 N. H. 414; Gray) 285.

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CHAPTER XXXI.

LIENS IN FAVOR OF THE LANDLORD.

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§ 320. Apart from statute or agreement.

By the word "lien," as we use it in this chapter, is meant a right, as regards particular property, to obtain satisfaction of a claim by the forced sale of such property, which may be asserted, subject to prescribed limitations, even as against third persons obtaining interests in the property after the inception of the lien. Such a lien is to be distinguished from the common-law possessory

lien, which rests on possession and does not give any right of sale to the lienor.

Adopting the above definition of a lien, it is clear that at common law the landlord had, apart from agreement, and before distress, no lien upon chattels belonging to the tenant to secure the payment of his rent or the performance of other obligations imposed by the instrument of lease.¹ He had a right to seize, by way of distress, the chattels upon the demised premises, and eventually he was given by the statute 2 W. & M. Sess. 1, c. 5, § 2, the right to sell the chattels so seized, in order to satisfy his claim for rent,² but the right of distress, even after this statute, did not give him a lien on the chattels. He had no interest in them, which he could assert as against third persons, or even as against the tenant, after their removal from the premises,³ until he had taken them into possession for nonpayment of rent. After he had done so, he had a right analogous to a lien, as having the right to retain them until the rent was paid, or, after the passage of the statute above referred to, to sell them and satisfy his claim from the proceeds.

Occasionally the right of distress itself has been characterized as a lien, this having reference apparently to the priority obtainable by distress as regards the property subject thereto⁴ It is perhaps by reason of such language that the view was at one

¹ Sutton v. Rees, 9 Jur. (N. S.) 347; Stamps v. Gilman, 43 Miss. 456, 456; Morgan v. Campbell, 89 U. S. 5 Am. Rep. 498; Richardson v. Mc-(22 Wall.) 381, 22 Law. Ed. 796; Laurin, 69 Miss. 70, 12 So. 264; Snell Leopold v. Godfrey, 11 Biss. 158, 50 Fed. 145; Hitchcock v. Hassett, 71 729 (semble); Howland v. Forlaw, Cal. 331, 12 Pac. 228; Patterson v. 108 N. C. 567, 13 S. E. 173; Wetherill v. Gallagher, 217 Pa. 635, 66 Taylor, 15 Fla. 336; Johnson v. Emanuel, 50 Ga. 590; Hobbs v. Davis, Atl. 849; Loomis v. Lincoln, 24 Vt. 50 Ga. 213; Herron v. Gill, 112 Ill. 153, 58 Am. Dec. 156. That the landlord has a right to distrain goods belonging to a third person on the premises gives him no lien thereon, and such person may remove his property on the tenant's bankruptcy. Wetherill v. Gallagher, 217 Pa. 635, 149, 69 Am. Dec. 129; Gelston v. 66 Atl. 849.

² See post, § 325.

³ See post, § 328 m (1).

⁴ Williams v. Leper, 3 Burrow,

time apparently adopted in one state that a landlord has a lien for his rent apart from statute or agreement, even prior to distress.⁵ In two states a statutory provision gives the landlord a lien upon the tenant's property, to date from the time of distress,⁶ a character of provision which presumably adds nothing to the effectiveness of a distress.

Occasionally the right of the landlord to re-enter for nonpayment of rent has been referred to as a lien.⁷ In Pennsylvania it appears that, not only is the landlord, by reason of his right of re-entry for nonpayment of the rent, regarded as having a lien on the land, but it attaches to the proceeds of the sale of the land, whether at the instance of the landlord or of a third person, in preference to other liens subsequent to the date of the lease.⁸

In New York it has been decided that "rents" paid by under-tenants, that is, sums paid by them on account of rent, if they come into the hands of a receiver of the tenant in chief, cannot be distributed among the latter's creditors until the rent under the head lease has been paid, provided, at least, the head landlord has the right of re-entry for nonpayment of rent.⁹ It was also there decided that, on the sale of a leasehold interest under foreclosure, the sheriff was properly directed to pay the rent due the landlord out of the proceeds of sale, it being said that the

1886; *Ex parte Grove*, 1 Atk. 104; *Buckley v. Taylor*, 2 Term R. 600. classed as a "lien" in *Salmond, Jurisprudence*, p. 525.

The right of distress is so referred to in *Salmond, Jurisprudence* (at p. 146, 4 Am. Dec. 430; *Ter-Hoven v. Kerns*, 2 Pa. 96; *In re Dougherty's Estate*, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; *Pancoast's Appeal*, 8 Watts & S. (Pa.) 381; *Powell v. Whitaker*, 88 Pa. 445; *Foulke v. Millard*, 108 Pa. 230; *Wood's Appeal*, 30 Pa. 274; *Spangler's Appeal*, 30 Pa. 277, note. See 3 Am. Law Reg. at p. 72. And compare *Miners' Bank v. Heilner*, 47 Pa. 452, opinion of Woodward, C. J.

⁵ *O'Hara v. Jones*, 46 Ill. 288; *Eames v. Mayo*, 6 Ill. App. (6 Bradw.) 334.

⁶ See *Florida Gen. St.* 1906, § 2237; *Georgia Code* 1895, § 2795.

⁷ *Stephenson v. Haines*, 16 Ohio St. 478; *Wills v. Gibson*, 7 Pa. 154. The landlord's right of re-entry is

⁸ *Riggs v. Whitney*, 15 Abb. Pr. (N. Y.) 388. See *Stillman v. Van Beuren*, 100 N. Y. 439, 3 N. E. 671, 53 Am. Rep. 206.

“practical operation” of the purchaser’s liability to be turned out if the rents are not paid “is that of a lien.”¹⁰

In the administration of the bankrupt law the federal courts have occasionally gone a considerable distance in asserting the existence of a lien for rent. In this country the tenant’s bankruptcy terminates the right to distrain on his goods,¹¹ but the courts have been unwilling that the landlord should thus, by the accident of the tenant’s bankruptcy, lose the possibility of establishing the priority of his claim for rent. That is, the right of distress has been regarded as a lien within the intent and meaning of the bankrupt act, and the landlord has been allowed a priority over the general creditors to the extent of the goods subject to his right of distress.¹² In those states in which the statute 8 Anne, c. 14, § 1, or a counterpart thereof, is in force,¹³ the preference of the landlord has been based, more satisfactorily, it would seem, so far as principle is concerned, on the theory that the taking of the tenant’s effects into the jurisdiction of the court is within the equity of the statute¹⁴ or constitutes an equitable execution.¹⁵ In one state the landlord has been regarded as having a *quasi* lien on the goods subject to distress, for the purpose of entitling him to prior payment out of the proceeds of the sale of such goods under attachment.^{15a}

The right which the landlord has, under the statute 8 Anne, c. 14, § 1, or a similar state statute, to demand that the sheriff, upon levying under an execution upon goods liable to distress, pay to him the equivalent of twelve months’ rent,¹⁶ though some-

¹⁰ Catlin v. Grissler, 57 N. Y. 363.

See Robinson v. Ryan, 25 N. Y. 320.

¹¹ See post, § 328 f, at note 319.

¹² Austin v. O'Reilly, 2 Woods, 670, Fed. Cas. No. 665; In re Trim, 2 Hughes, 355, Fed. Cas. No. 14,174; In re Mitchell, 116 Fed. 87. See In re Wynne, Chase, 227, Fed. Cas. No. 18,117. Compare Buckey v. Snouffer, 10 Md. 149, 69 Am. Dec. 129, where it was decided that if the tenant was declared insolvent under the state law, the landlord had no prior right as to the assets of the estate, by reason of the pre-existing right of distress.

¹³ See post, at note 16.

¹⁴ Longstreth v. Pennock, 87 U. S. (20 Wall.) 575, 22 Law. Ed. 451.

¹⁵ In re Trim, 2 Hughes, 355, Fed. Cas. No. 14,174; In re Appold, 25 Leg. Int. (Pa.) 180, Fed. Cas. No. 499; In re Hoover, 113 Fed. 136; In re McConnell, 31 Leg. Int. (Pa.) 61, Fed. Cas. No. 8,712. See In re West Side Paper Co., 159 Fed. 241.

^{15a} Thomason v. Baltimore & S. Steam Co., 33 Md. 312. No reference is made to the case of Buckey v. Snouffer, 10 Md. 149, 69 Am. Dec. 129. Ante, note 12.

¹⁶ See ante, § 183.

times referred to as a lien, is not, it seems, appropriately so termed. These statutes, as they have been construed, give the landlord no right to proceed against the goods or to compel their application to the satisfaction of his claim, but ordinarily give him merely a right of recovery in damages against the sheriff or other officer in case he removes the goods without the payment of one year's rent. Furthermore, the existence of these statutes in no way affects the power of the tenant, or of the officer selling under execution, to transfer an unincumbered title to the goods on the premises.¹⁷ The Delaware statute, however, giving the landlord a right to be first paid a year's rent out of the sale of goods seized by virtue of any process of execution, attachment, or sequestration, has apparently been regarded as giving the landlord a lien for such amount of rent, which takes priority of a mortgage on the chattels given before the commencement of the tenancy,¹⁸ a view which would seem to render a mortgage on chattels, not accompanied by possession, a somewhat unreliable form of security, by reason of the possibility of their removal to leased premises.

In Virginia and West Virginia there are statutes, to some extent apparently, based on the statute of Anne, but much more extensive in their operation.¹⁹ They provide that if, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage, or otherwise, upon the interest or property, in goods on premises leased or rented, of any person liable for the rent, the party having such lien may remove said goods on the following terms, and not otherwise, that is to say, "on the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being altogether more than a year's rent in any case," and then provide that if the goods are taken under legal process, the officer shall pay the rent from the proceeds of sale or secure the payment thereof. These statutes have been referred to as creating a lien in favor of the landlord.²⁰

¹⁷ See *Stamps v. Gilman*, 43 Miss. 456, 5 Am. Rep. 498; *Buckey v. Snouffer*, 10 Md. 149, 69 Am. Dec. 129.

¹⁸ *Ford v. Clewell*, 9 Houst. (Del.) 179, 31 Atl. 715.

¹⁹ *Virginia Code* 1904, § 2792; *West Virginia Code* 1906, § 3405.

²⁰ *Wades v. Figgatt*, 75 Va. 575; *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998; *In re McIntire*, 142 Fed. 593; *In re Wynne*, Chase, 227,

They are not, however, very explicit as to the character of the rights intended to be vested in the landlord, and might perhaps, like the statute of Anne, have been construed as merely giving him a right of personal recourse against the person violating them. They do not appear to give the landlord protection as against purchasers from the tenant or as against lienors or others who obtain an interest in the goods, or levy thereon, after their removal from the premises.²¹

§ 321. Statutory liens.

a. **Creation and existence of the tenancy.** In quite a number of the states there are statutes subjecting chattels or crops upon the demised premises to a lien in favor of the landlord, usually for rent, and also occasionally for advances made by the landlord to the tenant, or for supplies furnished by him.

A statute giving a landlord a lien does not, it is clear, give a lien when the relation of landlord and tenant is nonexistent, and there are a number of decisions or *dicta* to that effect.²² So it has been decided that a vendor, not being the landlord of the purchaser put into possession,²³ is not entitled to a lien on the latter's property,²⁴ though the right to a lien has been regarded as arising upon the subsequent creation of the relation of tenancy,²⁵ even when this is by force of a provision in the original

Fed. Cas. No. 18,117. As to the priority of a deed of trust made previous to a tenancy created by holding over, see *City of Richmond v. Duesberry*, 27 Grat. (Va.) 210.

²¹ See *Geiger's Adm'r v. Harman's Ex'r*, 3 Grat. (Va.) 130.

²² *Smith v. Maberry*, 61 Ark. 515, 33 S. W. 1068; *Tucker v. Adams*, 52 Ala. 254; *Kennon v. Wright*, 70 Ala. 434; *Drakford v. Turk*, 75 Ala. 339; *Saterfield v. Moore*, 110 Ga. 514, 35 S. E. 638; *Eve v. Crowder*, 59 Ga. 799; *Watkins v. Duvall*, 69 Miss. 364, 13 So. 727; *Jamison v. Acker* (Miss.) 14 So. 691.

²³ As to this see ante, § 43 a.

²⁴ *Tucker v. Adams*, 52 Ala. 254;

Collins v. Whigham, 58 Ala. 438, 29 Am. Rep. 762. It was so decided when the purchaser had previously held under a lease. *Des Moines Nat. Bank v. Council Bluffs Sav. Bank* (C. C. A.) 150 Fed. 301. In *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924, 22 L. R. A. 598, it was decided that although a vendee may for some purposes be a tenant at will, he is not a lessee within the statute vesting the title to the crop in the landlord, this applying only where "lands shall be rented or leased by agreement, written or oral, for agricultural purposes, or shall be cultivated by a cropper."

²⁵ *Hadden's Ex'rs v. Powell*, 17 Ala.

contract of sale.²⁶ It has been decided that the right of a lessor to a lien is not affected by the fact that the lease provides that, after rent to a specified amount has been paid, the lessor shall convey the land to the lessee.²⁷ The owner of land is not entitled under such a statute to a lien for advances furnished to a mere "cropper,"²⁸ or to a subtenant, with whom he is not in privity.²⁹ The fact that the landlord is himself the tenant of another, so that his tenant is a subtenant as regards the latter, does not affect the right of such mesne landlord to the lien.³⁰

The form of a lease by which the relation of tenancy is created would seem to be entirely immaterial. Thus, the lease may be oral,³¹ and it has been decided that the fact that the lease is in terms for a period greater than that for which the statute allows an oral lease does not exclude the lien, the lessee having taken possession of the premises,³² although in another jurisdiction a different view is apparently asserted.³³ Even in this latter jurisdiction the landlord has been regarded as entitled to a lien for rent which, in accordance with the presumption that a tenant holding over by permission holds on the terms of the lease, accrued during such a holding over.³⁴

The fact that another relation also exists between the land-

314; *Smith v. Fouche*, 55 Ga. 120; *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924, 22 L. R. A. 598. The lien of the sublessor cannot be defeated by a showing that the original lease to him was open to attack as having been made by a guardian for an inadequate rent.

²⁶ *Collins v. Whigham*, 58 Ala. 438, 29 Am. Rep. 762; *Quettermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1096. *Perry v. Perry*, 127 N. C. 23, 37 S. E. 71.

²⁷ *Crinkley v. Edgerton*, 113 N. C. 444, 18 S. E. 669. ³¹ *Wilson v. State (Ala.)* 39 So. 776; *Scully v. Porter*, 57 Kan. 322, 46 Pac. 313; *Grubbs v. Stephenson*, 117 N. C. 66, 23 S. E. 97.

²⁸ *Fields v. Argo*, 103 Ga. 387, 30 S. E. 29. But an employer might be given a lien by the terms of a particular statute. See *Neal v. Brandon*, 70 Ark. 79, 66 S. W. 200. ³² *Martin v. Blanchett*, 77 Ala. 288; *Nelson v. Webb*, 54 Ala. 436.

²⁹ *Moore v. Faison*, 97 N. C. 322, 2 S. E. 169. ³³ *Hill v. Gilmer (Miss.)* 21 So. 528. There is no discussion of the question, and the two cases cited do not seem to bear upon the point.

³⁰ *Strickland v. Stiles*, 107 Ga. 308, 33 S. E. 85, 45 L. R. A. 204, 73 Am. St. Rep. 122; *Moore v. Faison*, 97 N. C. 322, 2 S. E. 169; *Jarrell v. Daniel*, 114 N. C. 212, 19 S. E. 146, 26 L. R. A. 810, 41 Am. St. Rep. 786. ³⁴ *Love v. Law*, 57 Miss. 596. And see *Abraham v. Nicrosi*, 87 Ala. 173, 6 So. 293.

lord and the tenant has been regarded as immaterial. Thus, if a mortgagee, after default, having the legal title, makes a lease to the mortgagor, he has thereafter a lien under the statute.³⁵ A purchaser at foreclosure sale, making a lease to the mortgagor, has the same rights in this regard as any other lessor,³⁶ and a lien has been recognized in favor of one cotenant of land leasing it to the other.³⁷

b. **The nature and utilization of the premises.** The statute does not ordinarily require, as a condition precedent to the existence of the lien, that the premises shall be of a particular character, or used for a particular purpose.³⁸ When the lien is given on crops alone, however, part at least of the premises must, it is obvious, be used for agricultural purposes. In two states the statute giving a lien on chattels placed on the premises restricts it to the case of a lease of a storehouse, residence, or other building,³⁹ and such a statute has been construed as not giving a lien on improvements erected by the lessee on vacant land.⁴⁰ A statute providing that claims for rent shall be a lien on agricultural products and all other property "used" on the premises has been construed as not confined to agricultural lands,⁴¹ and the same view has been taken of a statute similarly expressed as to other property "usually kept" on the premises.⁴²

Where the statute gave a lien on property "in the house rented," it was held that each of the various apartments in a

³⁵ *Cooper v. Kimball*, 123 N. C. 120, 31 S. E. 346.

³⁶ *Cooper v. Kimball*, 123 N. C. 120, 31 S. E. 346.

³⁷ *Evans v. English*, 61 Ala. 416; *Grabfelder v. Gazetti* (Tex. Civ. App.) 26 S. W. 436.

³⁸ In North Carolina the statute (Revisal 1905, § 7993) gives a lien on crops when the land is leased for agricultural purposes. The question whether the lien exists for the whole rent when part only of the land is agricultural is apparently dependent on whether the lease of all the land can be regarded as a single

transaction. *Reynolds v. Taylor*, 144 N. C. 165, 56 S. E. 871.

³⁹ *Alabama* Code 1907, § 4747; *Texas* Rev. St. 1895, art. 3251. In Arizona the lien exists upon crops only when grown on a homestead. See *Hoopes v. Brier*, 9 Ariz. 154, 80 Pac. 327.

⁴⁰ *Garrison v. Webb*, 107 Ala. 499, 18 So. 297, 54 Am. St. Rep. 114; *Meyer v. O'Dell*, 18 Tex. Civ. App. 210, 44 S. W. 545; *Allen v. Houston Ice & Brew. Co.*, 44 Tex. Civ. App. 125, 16 Tex. Ct. Rep. 942, 97 S. W. 1063.

⁴¹ *Grant v. Whitwell*, 9 Iowa, 152.

⁴² *Jones v. Fox*, 23 Fla. 454, 2 So. 700.

building, leased to different persons, was a "house" for the purpose of the statute.⁴³

One cannot, it has been decided, enforce the lien for rent when the premises were leased for purposes of prostitution.⁴⁴

c. **Obligations secured**—(1) **Rent**—(a) **Rent payable in kind.** As before stated, the lien is ordinarily given by the statute to secure the payment of rent.⁴⁵ When the statute gives a lien for rent in general terms, it is immaterial whether the rent is payable in cash or in specific articles, as, for instance, a part of the crops.⁴⁶ In one state the statute gives a lien for rent only when it is payable in a part of the crops.⁴⁷

It has been decided that, when the rent is payable in a share of the crops, and, upon the tenant's failure to gather and deliver

⁴³ *Wolcott v. Ashenfelter*, 5 N. M. 442, 23 Pac. 780, 8 L. R. A. 691.

⁴⁴ *Burton v. Dupree*, 19 Tex. Civ. App. 275, 46 S. W. 272.

⁴⁵ *Alabama* Code 1907, §§ 4734, 4747 (on crop for rent "for the current year"); *Arizona* Rev. St. 1901, § 2695 (for rent, whether wholly or in part in money or specific articles); *Arkansas*, Kirby's Dig. St. 1904, § 5032 (on crop of any year "for rent that shall accrue for such year"); *District of Columbia* Code 1901, § 1229; *Florida* Gen. St. 1906, § 2237; *Georgia* Code 1895, § 2795 et seq.; *Illinois*, Hurd's Rev. St. 1905, c. 80, § 31 (for rent, whether payable in whole or in part in money or products of the premises, or labor); *Indiana*, Burn's Ann. St. 1901, § 7105 (for rent, whether payable in part of the crop, in kind, or in cash); *Iowa* Code 1897, § 2992; *Kansas* Gen. St. 1905, § 4074; *Kentucky* St. 1903, § 2317; *Maine* Rev. St. 1903, c. 93, § 44; *Maryland* Code Pub. Gen. Laws 1904, art. 53, § 22 (crop rent); *Mississippi* Code 1906, § 2832; *Missouri* Rev. St. 1899, § 4115 (on crop of any year "for rent that shall ac-

crue for such year"); *New Mexico* Comp. Laws 1897, § 2234; *North Carolina* Revisal 1905, § 1993; *South Carolina* Civ. Code 1902, §§ 3057, 3060; *Tennessee*, Shannon's Code 1896, § 5299; *Texas* Rev. St. 1895, arts. 3235, 3251; *Utah* Comp. Laws 1907, § 1407 et seq.; *Washington*, Ball. Ann. Codes & St. § 5957 (on crop of any year "for the rents accrued or accruing for such year, whether the same is paid wholly or in part in money or specific articles of property, or products of the premises, or labor").

⁴⁶ *Secrest v. Stivers*, 35 Iowa, 580; *Kennard v. Harvey*, 80 Ind. 37; *Sharp v. Fields*, 48 Tenn. (1 Heisk.) 571. It is occasionally provided by the statute that the lien exists whether the rent is payable in money or specific articles. See the statutes of Arizona, Illinois, Indiana, Washington. It has been stated that the lien probably exists when the rent consists of labor to be performed. See *Wilkinson v. Ketler*, 59 Ala. 306.

⁴⁷ *Maryland* Code Pub. Gen. Laws 1904, art. 53, § 22.

such share of the crops, as he is under an obligation to do, the landlord does it himself, the labor necessary for this purpose is a part of the rent, and the landlord has a lien for the cost thereof.⁴⁸

(b) **Rent accrued and to accrue.** In some states the statute, in providing for a lien upon the crop of any year, confines it to "rent for the current year" or for "such year."⁴⁹ The effect of such language is to prevent the assertion of a lien upon the crop for the rent of a previous year.⁵⁰ It has been decided, however, that under a statute giving a lien on the crops "growing and grown, for the rent that shall accrue for such year," the landlord has a lien for the rent both of the year in which the crop is planted, and of that in which it matures.⁵¹

When the statute gives a lien for rent in general terms, the lien has ordinarily been held to extend to the whole rent to accrue during the term of the lease.⁵² In one jurisdiction, however, a different view has been taken, and the lien was there held to be effective, in the case of a lease at a rent payable periodically, only for the rent already due, and for that of the current period.⁵³ As before stated, the statute giving a lien on crops frequently restricts the lien to the rent of the current

⁴⁸ *Secrest v. Stivers*, 35 Iowa, 580. And see *Fry v. Ford*, 38 Ark. 246. As to the right to a lien for the landlord's share of what should have been produced, see post, at note 70.

⁴⁹ In Alabama, Arkansas, Missouri, Washington.

⁵⁰ *Ballard v. Johnson*, 114 N. C. 141, 19 S. E. 98; *Prettyman v. Unland*, 77 Ill. 206; *Frink v. Pratt*, 130 Ill. 327, 22 N. E. 819.

⁵¹ *Miles v. James*, 36 Ill. 399.

⁵² *Andrews Mfg. Co. v. Porter*, 112 Ala. 381, 20 So. 475; *Scott v. Renfro*, 106 Ala. 611, 14 So. 556; *Sevier v. Shaw*, 25 Ark. 417; *Union Water Power Co. v. Chabot*, 93 Me. 339, 45 Atl. 30; *Garner v. Cutting*, 32 Iowa, 547; *Gilbert v. Greenbaum*, 56 Iowa, 211, 9 N. W. 182; *Martin v. Stearns*, 52 Iowa, 345, 3 N. W. 92, 35 Am. Rep. 278. So where the statute gave a

lien for "rent due and to become due." *Marsalis v. Pitman*, 68 Tex. 624, 5 S. W. 404; *Ghio v. Shutt*, 78 Tex. 375, 14 S. W. 860, 22 Am. St. Rep. 56.

In *Thorpe v. Fowler*, 57 Iowa, 541, 11 N. W. 3, it was held that an oral lease for one year, "with the privilege of" four years more, could not be regarded as binding the lessee for more than one year, and consequently did not entitle the lessor to a lien for rent for a longer time.

⁵³ *Joyce v. Wilkenning*, 8 D. C. (1 MacArthur) 567; *Harris v. Dammann*, 14 D. C. (3 Mackey) 90. A statute giving a lien for "rents due the landlord" was held to give no lien for rent not due. *Glasgow v. Ridgeley*, 11 Mo. 34, 47 Am. Dec. 139.

year,⁵⁴ and under such a statute there is no lien on the crop of one year for rent to accrue in subsequent years,⁵⁵ though there is for the rent of the current year still to accrue.⁵⁶

In Kentucky the statute⁵⁷ provides that the landlord's lien "shall not be for more than one year's rent, due or to become due, nor for any rent which has been due for more than one hundred and twenty days;" and in Texas⁵⁸ the statute giving a lien to the landlord of a house, residence, or other building,⁵⁹ provides that "the lien for rents to become due shall not continue or be enforced for a longer period than the current contract year, it being intended by the term 'current contract year' to embrace a period of twelve months, reckoning from the beginning of the lease or rental contract, whether the same be in the first or any other year of such lease or rental contract." By this latter language is meant apparently that the term of the lease is to be divided into yearly periods, and the lien on chattels on the premises at any time during one of such periods endures until the end of that period.⁶⁰ In Iowa the statute provides that, in case a stock of merchandise subject to the lien is sold by order of court or at judicial sale, the goods shall be liable only for rent accrued and for that to accrue within six months after the sale.⁶¹

In the case of a periodic tenancy,⁶² the lien can be at most, it seems, for the rent of the period running at the time at which the lien is asserted,^{63,64} or perhaps for such time as the tenancy must necessarily endure before it can be terminated by either party. This latter view would accord with a decision rendered in reference to a tenancy at will, that the lien secures the rent which will accrue during the time necessary to terminate such tenancy by notice.⁶⁵

If, for any reason, such as the eviction of the tenant, particular

⁵⁴ See ante, at note 49.

⁶¹ Iowa Code 1897, § 2992.

⁵⁵ See *Ballard v. Johnson*, 114 N. C. 141, 19 S. E. 98; *Fleming v. Day-enport*, 116 N. C. 153, 21 S. E. 188.

⁶² See ante, § 14.

⁵⁶ *Watt v. Scofield*, 76 Ill. 261.

^{63, 64} *Hempstead R. E., B. & B. Ass'n v. Cochran*, 60 Tex. 620; *Couts v. Spivey*, 66 Tex. 267, 17 S. W. 540; *Brackenridge v. Millan*, 81 Tex. 17, 16 S. W. 555.

⁵⁷ St. 1903, § 2317. See *English v. Duncan*, 77 Ky. (14 Bush) 377.

⁵⁸ Rev. St. 1895, art. 3251.

⁶⁵ *German State Bank v. Herron*,

⁵⁹ See ante, note 39.

⁶⁰ *Allen v. Brunner*, 33 Tex. Civ. App. 128, 75 S. W. 821.

111 Iowa, 25, 82 N. W. 430.

installments of the rent do not become due, there is, it seems clear, no right to assert a lien therefor.^{66,67}

(c) **Other indebtedness asserted as rent.** It is obvious that a statute giving a lien for rent does not give a lien for other indebtedness on the part of the tenant to the landlord,⁶⁸ and this is so although such other indebtedness results from a claim for damages on account of a breach of a covenant in the instrument of lease.⁶⁹ And it has been decided that a statute giving a lien for rent does not, in the case of a lease for a share of the crops, give a lien for what the landlord's share would have amounted to had the tenant properly cultivated the land, but the lien is only for his named share of what was actually produced.⁷⁰

Third persons interested in the property on which the lien is asserted may show that the amount for which the lien is claimed consists in part of other indebtedness.⁷¹ There are decisions to the effect that if the sum named as rent in the lease is in fact payable partly on account of rent, and partly on account of other matters, and it does not appear to what extent it is for rent, the landlord has no right to a lien for any part thereof.⁷² But in another jurisdiction a different view has apparently been adopted, to the effect that, while it may be shown by extrinsic evidence that a part of such sum is not payable on account of rent, a lien will still exist for the balance.⁷³

In two states the undertaking of the tenant to pay taxes has been regarded as in effect to pay rent, so as to entitle the landlord to a lien for the amount of the taxes.⁷⁴

The lien of the landlord has been regarded as securing him

^{66, 67} *The Richmond v. Cake*, 1 App. Nat. Bank of Sioux City v. Flynn, D. C. 447; *Camp v. West*, 113 Ga. 117 Iowa, 493, 91 N. W. 784. See 304, 38 S. E. 822. *Beattie v. Hughes*, 82 Ark. 199, 101 S. W. 170.

⁶⁸ *Varner v. Rice*, 39 Ark. 344; *Brown v. Turner*, 60 Mo. 21. ⁷² *Crill v. Jeffrey*, 95 Iowa, 634, 64 N. W. 625; *First Nat. Bank of Sioux City v. Flynn*, 117 Iowa, 493, 91 N. W. 784; *Riley v. Renick Mill Co.*, 44 Mo. App. 519.

⁶⁹ *Bush v. Willis*, 130 Ala. 395, 30 So. 443; *Overby v. Rogers*, 12 Ky. Law Rep. 289; *Galbraith v. Rogers*, 14 Ky. Law Rep. 238; *Merritt v. Fisher*, 19 Iowa, 354. ⁷³ *Dickenson v. Harris*, 48 Ark. 355, 3 S. W. 58; *Varner v. Rice*, 39 Ark. 344.

⁷⁰ *Wilkinson v. Ketler*, 59 Ala. 306; *Patterson v. Hawkins*, 71 Tenn. (3 Lea) 483. ⁷⁴ *Roberts v. Sims*, 64 Miss. 597, 2 So. 72; *Gedge v. Shoenberger*, 83 Ky. 91. See ante, §§ 143 b, 169 h.

⁷¹ *Lehman v. Howze*, 73 Ala. 302; *Roth v. Williams*, 45 Ark. 447; *First*

for the costs involved in its enforcement,⁷⁵ and a stipulation that the tenant should be taxed with attorney's fees, in case of the employment of an attorney on account of the violation of any of the conditions of the lease, has been held to entitle him to such fees in a proceeding to enforce the lien.⁷⁶

(2) **Advances and supplies.** In a number of the southern states the statute gives a lien for "advances" made by the landlord to the tenant to enable the latter to make the crops, these advances taking the form of either money or supplies, the statute sometimes enumerating particular classes of supplies for which the lien may be asserted.⁷⁷

⁷⁵ *Conwell v. Kuykendall*, 29 Kan. 707; *Slaughter v. Winfrey*, 85 N. C. 159.

⁷⁶ *Richards v. Bestor*, 90 Ala. 352, 8 So. 30.

⁷⁷ *Alabama* Code 1907, § 4734 (advances made in money, or other thing of value, either by the landlord directly or by another at his instance or request for which he became legally bound or liable, at or before the time such advances were made, for the sustenance or well being of the tenant or his family, or for preparing the ground for cultivation, or for cultivating, gathering, saving, handling or preparing the crop for market); *Arkansas*. Kirby's Dig. St. 1904, § 5033 (advances "either of money, provisions, clothing, stock, or other necessary articles," to enable tenant to make crop); *Florida* Gen. St. 1906, § 2239 (same as Alabama, except that instead of "for which he became legally bound" are substituted the words "or for which they have assumed a legal responsibility, at or before the time at which such advances were made"); *Georgia* Code 1895, § 2800 (for supplies, money, horses, mules, asses, oxen, farming utensils, of necessity to make crops); *Kentucky* St. 1903, § 2323 (for money or property furnished to enable the tenant to raise the crops or to subsist); *Maryland* Code Pub. Gen. Laws 1904, art. 53, § 23 ("advances made by landlord on faith of crops to be grown." Statute applicable to certain counties only); *Mississippi* Code, 1906, §§ 2832, 2933 (for "money advanced to the tenant, and the fair market value of all advances made by him to his tenant for supplies for the tenant and others for whom he may contract, and for his business carried on upon the leased premises," and "for the reasonable value of all live stock, farming tools, implements, and vehicles furnished by him to his tenant"); *North Carolina* Revisal 1905, § 1993 (for "all advancements made and expenses incurred in making and saving said crops"); *Tennessee*, Shannon's Code 1896, § 5303 (for supplies, implements, and work stock furnished and used in the cultivation of the crop, provided said Section 5304 gives a lien on the crop "for necessary supplies of food and clothing furnished by the landlord or his agent, to the tenant, for himself or those dependent on him, to enable the tenant to make the

A statute giving the landlord a lien for advances to enable the tenant to make the crop has been held to give him a lien for money advanced to enable him to open ditches and repair the fences,⁷⁸ and a statute giving a lien for "all advancements made and expenses incurred in making and saving a crop" was regarded as giving it for everything of value supplied by the landlord to the tenant in good faith, directly or indirectly, for the purpose of making and saving the crop, such as subsistence for the tenant and his employees, and work animals, farming implements, and the like, and board furnished the tenant and his wife was held to be secured by the lien.⁷⁹ Under the same statute the landlord was regarded as entitled to a lien for a mule and wagon furnished by him to the tenant, and it was said that he would be so entitled in case he furnished miscellaneous goods to the tenant to be utilized by the latter in paying his laborers.⁸⁰

A statute giving a lien for "supplies" advanced or furnished by the landlord to the tenant to enable him to make or save the crop has been held to entitle him to a lien for mules sold or leased by him to the tenant for this purpose,⁸¹ and also for pasturage furnished for the tenant's stock used in cultivating the farm and for his cows which furnished milk for his family.⁸² Board fur-

crop, provided an account of such other property); *Virginia Code* necessary supplies is kept as the 1904, § 2496 (for advances "in money, supplies, or other thing").

articles are furnished. "This section requires no special contract." Section 5303 gives a lien, independent of special contract, in favor of "land owners and persons controlling land, by lease or otherwise," for supplies, implements and "work stock" furnished "share croppers": *Texas Rev. St.* 1895, art. 3235 (for the value of all animals, tools, provisions and supplies furnished by the landlord to the tenant to enable the tenant to make a crop on such premises, and to gather, secure, house and put the same in condition for market, the money, animals, tools, provisions and supplies so furnished being necessary for that purpose, whether the same is to be paid in money, agricultural products, or

⁷⁸ *Airey v. Weinstein*, 54 Ark. 443, 16 S. W. 123.

⁷⁹ *Brown v. Brown*, 109 N. C. 124, 13 S. E. 797.

⁸⁰ *Ledbetter v. Quick*, 90 N. C. 276.

Advances of money have been held to be, *prima facie*, payable immediately, and not at the end of the term, and as consequently entitling the landlord to distrain before that time. *Thompson v. Tilton*, 22 Ky. Law Rep. 1004, 59 S. W. 485.

⁸¹ *Strauss v. Baley*, 58 Miss. 131; *Trimble v. Durham*, 70 Miss. 295, 12 So. 207.

⁸² *Thomas v. Tucker, Zeve & Co.*, 40 Tex. Civ. App. 337, 89 S. W. 802.

nished by the landlord to the tenant is apparently to be regarded as "supplies,"⁸³ as is money advanced by him,⁸⁴ or paid by him for gathering, hauling, and packing the crop.⁸⁵

Under a statute giving a lien for advances of money or other things of value "for cultivating, gathering, or preparing the crop," the landlord was regarded as entitled to a lien for blacksmith's tools furnished by him to the tenant.⁸⁶

When the statute in terms gives a lien only for advances or supplies made or furnished to enable the tenant to make the crop, it is evident that the lien does not cover advances or supplies not made or furnished for this purpose.⁸⁷ But whether they are necessary or appropriate for this purpose when furnished in good faith by the landlord has been said to be a question for the tenant to decide.⁸⁸ The parties cannot, by collusion, create a debt, for which a lien will be enforced, when no advances are made, or these are not made for crop purposes.⁸⁹

When the statute gives a lien for advances or supplies made or furnished by the landlord, he has no lien for the value of advances or supplies made or furnished by a third person to the tenant, even though, it has been decided, the landlord becomes surety or guarantor to such person and is compelled, upon the tenant's default, to repay such third person.⁹⁰ There must be a

⁸³ See *Jones v. Eubanks*, 86 Ga. 616, 12 S. E. 1065, where, however, the question was whether board constituted "supplies" within a statute authorizing a conventional lien therefor. *Earl v. Malone*, 80 Ark. 218, 96 S. W. 1062.

⁸⁴ *Strickland v. Stiles*, 107 Ga. 308, 33 S. E. 85, 45 L. R. R. 204, 73 Am. St. Rep. 122. Here also the question was of the creation of a conventional lien by authority of statute. ⁸⁷ *Powell v. State*, 84 Ala. 444, 4 So. 719; *Tucker, Zeve & Co. v. Thomas*, 35 Tex. Civ. App. 499, 80 S. W. 649.

⁸⁵ *Strauss v. Baley*, 58 Miss. 131.

⁸⁸ *Ledbetter v. Quick*, 90 N. C. 276.

⁸⁹ *Ledbetter v. Quick*, 90 N. C. 276.

⁸⁶ *Holladay v. Rutledge*, 145 Ala. 656, 39 So. 613.

⁹⁰ *Kaufman v. Underwood*, 83 Ark. 118, 102 S. W. 718, 119 Am. St. Rep. 121; *Kelley v. King*, 18 Tex. Civ. App. 360, 44 S. W. 915; *Ranger Mercantile Co. v. Terrett* (Tex. Civ. App.) 20 Tex. Ct. Rep. 471, 106 S. W. 1145; *Ellis v. Jones*, 70 Miss. 60,

A landlord having advanced a tenant, who raised cotton, a sewing machine, a sum for ginning and wrapping, and a sum for pasturing, testimony of the landlord that he furn-

ished the articles "on the faith of his lien" was held to be sufficient to sustain a finding that these supplies were necessary to enable the tenant to make and gather the crop.

direct indebtedness created on the part of the tenant towards the landlord by the making of the advances or the furnishing of the supplies.⁹¹ But it is not necessary that the supplies actually pass through the landlord's hands, and if a third person delivers them to the tenant entirely on the landlord's responsibility, they are in effect purchased by the landlord, and furnished by him to the tenant, and the landlord has a lien for their value.⁹² The question whether the supplies were thus purchased by the landlord and furnished to the tenant, or purchased by the tenant, has been regarded as one for the jury,⁹³ and that the landlord and tenant signed joint notes for their value,⁹⁴ or even that the landlord signed the tenant's note as surety,⁹⁵ was considered not to be conclusive that the supplies were not furnished by the landlord.

In Alabama the statute ⁹⁶ gives the landlord a lien for advances made "either by him directly, or by another at his instance or request for which he became legally bound or liable at or before the time such advances were made." And the Florida statute contains a substantially similar provision.⁹⁷ The former statute, it has been decided, does not create any lien when the landlord is not himself personally liable,⁹⁸ and the landlord cannot claim a lien if he, gratuitously and without the request or knowledge of the tenant, assumes liability for advances made by a third person to the tenant, unless the tenant thereafter ratifies his action in this regard, the statute not being intended thus to enable the landlord to acquire a lien on the tenant's crop by his own arbitrary action.⁹⁹

11 So. 566; *Scott v. Pound*, 61 Ga. King, 18 Tex. Civ. App. 360, 44 S. 579; *Brimberry v. Mansfield*, 86 Ga. W. 915.

792, 13 S. E. 132. But *Powell v. Perry*, 127 N. C. 22, 37 S. E. 71, and *Fournier v. Brown*, 14 Ky. Law Rep. 204, seem *contra*.

⁹¹ *Ellis v. Jones*, 70 Miss. 60, 11 So. 566.

⁹² *Brimberry v. Mansfield*, 86 Ga. 792, 13 S. E. 132; *Scott v. Pound*, 61 Ga. 579; *Dowling v. Wall*, 114 Ala. 58, 21 So. 948; *Powell v. Perry*, 127 N. C. 22, 37 S. E. 71; *Ellis v. Jones*, 70 Miss. 60, 11 So. 566; *Kelley v.*

⁹³ *Scott v. Pound*, 61 Ga. 579.

⁹⁴ *Scott v. Pound*, 61 Ga. 579.

⁹⁵ *Rodgers v. Black*, 99 Ga. 139, 25 S. E. 23. Compare *Kaufman v. Underwood*, 83 Ark. 118, 102 S. W. 718, 119 Am. St. Rep. 121.

⁹⁶ Alabama Code 1907, § 4734.

⁹⁷ See ante, note 77.

⁹⁸ *Bell v. Hurst*, 75 Ala. 44; *Gerson v. Norman*, 111 Ala. 433, 20 So. 453.

⁹⁹ *Clanton v. Eaton*, 92 Ala. 612, 8 So. 823.

A statute giving to the landlord a lien for supplies furnished by him does not entitle him to one for supplies sold by him to the tenant, not as landlord, but as agent for another, even though he assumed a personal liability to his principal for the payment of the price.¹⁰⁰⁻¹⁰²

When the landlord is given a lien for live stock furnished for making the crop, it is immaterial, it has been decided, whether he sells or hires it to the tenant, he acting in his own behalf.¹⁰³

It has been said that, in order to make an advance, the landlord must furnish, or cause to be furnished, something not before the tenant's, and that a mere forbearance to demand something due is not an advance; and it was accordingly decided that the fact that the landlord permitted the tenant to retain corn which he was under contract to deliver to the landlord at the time of the inception of the tenancy did not entitle the landlord to a lien.¹⁰⁴ It has also been decided that rent for one year, not paid during such year, cannot be treated by the parties as an advance for the next year.¹⁰⁵ But a contrary decision has been made, to the effect that if the landlord, instead of taking the share of the crop to which he was entitled as rent for the previous year, allowed the tenant to retain it as an advance, to aid him in making his crop, the landlord was entitled to a lien therefor as for an advance.¹⁰⁶

A statute giving a lien upon the crops of the year in which the advances are made or supplies are furnished obviously does not give a lien for such advances or supplies upon the crop of a subsequent year,¹⁰⁷ and the same construction has been placed on a statute giving a lien in general terms on the crop, for advances to make the crop.¹⁰⁸ In Alabama the statute¹⁰⁹ provides that whenever a tenant fails to discharge his indebtedness for ad-

¹⁰⁰⁻¹⁰² *Swann v. Morris*, 83 Ga. 143, 9 S. E. 767.

¹⁰³ *Boyce v. Day*, 3 Ga. App. 275, 59 S. E. 930.

¹⁰⁴ *Lumbley v. Gilruth*, 65 Miss. 23, 2 So. 77, 7 Am. St. Rep. 631.

¹⁰⁵ *Evans v. English*, 61 Ala. 416.

¹⁰⁶ *Thigpen v. Maget*, 107 N. C. 39, 12 S. E. 272.

¹⁰⁷ *Parks v. Simpson*, 124 Ga. 523, 52 S. E. 616. It was decided in this

case that the parties "cannot by agreement bring other debts than those which the law itself embraces within its scope." In most jurisdictions such an agreement would, it seems, ordinarily be effective to create a conventional lien. See *post*, § 322.

¹⁰⁸ *Walker v. Patterson's Estate*, 33 Tex. Civ. App. 650, 77 S. W. 437.

¹⁰⁹ Code 1907, § 4736.

vances, and continues his tenancy under the same landlord, the balance due shall be held an advance towards making the crop of the succeeding year, for which a lien shall attach to the crop. The purpose of this statute, it has been said, is to afford such security to the landlord as to remove the temptation, frequently presented, of denuding the tenant of all that he has, so as to cripple, if not destroy, his ability to continue the tenancy another year.¹¹⁰ It has been held to be immaterial, for the purposes of this statutory provision, that the tenancy for the succeeding year is with reference to entirely different land, the continuance of the relation of tenancy being the essential consideration.¹¹¹ Under this provision, if the advances are not paid in the next succeeding year, the balance remaining due at the end of that year is to be considered as an advance for the next year, and so on, as long as the tenancy lasts.¹¹²

The advances must be made or the supplies furnished while the relation of landlord and tenant exists.¹¹³ That the advances may be within the statute giving a lien when made for crop purposes, it is not necessary, it has been decided, that they be made after the planting of the crop, the tenant having the same need of subsistence for himself and his family while waiting the time for crop planting as after it arrives.¹¹⁴

(3) **Stipulations of the lease.** In three jurisdictions the statute gives a lien to secure "the faithful performance of the terms of the lease,"¹¹⁵ and in one to secure "the faithful performance of the lease."¹¹⁶ The meaning of these provisions seems to be that the landlord has a lien for such damages as he may be entitled to recover for breach by the tenant of a covenant of the lease.

A statute giving a lien for rent and advances obviously gives

¹¹⁰ *Thompson v. Powell*, 77 Ala. S. W. 526; *Moore v. Faison*, 97 N. C. 391. 322, 2 S. E. 169.

¹¹¹ *Thompson v. Powell*, 77 Ala. 391; *Reese v. Rugely*, 82 Ala. 267, 2 So. 441. ¹¹⁴ *Ragsdale v. Kinney*, 119 Ala. 454, 24 So. 443.

¹¹² *Bush v. Willis*, 130 Ala. 395, 30 So. 443. ¹¹⁵ *Arizona Rev. St.* 1901, § 2695; *Illinois, Hurd's Rev. St.* 1905, c. 80, § 31; *North Carolina Revisal* 1905, § 1993.

¹¹³ *Eve v. Crowder*, 59 Ga. 799; ¹¹⁶ *Washington, Ball. Ann. Codes* *Liles v. Price* (Tex. Civ. App.) 51 & St. § 5957.

no lien for a breach of stipulations of the lease in regard to other matters.¹¹⁷

d. **Things subject to the lien**—(1) **General considerations.** In almost every state in which the statute gives a lien in favor of the landlord, the crops raised upon the premises are made subject thereto.¹¹⁸ In some the lien is upon property placed, kept or used on the premises,¹¹⁹ and in one upon the buildings thereon.¹²⁰ And in three jurisdictions the landlord has a lien on articles supplied by him to the tenant for the value thereof.¹²¹

(2) **Crops.** A statute giving a lien on the crop grown in any particular year, for the rent of that year, evidently gives no lien

¹¹⁷ *Few v. Mitchell*, 80 Ark. 243, 96 S. W. 983.

¹¹⁸ *Alabama* Code 1907, § 4734; *Arizona* Rev. St. 1901, § 2695; *Arkansas*, Kirby's Dig. St. 1904, § 5032; *Florida* Gen. St. 1906, § 2237; *Georgia* Code 1895, §§ 2795, 2800; *Illinois*, Hurd's Rev. St. 1905, c. 80, § 31; *Indiana*, Burns' Ann. St. 1901, § 7105; *Iowa* Code 1897, § 2992; *Kansas* Gen. St. 1905, § 4074; *Maryland* Code Pub. Gen. Laws 1904, art. 53, § 22; *Mississippi* Code 1906, § 2832 ("agricultural products"); *Missouri* Rev. St. 1899, § 4115; *North Carolina* Revisal 1905, § 1993; *South Carolina* Civ. Code, §§ 3057, 3060; *Tennessee*, Shannon's Code 1896, §§ 5299, 5300-5305; *Texas* Rev. St. 1895, art. 3236 ("agricultural products"); *Virginia* Code 1904, § 2496; *Washington*, Ball. Ann. Codes & St. § 5957.

¹¹⁹ *Alabama* Code 1907, § 4747 (landlord of any storehouse, dwelling house, or other building, shall have a lien on the goods, furniture, and effects of tenant for rent); *Arizona* Rev. St. 1901, § 2695 (on all property of tenant, not exempt by law, placed upon or used on the leased premises); *District of Columbia* Code 1901, § 1229 (on such of

the tenant's personal chattels, on the premises, as are subject to execution for debt); *Florida* Gen. St. 1906, § 2237 (on property of the lessee or his sublessee or assigns usually kept on the premises); *Iowa* Code 1897, § 2992 (on any personal property of the tenant used or kept on the premises during the term and not exempt from execution); *New Mexico* Comp. Laws 1897, § 2234 (on property of tenant "which remains in the house rented"); *Texas* Rev. St. 1895, art. 3251 (in case of lease of residence, storehouse or other building, on all the property of the tenant therein, not (seemingly) exempt from execution).

¹²⁰ *Maine* Rev. St. 1903, c. 93, §§ 44, 45.

¹²¹ In *Alabama* and *Florida*, on all articles advanced, and on all property purchased with money advanced, or obtained by barter in exchange for articles advanced, for the aggregate price of such articles and property. *Alabama* Code 1907, § 4734; *Florida* Gen. St. 1906, § 2239. And in *Texas* (Rev. St. 1895, art. 3235) on animals, tools, and other property furnished by the landlord to the tenant.

for such rent upon crops grown in any other year,¹²² and it has been decided that even when a statute giving a lien for advances did not expressly confine the lien to the crop raised during the year in which the advances were furnished, it was to be construed as so confining it, the lien being for advances to make the crop.¹²³

Though the rent consists of a portion of a crop of a specified character, as, for example, of corn or of cotton, the landlord's lien to secure the payment thereof extends to all the various classes of crops upon the demised land.¹²⁴ And *a fortiori* is this the case when the rent consists of a specified portion of all the crops raised.¹²⁵

(3) **Things kept or used on the premises.** A statute giving a lien on personal property of the tenant "used" on the premises has been held to include whatever property is incident to the nature and purposes of the occupation or business for which the premises were leased,¹²⁶ and to include things kept thereon for sale,¹²⁷ and cattle kept thereon for the purpose of feeding and improvement,¹²⁸ if such were among the purposes of the lease. A wagon not kept on the leased premises, though used to deliver goods sold in the course of the business conducted thereon, was held not to be within such a statute,¹²⁹ and the same view was taken with reference to railroad rolling stock which was occasionally on the premises, these having been leased for station purposes.¹³⁰

Where a statute gave a lien on "the goods, furniture and effects" of the tenant, the word "effects" must be construed, it was held, in connection with "goods" and "furniture" and as referring to property *ejusdem generis*,¹³¹ and the same statute was regarded as extending only to such property of the ten-

¹²² Ballard v. Johnson, 114 N. C. 141, 19 S. E. 98; Mills v. Pryor, 65 Ark. 214, 45 S. W. 350. ¹²⁷ Grant v. Whitwell, 9 Iowa, 152; Thompson v. Anderson, 86 Iowa, 703, 53 N. W. 418.

¹²³ Walker v. Patterson's Estate, 33 Tex. Civ. App. 659, 77 S. W. 437. ¹²⁸ Thompson v. Anderson, 86 Iowa, 703, 53 N. W. 418.

¹²⁴ Prettyman v. Unland, 77 Ill. 206; State v. Reeder, 36 S. C. 497, 15 S. E. 544. ¹²⁹ Van Patten v. Leonard, 55 Iowa, 520, 8 N. W. 334.

¹²⁵ Knowles v. Sell, 41 Kan. 171, 21 Pac. 102. ¹³⁰ Trust Co. of North America v. Manhattan Trust Co., 23 C. C. A. 30, 77 Fed. 82.

¹²⁶ Grant v. Whitwell, 9 Iowa, 152. ¹³¹ McKleroy v. Cantey, 95 Ala.

ant as enjoyed the protection of the leased premises and not to all the effects of the tenant.¹³² For both these reasons, it was decided, a mule and dray used in the mercantile business carried on upon the premises were free from the lien,¹³³ though in another case in the same state the language of the statute was held to include mules in a stable attached to an hotel on the premises leased, and used in the hotel business, they being used "in and about" the premises.¹³⁴ The lien does not, under such a statute, attach to the leasehold interest of the tenant in the land itself;¹³⁵ and neither such a statute, nor one giving a lien on property "used" on the premises, gives a lien on accounts due to the tenant from third persons, arising from the business conducted on the premises.¹³⁶

In a statute giving a lien on all property of the tenant "situated in the residence," the word "residence" was regarded as including not only the building occupied by the tenant's family, but also the other buildings and grounds used in connection therewith.¹³⁷

It has been decided that when the tenant holds over his original term by consent, the lien for rent which accrued during such term operates on chattels brought on the premises during the holding over.¹³⁸

(4) **Things on other premises.** The landlord cannot assert a lien on crops or personal chattels on one piece of land for rent due him by the tenant under a distinct demise of other land.¹³⁹

295, 11 So. 258; *First Nat. Bank v. Consolidated Elec. Light Co.*, 97 Ala. 465, 12 So. 71. lien on "movable effects" of the tenant was held to extend to notes, bills of exchange, and certificates of stock, on the premises and belonging to the tenant. *Matthews v. His Creditors*, 10 La. Ann. 718; *Stone's Succession*, 31 La. Ann. 311.

¹³² *Abraham v. Nicrosi*, 87 Ala. 173, 6 So. 293.

¹³³ *McKleroy v. Cantey*, 95 Ala. 295, 11 So. 258.

¹³⁴ *Stephens v. Adams*, 93 Ala. 117, 9 So. 529.

¹³⁵ *First Nat. Bank v. Consolidated Elec. Light Co.*, 97 Ala. 465, 12 So. 71.

¹³⁶ *McKleroy v. Cantey*, 95 Ala. 295, 11 So. 258; *Van Patten v. Leonard*, 55 Iowa, 520, 8 N. W. 334.

In Louisiana a statute giving a

¹³⁷ *York v. Carlisle*, 19 Tex. Civ. App. 269, 46 S. W. 257.

¹³⁸ *Abraham v. Nicrosi*, 87 Ala. 173, 6 So. 293.

¹³⁹ *Nelson v. Webb*, 54 Ala. 436; *Baker v. Cotney*, 142 Ala. 566, 38 So. 131, 110 Am. St. Rep. 50; *Gittings v. Nelson*, 86 Ill. 591.

But it has been held that he may assert a lien on such property on one piece of land for rent due upon another, if both tracts can be regarded as included in one demise, though for separate rents.¹⁴⁰

The burden is on the landlord, claiming a lien on a particular stock of cotton, grain, or other vegetable product, in the hands of a third person, to show that this was produced upon the demised premises.¹⁴¹

(5) **Things not belonging to the tenant.** In giving a lien upon the crops grown upon the demised premises, the statute does not ordinarily restrict it to crops belonging to the tenant, and it has accordingly been held to extend to crops belonging to a subtenant as well as to those belonging to the tenant himself, whose indebtedness is sought to be enforced.¹⁴² And it has been decided that the crop of a subtenant of part of the demised premises may be thus subjected to liability for the whole rent.¹⁴³ In one state it is provided by statute that the crop of the tenant in chief must first be appropriated to the satisfaction of the lien, and that if the landlord fails to proceed against the crop of the tenant in chief on notice by the subtenant, he shall lose his rights as against the latter's crop.¹⁴⁴ And in another state it has been decided that the subtenant, being in the position of surety by reason of the liability of his crop, can in equity demand that the landlord first exhaust the security afforded by the crop of the principal tenant.¹⁴⁵ The subtenant whose crop is thus applied upon the rent

¹⁴⁰ *Thompson v. Mead*, 67 Ill. 395; *Garrouette v. White*, 92 Mo. 237, 4 S. W. 681; *Applewhite v. Nelms*, 71 Miss. 482, 14 So. 443; *Edwards v. Scroggins v. Foster*, 76 Miss. 318, 24 So. 194.

¹⁴¹ *Saulsbury v. McKellar*, 55 Ga. 322; *Hays v. Berry*, 104 Iowa, 455, 73 N. W. 1028. *Anderson*, 36 Tex. Civ. App. 611, 82 S. W. 659; *Rutledge v. Walton*, 12 Tenn. (4 Yerg.) 458, 26 Am. Dec. 240; *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481.

¹⁴² *Foster v. Goodwin*, 82 Ala. 384, 2 So. 895; *Givens v. Easley*, 17 Ala. 385; *Robinson v. Lehman*, 72 Ala. 401; *Alston v. Wilson*, 64 Ga. 482; *Uhl v. Dighton*, 25 Ill. 154; *Houghton v. Bauer*, 70 Iowa, 314, 30 N. W. 577; *Beck v. Minnesota & Western Grain Co.*, 131 Iowa, 62, 197 N. W. 1032, 7 L. R. A. (N. S.) 930; *Montague v. Mial*, 89 N. C. 137; *Berry v. Berry*, 8 Kan. App. 584, 55 Pac. 348; *Andrew v. Stewart*, 81 Ga. 53, 7 S. E. 169, 12 Am. St. Rep. 296.

¹⁴³ *Andrew v. Stewart*, 81 Ga. 53, 7 S. E. 169, 12 Am. St. Rep. 296.

¹⁴⁴ Alabama Code 1907, § 4744. See *Derrick v. Pollard*, 117 Ala. 654, 23 So. 659, 42 L. R. A. 468.

¹⁴⁵ *Applewhite v. Nelms*, 71 Miss. 482, 14 So. 443. But it has been held that one cultivating on shares held with the tenant could not demand

due by the tenant in chief would have the right to assert this as a payment *pro tanto* upon the rent due by him to the latter.¹⁴⁶

Where the statute, in addition to providing for a lien upon the crop, also in terms made the subtenant liable for the rent, but not for rent becoming due before his interest began, it was held that the crop of the subtenant was subject to a lien only for the rent which accrued during the subtenant's term.¹⁴⁷

The lien of the principal landlord upon the crop of a subtenant is, it has been decided, prior to the lien of the sublessor.¹⁴⁸

In one case a tenant holding over, knowing that the premises had been leased to another person for the ensuing year, was apparently regarded as a subtenant, and it was said that the crop raised by him was "subject to the rental contract between the landlord and the tenant, at least to the extent of his liability under his contract for holding over."¹⁴⁹ There was no discussion of the matter or further explanation of what was in the mind of the court.

In one state, where the statute prohibits a sublease without the landlord's assent, it seems to be held that the subtenant's crop is not subject to the lien if the landlord assents to the sublease, while it is so subject if he does not assent.¹⁵⁰ But in another state, where a similar statute is in force, the landlord's assent to a sublease or assignment is not considered to affect his right to a lien on the subtenant's or assignee's crop,¹⁵¹ it being in one case said that if the sublease or assignment is without the landlord's assent, the sublessee or assignee is, as regards the landlord, to be regarded as merely an employee of the lessee, while if with the landlord's assent, the sublessee or assignee is to be regarded as a tenant of the original landlord for this purpose.¹⁵²

that the landlord levy first on property of the tenant other than the crop. *Alston v. Wilson*, 64 Ga. 482. 7 S. E. 169, 12 Am. St. Rep. 296; *Thompson v. Commercial Guano Co.*, 93 Ga. 282, 20 S. E. 309.

¹⁴⁶ *Thompson v. Commercial Guano Co.*, 93 Ga. 282, 20 S. E. 309. See ante, § 177 e. ¹⁵¹ *Williams v. Braden*, 63 Mo. App. 513; *Edwards v. Anderson*, 36 Tex. Civ. App. 611, 82 S. W. 659;

¹⁴⁷ *Garrouette v. White*, 92 Mo. 237, 4 S. W. 681. *Marrs v. Lumpkins*, 22 Tex. Civ. App. 448, 54 S. W. 775; *Trout v. Mc-*

¹⁴⁸ *Montague v. Mial*, 89 N. C. 137. *Queen (Tex. Civ. App.)* 62 S. W. 928.

¹⁴⁹ *Bain v. Wells*, 107 Ala. 562, 19 So. 774. ¹⁵² *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481.

¹⁵⁰ *Andrew v. Stewart*, 81 Ga. 53,

The statutes giving a lien to the landlord upon property or chattels, other than crops, upon the premises, usually restrict it in terms to things belonging to the tenant, and in such case, it is obvious, there is no right to a lien upon the property of other persons.¹⁵³ And it has even been decided that such a statute gives no lien, in favor of one who has leased to a firm, upon property belonging to one member of the firm.¹⁵⁴ Occasionally, as shown elsewhere, property of a third person may be subject to the lien as being apparently the property of the tenant.¹⁵⁵ The Maine statute expressly gives a lien for rent upon all buildings on the premises, although they may be owned by persons other than the lessee.¹⁵⁶

In Kentucky it has been decided that under a statute giving a lien for a year's rent to the landlord upon the property of the tenant or undertenant, the lien exists upon property of an assignee of the leasehold for a year's rent, though he has reassigned to another, thus relieving himself from personal liability.¹⁵⁷

Even though, by the terms of a sale of chattels to the tenant, the title remains in the vendor, they may be subject to the landlord's lien, by reason of failure to properly record the sale.¹⁵⁸ Apart from any question of recording, apparently, the vendee has, or may have, in such case, an equitable interest which is subject to the lien.¹⁵⁹

(6) **Things exempt from execution.** Occasionally the statute gives a lien only on property subject to execution,¹⁶⁰ or on property not exempt therefrom,¹⁶¹ or provides that the statute shall

¹⁵³ *Johnson v. Douglass*, 13 D. C. R. A. 513 (by a majority of four (2 Mackey) 36; *Perry v. Waggoner*, judges to three).

¹⁵⁴ *Cohen v. Candler*, 79 Ga. 427, 7 68 Iowa, 403, 27 N. W. 292; *Schurz v. McMenamy*, 82 Iowa, 432, 48 N. S. E. 160; *Gartrell v. Clay*, 81 Ga. W. 806; *Needham Piano & Organ Co. v. Hollingsworth* (Tex. Civ. App.) 40 S. W. 750; *Davis v. Washington*, 18 Tex. Civ. App. 67, 43 S. W. 585.

¹⁵⁵ See *Bingham v. Vandegrift*, 93 Ala. 283, 9 So. 280.

¹⁵⁶ District of Columbia Code 1901, § 1229. See *The Richmond v. Cake*, 1 App. D. C. 447.

¹⁵⁷ *Ward v. Walker*, 111 Iowa, 611, 82 N. W. 1028.

¹⁵⁸ See post, § 321 f.

¹⁵⁹ See *Union Water Power Co. v. Chabot*, 93 Me. 339, 45 Atl. 30.

¹⁶⁰ *Myer Bros.' Assignee v. Gaertner*, 106 Ky. 481, 50 S. W. 971, 45 L. Ky. 183, 15 S. W. 179.

¹⁶¹ *Arizona Rev. St.* 1901, § 2695; *Iowa Code* 1897, § 2992; *Utah Comp. Laws* 1907, § 1407. As to the provisions of the Kentucky statutes in this respect, see *Rudd v. Ford*, 91

not affect any act exempting property from forced sale.¹⁶² In the absence of any such provision in the statute, however, the lien has been held to take priority over any claim of exemption.¹⁶³

The Iowa statute, giving the landlord a lien for his rent "upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used on the premises during the term, and not exempt from execution," has been construed as giving the tenant a right of exemption as against the lien on the "other personal property" only and not as against that on the crops.¹⁶⁴ In Texas the statute, while it expressly provides that the lien on the crops, as well as that on things supplied by the landlord to the tenant, shall take precedence of the claim for exemption, makes the lien on other things on the premises inferior to the right of exemption.¹⁶⁵

The person asserting the right of exemption as against the lien has been held to have the burden of showing what part of the property is exempt.¹⁶⁶

Where the statute gave a lien on property kept or used on the premises during the term, and not exempt from execution, it was held that property left on the premises after the term, previously exempt, did not become subject to the lien because the right of exemption then came to an end, since the right to a lien came to an end at the same time.¹⁶⁷

The right of exemption must, it has been decided, be asserted before judgment foreclosing the lien is rendered.¹⁶⁸

(7) **Proceeds of sale.** A statute giving a lien on crops or chattels on the premises does not ordinarily give a lien on the

¹⁶² Texas Rev. St. 1895, art. 3251. *Type Foundry v. Taylor* (Tex. Civ. App.) 35 S. W. 691. In Kentucky,

¹⁶³ *Ex parte Barnes*, 84 Ala. 540, 4 So. 769; *Taliaferro v. Pry*, 41 Ga. 622; *Hill v. George*, 38 Tenn. (1 Head) 394; *Harrell v. Fagan*, 43 Ga. 339. likewise, the lien on the crops is expressly made superior to the right of exemption. Ky. St. 1903, § 2323.

¹⁶⁴ *Hipsley v. Price*, 104 Iowa, 282, 73 N. W. 584. ¹⁶⁵ *Hays v. Berry*, 104 Iowa, 455, 73 N. W. 1028; *Hilman v. Brigham*, 117 Iowa, 70, 90 N. W. 491.

¹⁶⁶ *Bacon v. Carr*, 112 Iowa, 193, 83 N. W. 957. ¹⁶⁷ *York v. Carlisle*, 19 Tex. Civ. App. 269, 46 S. W. 257; *Mills v. Pryor*, 65 Ark. 214, 45 S. W. 350. ¹⁶⁸ *See Champion v. Shumate*, 90 Tex. 597, 39 S. W. 128, 362, 40 S. W. 394; *Stokes v. Barney*, 3 Tex. Civ. App. 219, 22 S. W. 126; *St. Louis*

proceeds of a voluntary sale thereof by their owner.¹⁶⁹ But it has been held that if the landlord allows the tenant to sell the property subject to the lien, under an agreement that the proceeds shall be applied on the rent, he is entitled to the proceeds as against subsequent garnishments thereof.¹⁷⁰ And if the property is sold in judicial proceedings, not brought to enforce the lien, the lien binds the proceeds.¹⁷¹ In one state a statute providing that the lien may be enforced by attachment, which may be levied on the crops or the proceeds thereof,¹⁷² has been held to extend the lien to the proceeds of the sale of the crops.¹⁷³

It has been decided that a lien in favor of the landlord on particular chattels does not extend to the proceeds of insurance thereon.¹⁷⁴

e. **Persons entitled to assert the lien**—(1) **Assignees.** In several cases a transferee of the reversion has been regarded as entitled to assert the lien,¹⁷⁵ and this seems the obvious construction to be placed on a statute giving a lien to the "landlord." It has been decided that one to whom the land was mortgaged prior to the lease has no such right, he not being the landlord.¹⁷⁶

In one state it has been held that the lessor may assert a lien for rent though he has, since the rent accrued, transferred the

¹⁶⁹ *McKleroy v. Cantey*, 95 Ala. 295, 11 So. 258; *Hartwig v. Hes*, 131 Iowa, 501, 109 N. W. 18; *Hove v. Stanhope State Bank*, 138 Iowa, 39, 115 N. W. 476; *Jones v. Stevens* (Miss.) 12 So. 446; *Newman v. Ward* (Tex. Civ. App.) 46 S. W. 868; *Estes v. McKinney* (Tex. Civ. App.) 43 S. W. 556.

¹⁷⁰ *Bergman v. Guthrie*, 89 Iowa, 280, 56 N. W. 502.

¹⁷¹ *Bryan v. Sanderson*, 10 D. C. (3 MacArthur) 431; *McKleroy v. Cantey*, 95 Ala. 295, 11 So. 258; *Smith v. Huddleston*, 103 Ala. 223, 15 So. 521; *Gilbert v. Greenbaum*, 56 Iowa, 211, 9 N. W. 182; *Davis v. Goldberg*, 75 Tex. 48, 12 S. W. 952. See *In re Bowne*, 12 N. B. R. 529, 146 b). Fed. Cas. No. 1,741, and post, at notes 399, 400.

¹⁷² Alabama Code 1907, § 4741.

¹⁷³ *Scaife v. Stovall*, 67 Ala. 237; *Barnett v. Warren*, 82 Ala. 557, 2 So. 457; *Ehrman v. Cates*, 101 Ala. 601, 14 So. 361.

¹⁷⁴ *In re Reis*, 3 Woods, 18, Fed. Cas. No. 11,684.

¹⁷⁵ *Simmons v. Fielder*, 46 Ala. 304; *Kennard v. Harvey*, 80 Ind. 37; *Tucker v. Whitehead*, 58 Miss. 762. This is presumably what is meant by statements that an assignee of the "lease" is entitled to the benefit of the lien (*Haywood v. O'Brien*, 52 Iowa, 537, 3 N. W. 545; *Taylor v. Nelson*, 54 Miss. 524). Strictly speaking, an assignee of the "lease" is not the landlord (See ante, § 146 b).

¹⁷⁶ *Drakford v. Turk*, 75 Ala. 339.

reversion.¹⁷⁷ Ordinarily, it seems, the transferor would have no right to assert a lien for rent or advances.^{177a}

It has been decided in one state that, in the absence of a statutory provision to the contrary, an assignee of the rent alone, or of the "rent note,"¹⁷⁸ does not acquire any right to assert the lien for rent.¹⁷⁹ In other states it is held that, in the absence of express statutory authorization, the assignee cannot enforce the lien by the ordinary statutory remedies belonging to the landlord, such as attachment or distress,¹⁸⁰ but that he may assert it in a court of equity.¹⁸¹ In one state the statute expressly gives the assignee of the rent the same remedies as the assignor,¹⁸² and this has been regarded as entitling him to assert a lien therefor.¹⁸³

One does not, it has been decided, absolutely lose the benefit of the lien by assigning his claim for rent as collateral security, and, upon payment of the debt and consequent redemption of the note, his right to enforce the lien is revived.¹⁸⁴

¹⁷⁷ Meyer v. Oliver, 61 Tex. 584.

^{177a} See Watkins v. Duvall, 69 Miss. 364, 13 So. 727.

¹⁷⁸ See ante, § 180 c (4), at note 596 a.

¹⁷⁹ Roberts v. Jacks, 31 Ark. 597, 25 Am. Rep. 584; Block v. Smith, 61 Ark. 266, 32 S. W. 1070. But if the crop is delivered in payment of the note to one to whom it had been transferred as collateral security, he may retain it on behalf of his transferor. Meyer v. Bloom, 37 Ark. 43.

In Georgia it was held that though the statute authorized the assignment of the lien, the assignment of the "rent notes" alone did not carry the lien. Lathrop v. Clewis, 63 Ga. 282. In Andrew v. Stewart, 81 Ga. 53, 7 S. E. 169, 12 Am. St. Rep. 296, it was held that the law in this respect was changed by a statute declaring that if a written "rent contract" be transferred in writing before the maturity of the crop, on the maturity of the crop a special lien

should arise in favor of the transferee. But Lathrop v. Clewis, 63 Ga. 282, supra, was followed in Rawls v. Moye, 98 Ga. 564, 25 S. E. 582. It is now provided (Supp. Code

1901, § 6217) that the lien shall pass on an assignment of the rent note.

¹⁸⁰ Foster v. Westmoreland, 52 Ala. 223; Gross v. Bartley, 66 Miss. 116, 5 So. 225; Manis v. Flood, 19 Tex. Civ. App. 591, 47 S. W. 1017. But see Keith v. Blanton, 71 Miss. 821, 15 So. 132.

¹⁸¹ Westmoreland v. Foster, 60 Ala. 448; Newman v. Greenville Bank, 66 Miss. 323, 5 So. 753; Hatchett v. Miller (Tex. Civ. App.) 53 S. W. 357. ¹⁸² Alabama Code 1907, §§ 4737, 4739, 4752.

¹⁸³ Bennett v. McKee, 144 Ala. 601, 38 So. 129.

¹⁸⁴ Dickinson v. Harris, 52 Ark. 58, 11 S. W. 965; Varner v. Rice, 39 Ark. 344; Farwell v. Grier, 38 Iowa, 83.

A statute giving the benefit of the lien to an assignee has been held to extend to the case of an assignment by way of mortgage or security.^{185,186} In spite of such a statute the assignor may, it has been decided, reserve the benefit of the lien to secure himself against loss by reason of his indorsement of the rent note.¹⁸⁷

A statute authorizing the assignment of the lien for rent or advances does not authorize the landlord to assign to another the right both to make advances and to claim a lien therefor.¹⁸⁸ And an assignee of the rent is not a landlord and so vested with the right to a lien for advances made by him.¹⁸⁹

In one case the surety on a rent note, paying the note, was regarded as entitled to the benefit of the landlord's lien,¹⁹⁰ as were, in another, apparently, mechanics who made improvements on the premises under contract with the tenant, on the faith of the landlord's agreement that the improvements should be paid for by the tenant out of the rent accrued and to accrue.¹⁹¹

(2) **Persons acting in behalf of others.** It has been decided that where the lease is made by one as "trustee," he may institute a proceeding in his own name to foreclose a lien for advances, though the land and the sums advanced belonged to another.¹⁹² And one who leased his wife's land in his own name and took a note for rent payable to himself as attorney was allowed to enforce the lien under a statute allowing recovery by "one with whom and in whose name a contract is made for the benefit of another."¹⁹³

f. **Priorities—(1) General considerations.** The statutes in a number of states, in providing that the landlord shall have a lien for rent or advances, refer, in express language, to the question of the priority of the lien as against other liens or transfers. Occasionally the lien is merely referred to as a "preference"

^{185,186} *Andrew v. Stewart*, 81 Ga. 53, 7 S. E. 169, 12 Am. St. Rep. 296; ¹⁸⁹ *State v. Elmore*, 68 S. C. 140, 46 S. E. 939.

Ballard v. Mayfield, 107 Ala. 396, 18 ¹⁹⁰ *Shields v. Atkinson*, 67 Ala. 244.

¹⁸⁷ *Strickland v. Stiles*, 107 Ga. 308, 33 S. E. 85, 45 L. R. A. 204, 73 ¹⁹¹ *Rubel v. Avritt*, 20 Ky. Law Rep. 896, 48 S. W. 432.

¹⁸⁸ *Bell v. Hurst*, 75 Ala. 44; *Leslie* 46 S. E. 431.

v. Hinson, 83 Ala. 266, 3 So. 443; ¹⁹² *Fargason v. Ford*, 119 Ga. 343, ¹⁹³ *Dickinson v. Harris*, 48 Ark. Henderson v. State, 109 Ala. 40, 19 355, 3 S. W. 58. So. 733.

lien,¹⁹⁴ or as a "prior and preferred" lien,¹⁹⁵ while some statutes expressly provide that it shall be paramount to all other liens,¹⁹⁶ with the exception, in some states, of liens for taxes,¹⁹⁷ liens of laborers,¹⁹⁸ and, in one state, of the lien for purchase money.¹⁹⁹ In one state it is provided in terms that the lien on the crop for advances shall have preference over any mortgage or other conveyance.²⁰⁰ In two states it is provided that the lien on supplies furnished, or on things obtained with supplies furnished or advances made, for the value of the supplies or advances, shall be prior to all other liens.^{201,202}

The word "lien" is, as before intimated, somewhat lacking in certainty of meaning, but a statutory provision that one person shall have a lien on a particular class of property belonging to another would seem, *prima facie*, to signify that he has a right to proceed against such property, in order to realize his claim, to the exclusion of those persons who may have obtained an interest in the property, or an incumbrance thereon, after the inception of the lien, provided at least those persons had notice thereof. In other words, one to whom a "lien" on specific property is given by statute has presumably the same rights in this regard as would one who is given a lien by decree of a court of equity.²⁰³ The only alternative would seem to be to regard the "lien" as giving a right merely to realize the claim from the class of property named, so far as it may not have been transferred or incumbered by the debtor before the commencement of proceedings to enforce the lien. That the operation of the lien is not thus dependent on the commencement of proceedings to enforce it has been clearly asserted;²⁰⁴ and that the lien of the land-

¹⁹⁴ Texas Rev. St. 1895, §§ 3233, 3251.

¹⁹⁵ South Carolina Civ. Code 1902, § 3057.

¹⁹⁶ Alabama Code 1907, §§ 4734, 4747; Florida Gen. St. 1906, § 2237; Mississippi Code 1906, §§ 2832, 2833; North Carolina Revisal 1905, § 1993; Tennessee, Shannon's Code 1896, § 5299; Virginia Code 1904, § 2496.

¹⁹⁷ Alabama Code 1907, § 4747; Georgia Code 1895, § 2796; Utah Comp. Laws 1907, § 1408.

¹⁹⁸ Georgia Code 1895, § 2796; Utah Comp. Laws 1907, § 1408.

¹⁹⁹ Utah Comp. Laws 1907, § 1408.

²⁰⁰ Arkansas, Kirby's Dig. St. 1904,

§ 5033.

^{201,202} Florida Gen. St. 1906, § 2239; Mississippi Code 1906, § 2832.

²⁰³ See 2 Pomeroy, Eq. Jur. § 716, *et seq.*

²⁰⁴ Hunter v. Whitfield, 89 Ill. 229. See Strauss v. Baley, 58 Miss. 131; Grant v. Whitwell, 9 Iowa, 152; Garner v. Cutting, 32 Iowa, 547; Scully

lord is not to be postponed to the claims of subsequent purchasers and incumbrancers is recognized even in the states in which the statute does not in express terms provide for the priority of the lien.²⁰⁵ Conversely, even in states in which the statute does so provide, the question of priority is not infrequently adjusted with reference to equitable or other considerations, such as whether the person claiming adversely is a *bona fide* purchaser for value,²⁰⁶ or whether the sale to him was in the ordinary course of business.²⁰⁷

The right of the landlord to realize his claim from the crops on the premises on which the statute gives him a lien, as against persons who have acquired interests in the crops after the commencement of the tenancy, has been freely recognized, in states in which there is no express provision as to priority as well as in those in which there is such a provision.²⁰⁸ As regards things brought upon the premises, on the other hand, the landlord's lien is regarded as taking priority of such rights only as were acquired by third persons after the things were so brought,²⁰⁹ since otherwise an innocent purchaser or incumbrancer of chattels might be defeated by their subsequent removal to leased premises; and this view has been adopted even in a jurisdiction in which the statute expressly makes the landlord's lien para-

v. Porter, 57 Kan. 322, 46 Pac. 313; Kan. App. 197, 52 Pac. 704; Dawson Berkey & Gay Furniture Co. v. v. Coffey, 48 Mo. App. 109; Lane v. Sherman Hotel Co., 81 Tex. 135, 16 Pollard, 88 Mo. App. 326; Williams S. W. 907, 26 Am. St. Rep. 733; Newman v. Ward (Tex. Civ. App.) 46 S. 567, 79 S. W. 487; Beckwith v. Bent, W. 863; Anderson v. Henry, 45 W. 49 Ky. (10 B. Mon.) 95. Va. 319, 31 S. E. 993.

²⁰⁵ See post, at notes 207, 208.

²⁰⁶ See post, at notes 221, 232.

²⁰⁷ See post, at notes 233-233.

²⁰⁸ Watt v. Seofield, 76 Ill. 261; Prettyman v. Unland, 77 Ill. 206; Harvey v. Hampton, 108 Ill. App. 501; Holden v. Cox, 60 Iowa, 449, 15 N. W. 269; Beck v. Minnesota & Western Grain Co., 131 Iowa, 62, 107 N. W. 1032, 7 L. R. A. (N. S.) 930; Stadel v. Aikins, 65 Kan. 82, 68 Pac. 1088; Salina State Bank v. Burr, 7

²⁰⁹ Webb v. Sharp, 80 U. S. (13 Wall.) 14, 20 Law. Ed. 478; Fowler v. Rapley, 82 U. S. (15 Wall.) 328, 21 Law. Ed. 35; Beall v. White, 94 U. S. 382, 24 Law. Ed. 173; Kyle v. Swen, 99 Ala. 573, 12 So. 410; Selsel v. Folmar, 103 Ala. 491, 15 So. 850; Wright v. Rothschild's Sons & Co., 13 Ky. Law Rep. 336; Garner v. Cutting, 32 Iowa, 547. The Florida statute (Gen. St. 1906, § 2237) expressly so provides.

mount,²¹⁰ as well as one in which the statute provides that the lien shall commence with the commencement of the tenancy.²¹¹

Occasionally the landlord's lien has been given priority as against the claims of others upon the ground of a failure to record the instruments evidencing such claims, as provided by statute.^{212, 213}

It has been decided that the landlord has a lien, although the statute creating the lien was not passed till after the commencement of the tenancy, but that such lien cannot take priority over a specific lien or incumbrance existing on the property prior to the passage of the statute.²¹⁴

The question of the priority of the lien of the landlord as against a conveyance or incumbrance in favor of another is independent of the time of the maturity of the claim secured by the lien. Thus, the lien for rent may take priority of a conveyance or incumbrance taking effect prior to the time the rent becomes due.²¹⁵ And a lien for advances may, it has been decided, so take priority over a conveyance executed even before the making of the advances.²¹⁶

The Virginia statute, which prohibits one obtaining a lien on goods on the leased premises "after the commencement of any tenancy" from removing the goods till after payment of a year's rent,²¹⁷ has been the subject of occasional judicial decision. It

²¹⁰ See *Seisel v. Folmar*, 103 Ala. 491, 15 So. 850.

²¹¹ *District of Columbia. See Webb v. Sharp*, 80 U. S. (13 Wall.) 14, 20 Law. Ed. 478; *Fowler v. Rapley*, 82 U. S. (15 Wall.) 328, 21 Law. Ed. 35.

^{212, 213} See *Cohen v. Candler*, 79 Ga. 427, 7 S. E. 160; *Gartrell v. Clay*, 81 Ga. 327, 7 S. E. 161; *Berkey & Gay Furniture Co. v. Sherman Hotel Co.*, 81 Tex. 135, 16 S. W. 807, 26 Am. St. Rep. 783; *Austin v. Welch*, 31 Tex. Civ. App. 526, 72 S. W. 881; *Liquid Carbonic Acid Mfg. Co. v. Lewis*, 32 Tex. Civ. App. 481, 75 S. W. 47.

²¹⁴ *Arbuckle v. Nelms*, 50 Miss. 556; *Storm v. Green*, 51 Miss. 103.

²¹⁵ *Sevier v. Shaw*, 25 Ark. 417; *Watt v. Scofield*, 76 Ill. 261; *Garner*

v. Cutting, 32 Iowa, 547; *Beckwith v. Bent*, 49 Ky. (10 B. Mon.) 95; *Bourcier v. Edmondson*, 58 Tex. 675; *Polk v. King*, 19 Tex. Civ. App. 666, 48 S. W. 601.

²¹⁶ *Wells v. Thompson*, 50 Ala. 83; *Dowling v. Wall*, 114 Ala. 58, 21 So. 948. In *Powell v. Perry*, 127 N. C. 22, 37 S. E. 71, it was held that the lien of a landlord on the crop for supplies furnished his tenant took effect as of the time of furnishing the supplies, though the landlord did not pay the tradesman from whom the supplies were obtained until after he had instituted suit to recover the crop from one who had seized it.

²¹⁷ See ante, at note 19.

has been decided that one holding over by consent after the original term holds under a new tenancy, so that a lien created in favor of a third person during the original tenancy is not "after the commencement of" the tenancy, so as to give the landlord priority,²¹⁸ and a like decision was made where the lease was renewed, not in accordance with the provisions of the original lease.²¹⁹ A provision in the similar West Virginia statute, that it shall not affect the priority of the lien for taxes, does not, it has been held, enable the tenant himself, by purchasing the goods at tax sale, to displace the landlord's lien.²²⁰

(2) **Purchasers with notice**—(a) **Ordinarily take subject to lien.** The lien is ordinarily effective as against persons purchasing the crop, or other property on which the lien is given, with notice of the lien.²²¹ The only cases, perhaps, in which such a purchaser takes free from the lien are those hereafter referred to, in which the sale of the property is in the usual course of business,^{221a} and those in which the landlord waives the right to assert the lien as against such purchaser, or estops himself to do so.²²²

The purchaser cannot assert, as against the landlord asserting the lien, that there is other property subject to the lien, not purchased by him.²²³

(b) **What constitutes notice.** In order to charge a purchaser with notice of the lien within the above rule, it is not necessary that he have actual knowledge of the unsatisfied claim for rent or advances, but it is sufficient that he have knowledge of facts putting him on inquiry in this regard. Knowledge that the

²¹⁸ *City of Richmond v. Duesberry*, 56 Ark. 499, 20 S. 27 Grat. (Va.) 210.

²¹⁹ *Upper Appomattox v. Hamilton*, 83 Va. 319, 2 S. E. 195. See *Wades v. Figgatt*, 75 Va. 575.

²²⁰ *Bartlett v. Lowndes*, 34 W. Va. 493, 12 S. E. 762.

²²¹ *Hussey v. Peebles*, 53 Ala. 432; *Barnett v. Warren*, 82 Ala. 557, 2 W. 556.

So. 457; *Andrews Mfg. Co. v. Porter*, 112 Ala. 381, 20 So. 475; *Fowler v. Rapley*, 82 U. S. (15 Wall.) 328, 21

Law. Ed. 35; *Volmer v. Wharton*, 34 Ark. 691; *Merchants' & Planters' Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406; *Noe v. Layton*, 69 Ark. 551, 64 S. W. 880; *Soluble Pacific Guano Co. v. Harris*, 78 Ga. 20; *Harvey v. Hampton*, 108 Ill. App. 501; *Holden v. Cox*, 60 Iowa, 449, 15 N. W. 269; *Cooper v. Baker*, 54 Miss. 637; *Estes v. McKinney* (Tex. Civ. App.) 43 S. W. 556.

^{221a} See post, § 321 f (2) (c).

²²² See post, § 321 i.

²²³ *Couch v. Davidson*, 109 Ala. 313, 19 So. 507; *Andrew Mfg. Co. v. Porter*, 112 Ala. 381, 20 So. 475.

crops on which the lien is asserted were grown upon, or that the chattels on which the lien is asserted were kept upon, demised premises, has been frequently referred to as sufficient to charge the purchaser under this rule.²²⁴ The cases are not, however, explicit as to whether a purchaser is charged with notice that the person disposing of the crops or chattels on particular land is holding merely as tenant to another, or whether he must have actual notice of the existence of the relation of tenancy with reference to this land in order to be charged with notice of the lien. In a number of cases the fact that the purchaser had knowledge of the relation of tenancy is referred to as one of the facts authorizing a finding of notice of the lien on the part of the purchaser.²²⁵ There is, however, apparently, no direct

²²⁴ *Atkinson v. James*, 96 Ala. 214, that it was grown on premises demised by another to the same tenant. *King v. Rowlett*, 120 Mo. App. Eyster, 102 Ala. 325, 14 So. 657; 120, 96 S. W. 493.

Scott v. Renfro, 106 Ala. 611, 14 So. 556; *Bush v. Willis*, 130 Ala. 395, 30 So. 443; *Foxworth v. Brown*, 114 Ala. 299, 21 So. 413; *Sloan v. Hudson*, 119 Ala. 27, 24 So. 458; *Maelzer v. Swan*, 75 Kan. 496, 89 Pac. 1037; *Smith v. Meyer*, 25 Ark. 609; *Judge v. Curtis*, 72 Ark. 132, 78 S. W. 746; *Watt v. Scofield*, 76 Ill. 261; *Prettyman v. Unland*, 77 Ill. 206; *Harvey v. Hampton*, 108 Ill. App. 501; *Stadel v. Aikins*, 65 Kan. 82, 68 Pac. 1088.

In Missouri the statute (Rev. St. 1899, § 4123) expressly declares that a purchaser of any crop if he "has knowledge of the fact that such crop was grown on demised premises" shall be liable for the value thereof. See *Toney v. Goodley*, 57 Mo. App. 235; *Matthews v. Nation*, 69 Mo. App. 327; *Williams v. De Lisle Store Co.*, 104 Mo. App. 567, 79 S. W. 487. A purchaser has been decided to be liable under this statute although he did not know that the crop was grown on the premises demised by plaintiff, he thinking

²²⁵ *Manasses v. Dent*, 89 Ala. 565, 8 So. 108; *Aderhold v. Blumenthal*, 95 Ala. 66, 10 So. 230; *Kelly v. Eyster*, 102 Ala. 325, 14 So. 657; *Smith v. Meyer*, 25 Ark. 609; *Judge v. Curtis*, 72 Ark. 132, 78 S. W. 746; *Watt v. Scofield*, 76 Ill. 261; *Prettyman v. Unland*, 77 Ill. 206; *Dawson v. Coffey*, 48 Mo. App. 109; *Williams v. De Lisle Store Co.*, 104 Mo. App. 567, 79 S. W. 487; *Lehman v. Stone* (Tex. App.) 16 S. W. 784.

In *Wilson v. Stewart*, 69 Ala. 302, it was decided that the fact that a purchaser had notice of the existence of a claim for rent which had been satisfied did not tend to charge him with notice of a lien for advances. Since notice of the claim for rent necessarily involves notice of the existence of the relation of tenancy, this decision seems in effect to be that a purchaser of crops grown on premises which he knows to be held under a lease is not charged with notice of a lien for advances. A different view is as-

decision that actual knowledge of the tenancy is necessary, and there are occasional statements to the effect that one purchasing a crop or part of a crop on particular land, which was grown thereon, is bound to inquire as to the nature of the right by which the person disposing of the crop is in possession of the land.²²⁶ The mere fact, however, that the purchaser of chattels, or produce of any character, knows that the vendor holds certain land as tenant of another, does not, it has been held, charge him with notice that such chattels or produce came from that land, so as to enable the landlord to assert the lien as against him.²²⁷

The purchaser's duty of inquiry as to the satisfaction of all claims for rent or advances is not satisfied, it has been decided, by the fact that he has received assurances from the tenant, his vendor, in this regard,²²⁸ and the same view has been asserted with reference to statements by the tenant as to his ownership of the land in fee.²²⁹

One who purchases property which is subject to the lien, pending a suit to foreclose the lien, has been regarded as charged with notice of the lien,²³⁰ as has, apparently, one who purchases the crop so subject when its possession is actually in the landlord.²³¹

The burden of showing notice to the purchasers of the existence of the lien is upon the landlord.²³²

(c) **Purchasers in ordinary course of business.** The rule that a purchaser with notice of the lien, or of the facts on which the lien is based, takes subject to the lien, is subject to an exception, according to a number of cases, if the article sold was kept for

serted in the later cases of *Kelly v. Ala.* 540, 10 So. 131; *Noe v. Layton, Eyester*, 102 Ala. 325, 14 So. 657; *Atkinson v. James*, 96 Ala. 214, 10 So. 846. *Steward*, 69 Ark. 306, 63 S. W. 47; *Williams v. De Lisle Store Co.*, 104

²²⁶ *Waite v. Corbin*, 109 Ala. 154, 19 So. 505; *Bush v. Willis*, 130 Ala. 395, 30 So. 443; *Scully v. Porter*, 57 Kan. 322, 46 Pac. 313. See *Mangum v. Stadel*, 76 Kan. 764, 92 Pac. 1093. ²²⁹ *Bush v. Willis*, 130 Ala. 395, 30 So. 443; *Manasses v. Dent*, 89 Ala. 565, 8 So. 108.

²²⁷ *Toney v. Goodley*, 57 Mo. App. 225; *Castleman v. Harris*, 86 Mo. App. 270. ²³⁰ *York v. Carlisle*, 19 Tex. Civ. App. 269, 46 S. W. 257. ²³¹ *Brownell v. Twyman*, 68 Ill. App. 67.

²²⁸ *Waite v. Corbin*, 109 Ala. 154, 19 So. 505; *Weil v. McWhorter*, 94 App. 67. ²³² *Brownell v. Twyman*, 68 Ill. App. 67.

sale on the leased premises and was sold in the ordinary course of business.²³³ Otherwise no business involving the keeping for sale of articles of merchandise could be successfully conducted on the leased premises. In one state the statute expressly provides that such sales shall be free from the lien.²³⁴

The transfer by a tenant, conducting a mercantile business, of a part or the whole of his stock in trade, in payment of a debt or debts, is not a sale in the ordinary course of business, so as to be within this exception to the general rule.²³⁵ Nor is a sale of the tenant's whole stock in trade, whether *en masse*,²³⁶ or in large quantities to different persons, for the purpose of retiring from business,²³⁷ within the exception. The sale of crops raised on the leased premises does not come within this exception, they not being kept for sale.²³⁸

(3) **Purchasers without notice**—(a) **Ordinarily take free from lien.** In a number of states it has been decided, on a consideration of the purpose and language of the statute, that the lien is effective as against a purchaser of the crops or other chattels, even though he is without notice of the lien, either actual or constructive.²³⁹ In other states the ordinary view that a

²³³ *Fowler v. Rapley*, 82 U. S. (15 S. W. 202; *Id.*, 44 Tex. Civ. App. 177, Wall.) 328, 21 Law. Ed. 35; *Beall v.* 105 S. W. 1129. *White*, 94 U. S. 382, 23 Law. Ed. 173; ²³⁸ *Holden v. Cox*, 60 Iowa, 449, 15 Weil v. McWhorter, 94 Ala. 540, 10 So. N. W. 269.

131; *McKleroy v. Canteay*, 95 Ala. ²³⁹ *Kennard v. Harvey*, 80 Ind. 37; 295, 11 So. 258; *Andrews Mfg. Co. v.* *Shelby v. Moore*, 22 Ind. App. 371, Porter, 112 Ala. 381, 20 So. 475; 53 N. E. 842; *Campbell v. Bowen*, 22 Grant v. Whitwell, 9 Iowa, 152; *Rich-* Ind. App. 562, 54 N. E. 499; *Rich-* ardson v. Peterson, 58 Iowa, 724, 13 N. W. 63; *Blake v. Counselman*, 95 Thompson v. Anderson, 86 Iowa, 219, 63 N. W. 679; *Frorer v.* Iowa, 703, 53 N. W. 418.

²³⁴ *Texas Rev. St.* 1895, art. 3238. *Hammes*, 99 Iowa, 48, 68 N. W. 564; *See Marsalis v. Pitman*, 68 Tex. Hays v. Berry, 104 Iowa, 455, 73 N. W. 1028; *Union Water Power Co. v.* 624, 5 S. W. 404. *Chabot*, 93 Me. 339, 45 Atl. 30; *Bel-*

²³⁵ *Weil v. McWhorter*, 94 Ala. 540. *Chabot*, 93 Me. 339, 45 Atl. 30; *Bel-* 10 So. 131. *See Marsalis v. Pitman*, cher v. Grimsley, 88 N. C. 88, 43 68 Tex. 624, 5 S. W. 404. *Am. Rep.* 732; *Newman v. Bank of*

²³⁶ *Fowler v. Rapley*, 82 U. S. (15 Wall.) 328, 21 Law. Ed. 35; *Marsalis* *Greenville*, 66 Miss. 323, 5 So. 753; *v. Pitman*, 68 Tex. 624, 5 S. W. 404. *Eason v. Johnson*, 69 Miss. 371, 12 So. 446; *Warren v. Jones*, 70 Miss.

²³⁷ *Freeman v. Collier Racket Co.*, 202, 14 So. 25; *Ball v. Sledge*, 82 100 Tex. 475, 18 Tex. Ct. Rep. 98, 101 Miss. 749, 35 So. 447, 100 Am. St.

bona fide purchaser is to be protected has been adopted in this connection.²⁴⁰

(b) **Purchasers not for value.** Even in jurisdictions where a *bona fide* purchaser ordinarily takes free from the lien, he does not do so if he is not a purchaser for value, that is, if the transfer of the title is based on merely a "good" as distinguished from a "valuable" consideration.²⁴¹ He is not a *bona fide* purchaser for value if he pays the consideration after receiving notice of the lien.²⁴² It is in accordance with the above principle that one to whom the tenant makes an assignment for the benefit of creditors takes subject to the lien in favor of the landlord.²⁴³ One to whom the tenant delivers the property merely for a temporary purpose is obviously, in the ordinary case, not a purchaser for value.²⁴⁴

(4) **Mortgagees.** The landlord's lien upon the crops on the premises takes priority over a mortgage on the crops, made after they come into existence,²⁴⁵ provided, in some jurisdictions, the

Rep. 654; Richardson v. Blakemore, may enforce the lien as against 79 Tenn. (11 Lea) 290; Phillips v. such a purchaser. This does not Maxwell, 60 Tenn. (1 Baxt.) 25; appear to accord with the previous Davis v. Wilson, 86 Tenn. 519, 8 S. case of Hadden v. Knickerbocker, 76 W. 151; Mathews v. Burke, 32 Tex. Ill. 677, 22 Am. Rep. 80.

419; American Cotton Co. v. Phillips, 241 Weil v. McWhorter, 94 Ala. 31 Tex. Civ. App. 79, 71 S. W. 220. 540, 10 So. 131; Scott v. Renfro, 106

240 Bledsoe v. Mitchell, 52 Ark. Ala. 611, 14 So. 556. 153, 12 S. W. 390; Puckett v. Reed, 242 Pape v. Steward, 69 Ark. 306, 31 Ark. 131; Hunter v. Matthews, 63 S. W. 47; Matthews v. Nation, 69 67 Ark. 362, 55 S. W. 144; Sealife v. Mo. App. 327; Darby v. Jorndt, 85 Stovall, 67 Ala. 237; Foxworth v. Mo. App. 274.

Brown, 114 Ala. 299, 24 So. 413; 243 McKleroy v. Cantey, 95 Ala. Thornton v. Carver, 80 Ga. 397, 6 S. 295, 11 So. 258; Fox v. Jones, 26 Fla. E. 915; Lancaster v. Whiteside, 108 276, 8 So. 449; O'Hara v. Jones, 46 Ga. 801, 33 S. E. 995; Stone v. Bohm, Ill. 288; Petry v. Randolph, 85 Ky. 79 Ky. 141; Monarch v. Dean, 3 Ky. 351, 3 S. W. 420; Loth v. Carty, 85 Law Rep. 757; Scully v. Porter, 3 Ky. 591, 4 S. W. 314; Paine v. Aberdeen Hotel Co., 60 Miss. 360; Rosenberg v. Shaper, 51 Tex. 134.

Goodley, 57 Mo. App. 235. In Fin- 244 See Maddox v. Maddox, 146 ney v. Harding, 136 Ill. 573, 27 N. E. 289, 12 L. R. A. 605, 29 Am. St. Ala. 460, 41 So. 426.

Rep. 334, while it is decided that the 245 Dowling v. Wall, 114 Ala. 58, landlord has no right of action 21 So. 948; Leslie v. Hinson, 83 Ala. against an innocent purchaser for 266, 3 So. 443; Beall v. James Fol- interference with his security (see mar Sons & Co., 122 Ala. 414, 26 So. post, § 321 m), it is said that he 1; Smith v. Meyer, 25 Ark. 609;

mortgagee is chargeable with notice of the lien,²⁴⁶ and, in others, even though he has no notice.²⁴⁷ The lien will also, it seems, take priority over a mortgage made before the planting of the crops, conceding the validity of such a mortgage on property not yet in existence.²⁴⁸ Otherwise, the landlord's lien might be excluded by the making of a collusive mortgage by the tenant upon the crop about to be planted by him.

If the tenant occupied, previous to the creation of the tenancy, and at the time at which he made the mortgage on the crop, the position of owner in fee of the land, one taking a mortgage from him upon the crop then growing, for a valuable consideration, is entitled to claim priority over the landlord's lien in favor of another, to whom the mortgagor subsequently conveys the fee, taking back a lease.²⁴⁹ But the case is different, it seems, as regards crops planted after the commencement of the tenancy, and as to those a mortgage or other lien, created by the tenant while he was owner in fee, would be inferior to the lien of the landlord.²⁵⁰

It has been decided that the fact that the landlord had previously been the mortgagee of the land, the mortgagor having, after default in the conditions of the mortgage, verbally attorned to him as tenant, and that one to whom such mortgagor subsequently mortgaged the crop had no notice of the creation of the relation of tenancy, and could not have obtained such notice from the records, did not give the mortgage on the crop priority over the landlord's lien.²⁵¹

It has been decided that when a contract for the sale of land

Watson v. Johnson, 33 Ark. 737; 248 Hamilton v. Maas, 77 Ala. 283; Lambeth v. Ponder, 33 Ark. 43; Meyer v. Bloom, 37 Ark. 43; Salina State Bank v. Burr, 7 Kan. App. 197, 52 Pac. 704; Beckwith v. Bent, 49 Ky. (10 B. Mon.) 95; Holt v. Colyer, 71 Mo. App. 280; Lane v. Pollard, 88 Mo. App. 326.

249 Mecklin v. Deming, 111 Ala. 153, 20 So. 507; Shows v. Brantley, 127 Ala. 352, 28 So. 716; Luce v. Moorehead, 73 Iowa. 498, 35 N. W. 598, 5 Am. St. Rep. 695; Wilezinski v. Lick, 68 Miss. 596, 10 So. 73.

250 Spruill v. Arrington, 109 N. C. 192, 13 S. E. 779.

251 Ford v. Green, 121 N. C. 70, 28 S. E. 132.

247 See Stone v. Bohm, 79 Ky. 141, and ante, note 239.

provides that, if the vendee defaults in payment of the purchase price, he shall pay rent as tenant, a lien for the rent arises as in other cases, and takes priority over a subsequent mortgage on the property subject to the lien, and that it is immaterial that the mortgagee, in making the advances secured by the mortgage, acted upon the strength of the contract of sale,²⁵² since this does not justify dealing with the vendee as owner. Nor can he claim priority on the ground that a conveyance by the original vendor to the person asserting the lien was not recorded, since this did not affect such mortgagee.²⁵³

While the landlord's lien on chattels kept on the premises is, as in the case of his lien on crops, prior to a mortgage made after the chattels are brought on the premises,²⁵⁴ it is subsequent to a mortgage on the chattels made before they are brought on the premises.²⁵⁵ A different rule would render a mortgage on chattels a most precarious form of security, by reason of the possibility that the chattels might be placed upon leased premises. Likewise, the mortgage, if made prior to the tenancy, is superior to the landlord's lien, even though the chattels were, at the time of making the mortgage, upon the premises, of which the mortgagor, or one to whom he sold the chattels, subsequently took a lease.²⁵⁶

A mortgage on chattels placed on the premises, made during

²⁵² *Abernathy v. Green* (Miss.) 11 13 Ky. Law Rep. 336; *Arnold v. So.* 186. Hewitt, 128 Iowa, 671, 104 N. W.

²⁵³ *Bacon v. Howell*, 60 Miss. 362. 843 (purchase-money mortgage).

²⁵⁴ *Beall v. White*, 94 U. S. 382, 24 But in *Hechtman v. Sharp*, 10 D. C. Law. Ed. 173; *Shields v. Atkinson*, (3 MacArthur) 90, it was decided 67 Ala. 244; *Beall v. James Folmar Sons & Co.*, 122 Ala. 414, 26 So. 1; that the landlord's lien is in such *Kyle v. Swem*, 99 Ala. 573, 12 So. case let in if a new note is given to the mortgagee and another mortgage given to secure it. 410; *Brody v. Cohen*, 106 Iowa, 309, 76 N. W. 682; *Garner v. Cutting*, 32 As to the priority of the landlord's lien for rent on a building under the Maine law, over a mortgage on the building, see *Union Water-Power Co. v. Chabot*, 93 Me. 339, 45 Atl. 30.

²⁵⁵ *Jarchow & Sons v. Pickens*, 51 256 *Rand v. Barrett*, 66 Iowa, 731, Iowa, 381, 1 N. W. 598; *Rand v. Barrett*, 66 Iowa, 731, 24 N. W. 530; 27 N. W. 530; *Perry v. Waggoner*, 68 Iowa, 403, 27 N. W. 292.

Wright v. Rothschild's Sons & Co.,

the term of a prior lease, has been held to take precedence of a lien for rent accruing under a renewal lease.²⁵⁷ It has, on the other hand, been decided that, though a new lease, made during the term of a former lease between the same parties, effected a surrender of the old lease by operation of law,²⁵⁸ the lien for rent accruing under the new lease took priority over a mortgage on the tenant's effects made before the new lease.²⁵⁹

In one state, it seems, the landlord's lien is entitled to priority even over a mortgage made before the placing of the chattels upon the demised premises, in case the mortgage is not recorded as provided by law.²⁶⁰ And in another state the landlord has been regarded as entitled to a lien upon chattels sold to the tenant and placed by him on the premises, though the title was retained by the vendor, the statute making such reservation of title invalid unless recorded.²⁶¹

It has been decided that, if the landlord purchases the tenant's crop, the lien is merged, but he has, as against a prior mortgagee, an absolute title to an undivided interest in the crop, equal to the amount of his lien therefor, though as to the balance he is merely a purchaser whose rights are subsequent to those of the mortgagee.²⁶²

(5) **Persons having liens for supplies or services.** The superiority of the landlord's lien over liens created, or arising by operation of law, in favor of other persons on account of supplies furnished by the latter to the tenant, has been recognized in several cases.²⁶³ But the lien of the landlord on a cotton crop has, in one state, been regarded as inferior to a lien in favor of another for the ginning and baling of the cotton, such service being

²⁵⁷ *Lyons v. Denpen*, 90 Ky. 305, 14 S. W. 279; *Thorpe v. Fowler*, 57 Iowa, 541, 11 N. W. 3; *Gasnick v. Steffensen*, 112 Iowa, 688, 84 N. W. 945. ²⁶¹ *Cohen v. Candler*, 79 Ga. 427, 7 S. E. 169; *Gartrell v. Clay*, 81 Ga. 327, 7 S. E. 161.

²⁵⁸ See ante, § 190 b (1).

²⁵⁹ *Rollins v. Proctor*, 56 Iowa, 326, 9 N. W. 235.

²⁶⁰ See *Berkey & Gay Furniture Co. v. Sherman Hotel Co.*, 81 Tex. 135, 16 S. W. 807, 26 Am. St. Rep. 782; *Austin v. Welch*, 31 Tex. Civ. App. 526, 72 S. W. 881; *Liquid Car-*

bonic Acid Mfg. Co. v. Lewis, 32 Tex. Civ. App. 481, 75 S. W. 47. ²⁶² *Titsworth v. Frauenthal*, 52 Ark. 254, 12 S. W. 498.

²⁶³ *Lake v. Gaines & Co.*, 75 Ala. 143; *Brown v. Hamil*, 76 Ala. 506; *Smith. Sen & Bro. v. Pouche*, 55 Ga. 120; *Goodwin v. Mitchell* (Miss.) 38 So. 657; *Spruill v. Arrington*, 109 N. C. 192, 13 S. E. 779.

for the benefit of all parties.²⁶⁴ The lien of a warehouseman for advances, on cotton stored with him by the tenant, made by him without notice of any claim for rent, has been regarded as superior to the lien for rent.²⁶⁵ But a lien for warehouse charges has been held to be inferior to the landlord's lien, the crop having been removed to the warehouse without the landlord's consent.²⁶⁶

In one state the statute expressly makes the landlord's lien for supplies inferior to that of laborers for services,²⁶⁷ and in another the statute provides for priority in favor of the lien for services, provided the landlord indorses his consent on the contract of employment.²⁶⁸ And where the statute expressly provides that the lien of a laborer on the crop shall be prior to all other liens, the laborer's lien is necessarily paramount to that of the landlord.²⁶⁹ But a mere agreement by the tenant with a laborer that the latter shall have the crop or a part of the crop cannot displace the landlord's lien.²⁷⁰

(6) **Attachment and execution creditors.** The lien of the landlord is not displaced by a levy upon the property by a creditor of the tenant under a writ of attachment.²⁷¹ Nor will the recovery of a judgment against the tenant by a third person and the issuance of execution thereunder affect the lien.²⁷²

²⁶⁴ *Duncan v. Jayne*, 76 Miss. 133, 163; *Groesbeck v. Evans*, 40 Tex. 23 So. 392. And see *Strauss v. Bailey*, 58 Miss. 131. ²⁶⁵ *Civ. App.* 216, 83 S. W. 430; *Id.*, 13 Tex. Ct. Rep. 659, 88 S. W. 889.

²⁶⁶ *Clark v. Dobbins*, 52 Ga. 656.

²⁶⁷ *Brown v. Noel*, 21 Ky. Law Rep. 648, 52 S. W. 849.

²⁶⁸ Georgia Code 1895, § 2800.

²⁶⁹ Arkansas, Kirby's Dig. St. 1904, § 5034.

²⁷⁰ *National Lumber Co. v. Bownan*, 77 Iowa, 706, 42 N. W. 557; *Stuart v. Twining*, 112 Iowa, 154, 83 N. W. 891.

²⁷¹ *Alston v. Wilson*, 64 Ga. 482; *Rousey v. Mattox*, 111 Ga. 883, 36 S. E. 925.

²⁷² *Smith v. Huddleston*, 103 Ala. 223, 15 So. 521; *Sevier v. Shaw*, 25 Ark. 417; *Hopkins v. Pedrick*, 75 Ga. 706; *Mead v. Thompson*, 78 Ill. 62; *Sanders v. Ohlhausen*, 51 Mo.

²⁷² *Sevier v. Shaw*, 25 Ark. 417; *Gibson v. Gautier*, 12 D. C. (1 Mackey) 35; *Colclough v. Mathis*, 79 Ga. 394, 4 S. E. 762; *Lightner v. Branron*, 99 Ga. 606, 27 S. E. 703; *Miles v. James*, 36 Ill. 399; *Travers v. Cook*, 42 Ill. App. 580; *Wetsel v. Mayers*, 91 Ill. 497; *Atkins v. Womeldorf*, 53 Iowa, 150, 4 N. W. 905; *Okolona Sav. Inst. v. Trice & Co.*, 60 Miss. 262; *Selecman v. Kinnard*, 55 Mo. App. 635; *Ghio v. Shutt*, 78 Tex. 375, 14 S. W. 860; 22 Am. St. Rep. 56; *Irion v. Bexar County*, 26 Tex. Civ. App. 527, 63 S. W. 550. But see *Governor v. Davis*, 20 Ala. 366, 56 Am. Dec. 200.

(7) **Marshaling of securities.** The doctrine of "marshaling securities" has in one case been applied in favor of a creditor of the tenant having a lien on the tenant's crop, the landlord being required first to exhaust the subtenant's crop, on which he alone had a lien, before resorting to the tenant's crop.²⁷³ But this doctrine cannot be applied in favor of a creditor of a subtenant having a lien on the latter's crop, it being applicable only as between creditors of the same debtor.²⁷⁴ Nor will it be applied if by possibility it may enure to the disadvantage of the creditor having the security of two funds, and consequently the landlord cannot be compelled to resort to the ungathered crop of the tenant, leaving to the other creditor the gathered crop, especially when the sufficiency of the former crop to satisfy the landlord's claim is doubtful.²⁷⁵

A creditor of the tenant who has a subsequent lien cannot demand that the landlord resort to the personal liability of a third person who has assumed payment of the rent.²⁷⁶ And a purchaser of the crop cannot demand that a payment made by the tenant, with no direction as to its application, be applied on the claim for rent or advances, so as to relieve the crop from the lien therefor.²⁷⁷ Neither the tenant,²⁷⁸ nor a purchaser from the tenant,²⁷⁹ can demand that the lien be enforced against one part of the property rather than another.

The landlord is under no obligation, as regards a junior incumbrancer, to see that the property on which their liens exist, or the proceeds of the sale thereof, are husbanded so as to cover both debts.²⁸⁰ But if the landlord takes measures to enforce his

²⁷³ *Walhoefer v. Hobgood*, 19 Tex. Civ. App. 629, 48 S. W. 32.

²⁷⁴ *Robinson v. Lehman*, Durr & Co., 72 Ala. 401.

²⁷⁵ *Wilkes v. Adler*, 68 Tex. 689, 5 S. W. 497. See *Dermidy v. Interstate Grain Co. (Iowa)* 86 N. W. 30; *Wilson & Son v. Curry*, 149 Ala. 368, 42 So. 753.

²⁷⁶ *Block v. Latham*, 63 Tex. 414.

²⁷⁷ *Soluble Pac. Guano Co. v. Harris*, 78 Ga. 20; *Hollingsworth v. Hill*, 67 Miss. 73, 10 So. 450. Nor can one who has levied on certain prop-

erty subject to the lien demand that the landlord apply a payment made by the tenant upon account of the particular claim for which a landlord's lien is asserted. *Cadenhead v. Rogers & Bro.*, 16 Tex. Ct. Rep. 837, 96 S. W. 952.

²⁷⁸ *Citizens' Sav. Bank of Olin v. Wood*, 134 Iowa, 232, 111 N. W. 929.

²⁷⁹ *Couch v. Davidson*, 109 Ala. 313, 19 So. 507; *Andrews Mfr. Co. v. Porter*, 112 Ala. 381, 20 So. 475.

²⁸⁰ *Hammond v. Harper*, 39 Ark. 248.

lien, he is bound to see that the property is handled and realized on in a proper manner.²⁸¹

g. Duration of the lien. The statutes of a number of states contain express provisions as to the duration of the lien, usually to the effect that the lien shall continue a named period after the expiration of the term, or, in the case of a lien for rent, after the rent becomes due.²⁸²

It has been decided that the lien is kept alive, in spite of the expiration of the time named in the statute, if a proceeding to foreclose the lien is instituted within that time.²⁸³ But elsewhere the commencement of an action against the tenant alone to enforce the lien has been held not to preserve the lien for the purpose of its assertion, after the statutory period, against a purchaser of the property from the tenant.²⁸⁴

²⁸¹ *Taylor v. Felder*, 5 Tex. Civ. Law Rep. 229; *Brown v. Noel*, 21 App. 417, 23 S. W. 480, 24 S. W. 313. Ky. Law Rep. 648, 52 S. W. 819.

²⁸² *Arizona* Rev. St. 1901, § 2695 (*six months after expiration of term*); *Arkansas*, Kirby's Dig. St. 1904, § 5032 (*six months after rent is due*). See *Valentine v. Hamlett*, 35 Ark. 538; *Anderson & Co. v. Bowles*, 44 Ark. 108. *District of Columbia* Code 1901, § 1229 (*three months after rent is due and until termination of action for rent brought within said three months*); *Illinois*, Hurd's Rev. St. 1905, c. 80, § 31 (*six months after expiration of term*); *Iowa* Code 1897, § 2992 (*one year after rent is due*); *Kentucky* St. 1903, §§ 2316, 2317, 2323 (*lien for rent, one hundred and twenty days after rent is due, and lien for advances, one hundred and twenty days after the expiration of term. In case of open removal of property, either lien endures only for fifteen days thereafter*). See *Petry v. Randolph*, 85 Ky. 351, 3 S. W. 420; *Gedge v. Shoenberger*, 83 Ky. 91; *McNichols v. Hopkins*, 10 Ky. Law Rep. 874; *Davis v. Ford*, 10 Ky. Law Rep. 241; *Conner v. Elliott*, 10 Ky. 546, 32 N. W. 487.

²⁸³ *Bourcier v. Edmondson*, 58 Tex. 675.

²⁸⁴ *Nickelson v. Negley*, 71 Iowa,

A proceeding to enforce the lien need not be instituted within the statutory period, it has been decided, if the property is assigned for the benefit of creditors within that time, it being the duty of the assignee to pay the landlord's claim out of the proceeds of sale, without suit.²⁸⁵ And a like view was taken when the landlord, instead of asserting his lien in a proceeding brought to enforce it, did so in a replevin suit instituted by a third person.²⁸⁶

It has been decided that a forfeiture of the term is within the meaning of a statute giving a lien for six months after the "expiration" of the term.²⁸⁷

A provision that the lien shall not continue more than a named number of days after the expiration of the term has been held to have no application if, within the time named, the tenant delivers to the landlord possession of the property subject to the lien.²⁸⁸

A lien to endure "as long as the lessee shall occupy the leased premises, and for thirty days thereafter," was held to be lost if proceedings to enforce it were not begun until thirty-four days after the death of the lessee.²⁸⁹ But ordinarily the death of the tenant does not affect the lien.²⁹⁰

When the statute provides for a lien during a certain length of time after the rent becomes due, this refers to the rent for which the lien is claimed, and in a proceeding to assert the lien against the property of a subtenant it is immaterial that the rent due under the sublease has been overdue longer than the time named.²⁹¹

The lien is not extinguished merely because the term has come to an end;²⁹² nor does the removal from the premises of the things subject to the lien ordinarily have this effect.²⁹³⁻²⁹⁵ If the

²⁸⁵ *Loth v. Carty*, 85 Ky. 591, 4 S. 50 Ala. 30; *Kern v. Noble*, 57 Ill. App. 27; *Wilcox v. Alexander* (Tex. Civ. App.) 32 S. W. 561.

²⁸⁶ *Edwards v. Cottrell*, 43 Iowa, 194. ²⁹¹ *Beck v. Minnesota & Western Grain Co.*, 131 Iowa. 62, 107 N. W. 1032, 7 L. R. A. (N. S.) 930.

²⁸⁷ *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 68 Fed. 72. ²⁹² *Lomax v. Le Grand & Co.*, 60 Ala. 537; *Couch v. Davidson*, 169 Ala. 313, 19 So. 567; *Fitzgerald v. Fowlkes*, 60 Miss. 270.

²⁸⁸ *Marquess v. Ladd*, 30 Ky. Law Rep. 1142, 100 S. W. 305.

²⁸⁹ *In re Stone's Estate*, 14 Utah, 205, 46 Pac. 1101.

²⁹⁰ *McDonald's Adm'r v. Morrison*,

²⁹³⁻²⁹⁵ See post, at note 364.

lien could be extinguished by such a removal by the tenant, it would evidently be of little value as security.

h. Extinguishment of the lien by payment. The lien cannot, necessarily, continue after the payment of the indebtedness which it secures. If the rent consists of an agreed portion of the crops, the delivery of such portion to the landlord extinguishes the lien,²⁹⁶ and it cannot, it has been decided, be revived by a subsequent agreement that such portion of the crops shall be differently applied.²⁹⁷ The lien is not extinguished by a tender, it has been held, unless this is kept good and the money paid into court.²⁹⁸

A purchaser of the property subject cannot demand that payments made by the tenant to the landlord shall be applied to the particular claims secured by the landlord's lien, so as to relieve the property therefrom.²⁹⁹ And the tenant cannot demand that the mortgagees of part of the chattels subject to the lien, who have acquired the reversion, shall, after selling under the mortgage, apply the proceeds on the rent rather than on the mortgage indebtedness, in order to protect the other chattels from sale under the lien.³⁰⁰

i. Relinquishment or waiver of the lien—(1) Express relinquishment. The right to a lien may be released or waived in express terms, at the time of making the lease, by provision to that effect in the instrument of lease, or otherwise.³⁰¹ It has been held that a provision that the rent is to become due as the crop is "matured and marketed" does not have that effect, so as to enable the tenant to market the crop free from the lien.³⁰²

The lien may be relinquished in favor of a particular person, having, or about to have, a claim against the tenant, without affecting the validity of the lien as against other persons,³⁰³ and

²⁹⁶ See *Curtis v. Cash*, 84 N. C. 41; *Baker v. Cotney*, 142 Ala. 566, 38 So. 131, 110 Am. St. Rep. 50.

²⁹⁷ *Tinman v. McMeekin*, 42 S. C. 311, 20 S. E. 36.

²⁹⁸ *Hamlett v. Tallman*, 30 Ark. 505; *Bloom v. McGehee*, 38 Ark. 329.

²⁹⁹ See ante, note 277.

³⁰⁰ *Citizens' Sav. Bank of Olin v. Wood*, 134 Iowa, 232, 111 N. W. 929.

³⁰¹ See *Knox v. Hunt*, 18 Mo. 243.

³⁰² *Davis v. Sparks*, 38 Ill. App. 166.

³⁰³ *Foster v. Napier*, 74 Ala. 393; *Stoelker v. Wooten*, 80 Ala. 610, 2 So. 703; *Napier v. Foster*, 80 Ala. 339; *Carter v. DuPre*, 18 S. C. 179, 44 Am. Rep. 569; *Saloy v. Bloch*,

136 U. S. 338, 34 Law. Ed. 668. A waiver in favor of a mortgagee is

such a waiver may be conditioned upon the doing of certain acts by that person.³⁰⁴ A relinquishment in favor of any person who may make advances to the tenant enures to the benefit of one who makes such advances on the strength thereof.³⁰⁵ The relinquishment of the lien in favor of another person may be to a specified amount only.³⁰⁶ It has been decided that a consent that another person should take the crop "less the rent," which consisted of a part of the crop, involved a retention of the lien for rent and a relinquishment of that for advances.^{307,308}

The landlord may relinquish his lien as to part of the crop or other things subject to the lien without losing it as to the other part;³⁰⁹ and one having a junior incumbrance upon the property cannot complain of such partial relinquishment, since his incumbrance is, as to that part, given first place.³¹⁰ But it has been held, apparently, that the landlord may, by relinquishing his lien on property retained by the tenant, lose his right to enforce the lien against property sold to another.³¹¹

In the absence of a statute requiring a waiver to be in writing, an oral waiver, made after the lease, in favor of a particular person, is effective, it seems.³¹²

(2) **Acceptance of note or other security.** The acceptance of the tenant's note for the rent or advances involves no waiver of the lien,³¹³ unless, presumably, this is accepted as payment of the

- not necessarily a waiver in favor of an assignee of the mortgage. *Neeley v. Phillips*, 70 Ark. 90, 66 S. W. 349.
- ³⁰⁴ *Stoelker v. Wooten*, 80 Ala. 610, 2 So. 703.
- ³⁰⁵ *Dreyfus v. Gage & Co.*, 84 Miss. 219, 36 So. 248.
- ³⁰⁶ *Boag v. Woodward*, 33 S. C. 247, 11 S. E. 726; *Dreyfus v. Gage & Co.*, 84 Miss. 219, 36 So. 248.
- ^{307,308} *Coleman v. Siler*, 74 Ala. 435.
- ³⁰⁹ *Robinson v. Lehman, Durr & Co.*, 72 Ala. 401; *Varner v. Ross*, 121 Ala. 603, 25 So. 725; *Bigham v. Cross*, 69 Ark. 581, 65 S. W. 101; *Boag v. Woodward*, 33 S. C. 247, 11 S. E. 726; *Walhoefer v. Hobgood*, 18 Tex. Civ. App. 291, 44 S. W. 566; *Citizens' Sav. Bank of Olin v. Woods*, 134 Iowa, 232, 111 N. W. 929.
- ³¹⁰ *Lemay v. Johnson*, 35 Ark. 225.
- ³¹¹ *John V. Fearwell & Co. v. Stick*, 96 Iowa, 87, 61 N. W. 565, 64 N. W. 614.
- ³¹² *Griggs v. Harton*, 84 Ark. 623, 104 S. W. 930.
- ³¹³ *Denham v. Harris*, 13 Ala. 465; *Coleman v. Siler*, 74 Ala. 435; *Cunnea v. Williams*, 11 Ill. App. (1st Bradw.) 72; *Sullivan v. Ellison*, 20 S. C. 481; *Trimble v. Durham*, 70 Miss. 295, 12 So. 207. But in *Garst v. Good*, 50 Mo. App. 149, it is said that the taking of a note for the rent is not conclusive of a waiver, but it at most raises a presumption thereof.

claim. And it is immaterial in this regard that the note contains a waiver of the statutory exemptions.³¹⁴ The acceptance of the tenant's draft for rent due, likewise, does not extinguish the lien, it not appearing to have been accepted in payment of the rent.³¹⁵ It has been decided, however, that if a note is accepted partly for rent and partly for other items, and it does not appear to what extent the note is for rent, the lien for rent is waived,³¹⁶ and a later decision in the same state seems to be to the effect that the inclusion in the note of the amount of other indebtedness with that of the rent, even though the amount of each is readily ascertainable, involves a waiver of the lien.³¹⁷

The acceptance by the landlord of the personal security of another, in addition to that of the tenant, for the payment of the indebtedness, does not involve a waiver of the lien,³¹⁸ provided at least an intention that it shall not so operate is shown.³¹⁹

The express reservation by the lease of a lien on the tenant's property does not, it has been decided, affect the existence of the statutory lien,³²⁰ and the same view has been asserted with reference to the effect of a subsequent chattel mortgage to secure the rent.³²¹ It has also been decided that the statutory lien is not affected by the creation of an express lien on all the tenant's chattels, whether exempt or not, it being, however, intimated that a failure to thus make the lien more extensive than the statutory lien, by extending it to exempt chattels, might give it the effect of a waiver of the latter.³²² And it was held that the taking of a mortgage on chattels, which was ineffective as against a third person by reason of failure to record it, did not involve a waiver of the lien, the failure to record being regarded as evi-

³¹⁴ *Stephens v. Adams*, 93 Ala. 117, 9 So. 529.

³¹⁵ *Worsham v. McLeod* (Miss.) 11 So. 107.

³¹⁶ *Smith v. Dayton*, 94 Iowa, 102, 62 N. W. 650.

³¹⁷ *Ladner v. Balsley*, 103 Iowa, 674, 72 N. W. 787.

³¹⁸ *Denham v. Harris*, 13 Ala. 465; *Coleman v. Siler*, 74 Ala. 435; *Cunnea v. Williams*, 11 Ill. App. (11 Bradw.) 72.

³¹⁹ *Rollins v. Proctor*, 56 Iowa, 326, 9 N. W. 235; *Block v. Latham*, 63 Tex. 414; *Smith v. Wells' Adm'x*, 67 Ky. (4 Bush) 92.

³²⁰ *Franklin v. Meyer*, 36 Ark. 96; *Dreyfus v. Gage & Co.*, 84 Miss. 219, 36 So. 248.

³²¹ *Merchants' & Planters' Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406.

³²² *Smith v. Dayton*, 94 Iowa, 102, 62 N. W. 650; *Ladner v. Balsley*, 103 Iowa, 674, 72 N. W. 787.

dence of a contrary intention.³²³ But there is a decision to the effect that the acceptance by the landlord's agent, in his own name, of a mortgage on the tenant's crop, involved a waiver of a lien on the subtenant's crop, in favor of a *bona fide* purchaser of the latter.³²⁴

The recovery of a personal judgment for the rent has been occasionally regarded as involving a waiver of the lien therefor,³²⁵ though in one case a contrary view has been adopted.^{325a}

That the tenant replevies property taken under distress, and gives bond to satisfy the judgment, has been decided not to affect the landlord's lien.³²⁶

(3) **Inducing action by third person.** If the landlord induces a third person to make advances or furnish supplies to the tenant by stating to him, expressly or by implication, that he will not assert the priority of his lien, he is estopped to assert such priority, and such effect was given to the landlord's promise not to make advances if the other would do so, he being thereby precluded from asserting a lien for advances as against the latter.³²⁷ That the landlord has thus lost his lien as to property on one piece of land does not, however, affect his lien as regards advances or rent due on account of other land, leased by him to the same tenant at a subsequent date, without the knowledge of the person in favor of whom the estoppel exists.³²⁸ It was held that an assignee of rent notes waived his lien by reason of his action in stating to certain persons, who did not know that he held the notes, that by procuring a waiver from the owner of the land they would obtain a prior lien for such advances as they

³²³ Pitkin v. Fletcher, 47 Iowa, 53. Puckett (Tex. Civ. App.) 66 S. W. 242.

³²⁴ Gaines v. Keeton, 68 Miss. 473, 10 So. 71.

³²⁵ Howard v. Deens, 143 Ala. 423, 39 So. 346; Wise v. Old, 57 Tex. 514. And see In re Lumpkin, 2 Hughes, 175, Fed. Cas. No. 8,606.

^{325a} Belcher v. Grimsley, 88 N. C. 88.

³²⁶ McEvoy v. Niece, 20 Tex. Civ. App. 686, 50 S. W. 424; McBride v.

³²⁷ Chancellor v. Law, 148 Ala. 511, 41 So. 514; Coleman v. Siler, 74 Ala. 435; Beattie v. Hughes, 82 Ark. 199, 105 S. W. 170. See Tinsley v. Craige, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570, where, however, it was decided that this doctrine could not be applied in view of a statutory provision that a waiver of the landlord's lien must be in writing.

³²⁸ Parker v. Clark, 61 Miss. 492.

might make, they having, on the strength of such statement, procured such waiver and then made advances.³²⁹

An agreement by the landlord to release a mortgage held by him, on the tenant's chattels, was regarded as effecting a waiver of his statutory lien as well, the person with whom the agreement was made so understanding it, as the landlord knew, and making a loan to the tenant on the faith thereof, and the statute of that state providing that "when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."³³⁰

On the same principle as that involved in the cases above referred to, that the landlord waives his lien in favor of one whom he induces to take a certain action by representations that the lien is nonexistent, it has been decided that he cannot assert the lien for rent as against a purchaser of the tenant's interest in the crop, to whom he stated, in reference to the intended purchase, that "it is all right" and that nothing was due him except the stipulated portion of the crop.³³¹ And it was held that the landlord in effect waived his lien on the tenant's cotton crop, in favor of a "ginner," by consenting, through his agent, to the ginning, which was necessary before the crop could be marketed.³³²

(4) **Consent to sale or removal of property.** There are a number of cases to the effect that, if the landlord consents to a sale by the tenant of the property on which he has a lien, he thereby waives the lien in favor of the purchaser.³³³ In some cases the decision appears to be based on the fact that the purchaser is without notice of the lien, and that consequently the landlord, as having made the sale possible, should bear any loss

³²⁹ *Dreyfus v. Gage & Co.*, 84 Miss. 219, 36 So. 248.

³³⁰ *Wood v. Duval*, 100 Iowa, 724, 69 N. W. 1061.

³³¹ *Goeing v. Outhouse*, 95 Ill. 346.

³³² *Duncan v. Jayne*, 76 Miss. 133, 23 So. 392.

³³³ See cases cited in notes next following. But in *Salina State Bank v. Burr*, 7 Kan. App. 197, 52 Pac. 704, it is decided that the lien

on a crop of corn was not waived by the insertion in the instrument of lease of a clause providing for the payment of the rent "from the proceeds of the first sale of the crop." That the consent to the sale does not involve a waiver of the lien in favor of persons other than the purchaser, see *Sparks v. Ponder*, 42 Tex. Civ. App. 431, 15 Tex. Ct. Rep. 380, 94 S. W. 428.

rather than the purchaser.³³⁴ In some, on the other hand, the fact that the purchaser would suffer if the landlord were allowed to assert his lien as against him appears to be ignored, and the decision is based rather on the theory that the consent to the sale operates as a waiver of the lien, irrespective of its effect upon other persons.³³⁵ That the waiver by reason of the consent to the sale is not based on the theory of a contract not to enforce the lien has been occasionally stated,³³⁶ and is clearly apparent, since there is ordinarily no consideration for the giving of consent.³³⁷ The fact indeed that there is no consideration for the consent to the sale has been regarded as entitling the landlord to withdraw the consent before the sale is made.³³⁸

If the landlord directly informs one proposing to purchase from the tenant property subject to the lien that the lien no longer exists, and the purchaser pays the tenant for the property on the strength of such information, the landlord is, necessarily, estopped to assert the lien as against such purchaser.³³⁹ But

³³⁴ *May v. McGaughey*, 60 Ark. 337, 92 N. W. 58, it is said 357, 30 S. W. 417, 28 L. R. A. 153; that a consideration exists for this purpose in such a case in the shape of detriment to the tenant, since, on the strength of the landlord's consent to the sale, he has bound himself to make a good title to the purchaser. But the sale is subsequent to the landlord's giving of consent, and, for this reason, any liability arising therefrom cannot be a consideration for the consent, and moreover the sale, even though it involve such a liability, is not a detriment to the tenant. If it were, he would not make it.

³³⁵ *Randall v. Ditch*, 123 Iowa, 582, 99 N. W. 190; *Noe v. Layton*, 76 Ark. 582, 89 S. W. 1005; *Campbell v. Bowen*, 22 Ind. App. 562, 54 N. E. 409; *Fulkerson v. Lynn*, 64 Mo. App. 649; *White v. McAlister*, 67 Mo. App. 314; *Planters' Compress Co. v. Howard*, 35 Tex. Civ. App. 300, 80 S. W. 119; *Foxworth v. Brown*, 120 Ala. 59, 24 So. 1. See *Cohn v. Smith*, 64 Miss. 816, 2 So. 244.

³³⁶ *Griffith v. Gillum*, 31 Mo. App. 33; *Fulkerson v. Lynn*, 64 Mo. App. 649.

³³⁷ *In Fishbaugh v. Spunaugle*, 118

³³⁸ *Cohn v. Smith*, 64 Miss. 816, 2 So. 244; *Sugg v. Farrar*, 107 N. C. 123, 12 S. E. 236. See *Planters' Compress Co. v. Howard*, 35 Tex. Civ. App. 300, 80 S. W. 119.

³³⁹ *Coeing v. Outhouse*, 95 Ill. 346. See *White v. Freedman's Bank*, 8 D. C. (1 MacArthur) 509.

why the landlord, by expressing to the tenant his consent to a sale of the crop, should thereby lose his lien as against one who purchases without knowledge of such consent, is not entirely clear. There is no room for any estoppel unless the purchaser learns of the landlord's consent before making the purchase, and acts on the strength thereof, and it is difficult to see how a consent to the sale can be regarded as an expression of an intention to waive the lien.^{340, 341} The landlord's consent to the sale would seem rather to show his reliance on and retention of his lien to protect him in his claim for rent or advances.

The receipt by the landlord, on account of rent, of a part of the proceeds of a sale by the tenant of property subject to the lien, does not, it has been held, show a consent to the sale, so as to preclude his assertion of a lien for the balance of the rent.³⁴² In another state, however, a different view has been taken.³⁴³

A consent to the sale of the crop cannot be inferred from the fact that the landlord consented to sales of crops of former years.³⁴⁴ Nor because he failed to "investigate or look up" another part of the crop which he knew had been disposed of, or to inquire as to the intended disposition of the part in question.³⁴⁵

^{340, 341} In *Bigham v. Cross*, 69 Ark. Bloom, 111 Iowa, 319, 82 N. W. 794, 581, 65 S. W. 101, it was held that there was no waiver resulting from the landlord's consent that third persons, who were furnishing supplies to the tenant, should handle and dispose of the crop, on condition that they protect him in his right as landlord.

³⁴² *Volmer v. Wharton*, 34 Ark. 691. See *Noe v. Layton*, 69 Ark. 551, 64 S. W. 880; *Id.*, 76 Ark. 582, 89 S. W. 1005.

³⁴³ *McCollum v. Wood* (Tex. Civ. App.) 33 S. W. 1087; *Planters' Compress Co. v. Howard*, 35 Tex. Civ. App. 300, 80 S. W. 119; *Id.*, 41 Tex. Civ. App. 285, 14 Tex. Ct. Rep. 815, 92 S. W. 44.

³⁴⁴ *Bivins v. West* (Tex. Civ. App.) 46 S. W. 112. In *Church v.*

³⁴⁵ *Blake v. Counselman & Co.* 95 Iowa, 219, 63 N. W. 679.

A consent to the sale of a part of the crop subject to the lien cannot be regarded as a consent to the sale of the whole.³⁴⁶

The landlord's consent to the removal of the crop from the premises has been regarded as extinguishing his lien in favor of a *bona fide* purchaser,³⁴⁷ but such consent will not have that effect, it is said, unless it results in misleading a *bona fide* purchaser, or it is intended thereby to waive the lien.³⁴⁸ When the statute provided that "landlords shall have a lien on the property of their tenants which remains in the house rented, for the rent due, and said property may not be removed from said house without the landlord's consent," it was held that the lien was lost upon the removal of property with the landlord's consent, and that there was a removal from "the house rented" within this provision when the property was removed to another apartment in the same building, held under a different lease.³⁴⁹

That the landlord allowed the tenant to apply a part of the crop to the latter's own use, the landlord having no knowledge of a third person's claim against the tenant, has been held not to involve a waiver in favor of such person of his lien as to the balance of the crop.³⁵⁰ It does not seem that the landlord's knowledge of such claim could have changed this result, there being no recognized obligation upon landlords to see that their tenants apply their crops to the payment of their debts.

It has been held that, when there was a reservation of a part of the crop as rent, the division of the crop, by mutual agreement, followed by the tenant's removal of his share, did not divest the lien,³⁵¹ but that the case was different when, though the tenant's share was set apart, he was told not to remove such share till he had paid his advances.³⁵²

(5) **Abstention from enforcement of lien.** The statutory lien exists independently of the levy of a distress for its enforce-

³⁴⁶ *Wimp v. Early*, 104 Mo. App. 85, 78 S. W. 242; *Walhoefer v. Hobgood*, 18 Tex. Civ. App. 291, 44 S. W. 566; *Antone v. Miles* ("Civ. App.) 17 Tex. Ct. Rep. 748, 105 S. W. 39. See *Bigham v. Cross*, 69 Ark. 581, 65 S. W. 101.
³⁴⁷ *Mav v. McCaughey*, 60 Ark. 357, 30 S. W. 417, 28 L. R. A. 153.
³⁴⁸ *Tuttle v. Walker*, 69 Ala. 172; *Coleman v. Siler*, 74 Ala. 435.
³⁴⁹ *Wolcott v. Ashenfelter*, 5 N. M. 442, 23 Pac. 780, 8 L. R. A. 691.
³⁵⁰ *Johnston v. Kleinsmith*, 33 Tex. Civ. App. 236, 77 S. W. 36.
³⁵¹ *Jordan v. Bryan*, 103 N. C. 59, 9 S. E. 135.
³⁵² *Jarrell v. Daniel*, 114 N. C. 212,

ment,³⁵³ and consequently the failure to undertake to enforce it in this manner,³⁵⁴ or the abandonment of a distress begun for this purpose,³⁵⁵ does not affect the existence of the lien. In one state, however, it has been held that if, after issuing a distress in a suit for rent, the landlord takes merely a personal judgment for the rent, the lien is lost.³⁵⁶ And so in another state the failure to enforce the lien for rent by attachment, as the statute provides, and the recovery of a personal judgment therefor, appear to be regarded as involving a waiver of the lien.³⁵⁷ And if the statute expressly limits the period of the duration of the lien, it is usually lost by a failure, within that time, to institute proceedings to enforce it.^{357a}

In one state, as before stated, if the landlord fails to proceed against his tenant's crop on notification by a subtenant, he loses his right to proceed against the crop of the latter.³⁵⁸

The action of the landlord in deferring for a month the sale under an attachment issued to enforce the lien has been held to involve no relinquishment of the lien,³⁵⁹ and the failure for a month to begin a proceeding to foreclose the lien, the landlord having in the meanwhile taken possession of the crop with the tenant's assent, was held not to involve the loss of the lien.³⁶⁰

(6) **Blending of claims.** It has occasionally been decided that if the landlord blends his claim for rent with other claims for which he has no lien, and undertakes to assert a lien for the whole amount of such claims, he thereby loses his lien.³⁶¹

19 S. E. 146, 26 L. R. A. 810, 41 Am. St. Rep. 786.

³⁵³ See ante, at note 204.

³⁵⁴ Lillard v. Noble, 159 Ill. 311, 42 N. E. 844; Mead v. Thompson, 78 Ill. 62; Bourcier v. Edmondson, 58 Tex. 675; Templeman v. Gresham, 61 Tex. 50; Randall v. Rosenthal (Tex. Civ. App.) 27 S. W. 906.

³⁵⁵ Lillard v. Noble, 159 Ill. 311, 42 N. E. 844; Wetsel v. Mayers, 91 Ill. 497; Hamilton v. Kilpatrick (Tex. Civ. App.) 29 S. W. 819.

³⁵⁶ Toland v. Swearingen, 39 Tex. 447; Wise v. Old, 57 Tex. 514; Bond v. Carter (Tex. Civ. App.) 73 S. W. 45.

³⁵⁷ Howard v. Deens, 143 Ala. 423, 39 So. 346. The fact that a replevy bond was given and accepted for the property distrained was held not to release the lien, though the proceeding was afterwards dismissed. McEvoy v. Niece, 20 Tex. Civ. App. 686, 50 S. W. 424.

^{357a} See ante, § 321 g.

³⁵⁸ See ante, note 144.

³⁵⁹ Gibson v. Gautier, 12 D. C. (1 Mackey) 35.

³⁶⁰ Gaw v. Bingham (Tex. Civ. App.) 107 S. W. 931.

³⁶¹ Smith v. Dayton, 94 Iowa, 102, 62 N. W. 650; Ladner v. Balsley, 103 Iowa, 674, 72 N. W. 787; First Nat.

j. **Removal of the property subject.** The existence of the lien does not, it seems, absolutely preclude the tenant from removing from the premises the property subject thereto,³⁶² but under some of the statutes, if he thereby endangers the landlord's claim, the latter may immediately proceed by distress or attachment against the property;^{362a} and in a number of cases the courts have recognized the right of the landlord to an injunction against removal, so far as this may appear necessary to protect his lien.³⁶³

The removal of the property from the leased premises does not, in most jurisdictions, affect the continued existence of the lien,³⁶⁴ and it is immaterial in this regard that the statutes exclude any right to seize, after removal, other classes of property on which no lien is given.³⁶⁵ In one jurisdiction, however, the lien is lost by removal, the statute giving a lien on property "which remains in the house rented."³⁶⁶

Bank of Sioux City v. Flynn, 117 Iowa, 493, 91 N. W. 84; *Riley v. Renick Mill. Co.*, 44 Mo. App. 519. But see *Dickenson v. Harris*, 48 Ark. 355, 3 S. W. 58; *Varner v. Rice*, 39 Ark. 344.

³⁶² See *Haseltine v. Ausherman*, 87 Mo. 410.

^{362a} *Price v. Roetzell*, 56 Mo. 500; *Hubbard v. Moss*, 65 Mo. 647; *Hulett v. Stockwell*, 27 Mo. App. 328; *Garnier v. Cutting*, 32 Iowa, 547; *Click v. Stewart*, 36 Tex. 280; *Miller v. Bider* (Iowa) 105 N. W. 594. See post, § 333 b.

³⁶³ *Milner v. Cooper*, 65 Iowa, 190, 21 N. W. 558; *Carson v. Electric Light & Power Co.*, 85 Iowa, 44, 51 N. W. 1144; *Wallin v. Murphy*, 117 Iowa, 640, 91 N. W. 930, 94 Am. St. Rep. 320; *Price v. Roetzell*, 56 Mo. 500. And an injunction has been issued against feeding the crops to stock (*Gray v. Bremer*, 122 Iowa, 110, 97 N. W. 991); and against a sale under execution by the tenant's creditors (*Click v. Stewart*, 36 Tex. 280). There is, it is has been decid-

ed in one state, no right to an injunction when an attachment is available. *Rotzler v. Rotzler*, 46 Iowa, 189. But in another it has been held that the remedy by attachment is not exclusive. *Price v. Roetzell*, 56 Mo. 500; *Sanders v. Ohlhausen*, 51 Mo. 163.

³⁶⁴ *Lomax v. LeGrand*, 60 Ala. 537; *Andrews Mfg. Co. v. Porter*, 112 Ala. 381, 20 So. 475; *Aikins v. Staddell*, 9 Kan. App. 298, 61 Pac. 325; *Henry v. Davis*, 60 Miss. 212; *Fitzgerald v. Fowlkes*, 60 Miss. 270; *Wilkes v. Adler*, 68 Tex. 689, 5 S. W. 497. In *Webb v. Sharp*, 80 U. S. (13 Wall.) 14, 20 Law. Ed. 478, the contrary view is suggested with reference to the District of Columbia statute. Under the Kentucky statute (St. 1903, § 2317) the lien exists for fifteen days after a bona fide removal of the property. See *Stone v. Bohm*, 79 Ky. 141.

³⁶⁵ *Henry v. Davis*, 60 Miss. 212; *Fitzgerald v. Fowlkes*, 60 Miss. 270.

³⁶⁶ *Wolcott v. Ashenfelter*, 5 N. M. 442, 23 Pac. 780, 8 L. R. A. 601,

There are, in several states, provisions imposing a penal liability upon the tenant removing or disposing of the property subject to the landlord's lien, without first satisfying the landlord's claim. The cases construing such statutes are referred to in the notes.³⁶⁷ It does not seem that the violation of such penal statutes would ordinarily impose any civil liability upon the tenant. The violation, however, of a statute providing, without the imposition of any penalty for noncompliance therewith, that it should be unlawful for the tenant to remove the crop until the landlord's claim for rent and advances had been satisfied,³⁶⁸ was decided to involve a conversion by the tenant and also by the person receiving it from the tenant with knowledge of the lien.³⁶⁹

It has apparently been decided by the supreme court of the United States that, upon the removal of the tenant's property into another state, the landlord's lien under the statute of the state in which the demised premises are located comes to an end, and that it cannot thereafter be asserted even in the courts of the latter state.³⁷⁰ This decision has been criticised,³⁷¹ and with good reason, it is submitted, since while the courts of the state into which the property is removed are under no obligation to recognize and enforce the statute of the state in which the demised premises are located, the courts of the latter state should do so, in so far as they can, in spite of the removal. The same view, that the removal of the tenant's property into an-

where an "apartment" was held to be a "house" within the meaning of the statute.

³⁶⁷ Money v. State, 89 Ala. 110, 7 So. 841; Smith v. State, 139 Ala. 115, 36 So. 727; Hackney v. State, 101 Ga. 512, 28 S. E. 1007; Morrison v. State, 111 Ga. 642, 36 S. E. 902; Edwards v. State (Miss.) 8 So. 464; Love v. State (Miss.) 8 So. 465; Varner v. Spencer, 72 N. C. 381; State v. Merritt, 89 N. C. 506; State v. Rose, 90 N. C. 712; State v. Powell, 94 N. C. 920; State v. Crowder, 97 N. C. 432, 1 S. E. 690; State v. Williams, 106 N. C. 646, 10 S. E. 901; State v. Smith, 106 N. C. 653, 11 S. E. 166; State v. Turner, 106 N. C. 691, 10 S.

E. 1026; State v. Foushee, 117 N. C. 766, 23 S. E. 247; State v. Neal, 129 N. C. 692, 40 S. E. 205; State v. Crook, 132 N. C. 1053, 44 S. E. 32, 61 L. R. A. 777, 95 Am. St. Rep. 688; State v. Bell, 136 N. C. 674, 49 S. E. 163; State v. Reeder, 36 S. C. 497, 15 S. E. 544; State v. Hoskins, 106 Tenn. 430, 61 S. W. 781.

³⁶⁸ Texas Rev. St. 1895, art. 3236.

³⁶⁹ Mensing Bros. & Co. v. Cardwell, 33 Tex. Civ. App. 16, 75 S. W. 347.

³⁷⁰ Walworth v. Harris, 129 U. S. 355, 32 Law. Ed. 712.

³⁷¹ Minor, Conflict of Laws, p. 309, note.

other jurisdiction extinguishes the lien as to that property, has been recognized by the courts of one of the states, in connection with property removed from that state.³⁷² In another state, what, it is conceived, is a sounder view is adopted, that the landlord is not deprived of his right to assert his lien in the courts of his own state by the fact that the property has been removed to another state by the tenant or some third person.³⁷³

k. **The possessory rights of the landlord.** The existence of the statutory lien does not of itself, it would seem, give any right of possession to the landlord as regards the property subject to the lien. The ownership of the property is in the tenant,³⁷⁴ and the statute does not purport to divest him thereof, or of the accompanying right of possession. That the landlord has no right of possession has been expressly asserted,³⁷⁵ and it has been decided that he cannot maintain replevin or its statutory equivalent for the property.³⁷⁶ There are, however, a number of decisions³⁷⁷ to the effect that he may, at least after the rent becomes due, assert a right of possession by force of his lien for rent.

³⁷² *Chism v. Thomson*, 73 Miss. 410, 19 So. 210; *Millsaps v. Tate*, 75 Miss. 150, 21 So. 663; *Ball v. Sledge*, 82 Miss. 749, 35 So. 447, 100 Am. St. Rep. 654.

³⁷³ *Atkinson v. James*, 96 Ala. 214, 10 So. 846, in which case a nonresident to whom a crop, grown on the demised premises, was delivered in his own state, was held liable in damages as having purchased it with knowledge that it was subject to a landlord's lien.

³⁷⁴ See *Broughton v. Powell*, 52 Ala. 123; *Hussey v. Peebles*, 53 Ala. 432; *Upham v. Dodd*, 24 Ark. 545; *Bowers v. Davis*, 79 Ill. App. 347; *Evans v. Groesbeck*, 42 Tex. Civ. App. 43, 93 S. W. 1005.

³⁷⁵ *Bell v. Matheny*, 36 Ark. 572; *Finney v. Harding*, 136 Ill. 573, 27 N. E. 289, 12 L. R. A. 605, 29 Am. St. Rep. 334; *Wilson v. Respass*, 86 N. C. 112.

³⁷⁶ *Bell v. Matheny*, 36 Ark. 572; *Knox v. Hellums*, 38 Ark. 413; *Treadway v. Treadway Ex'rs*, 56 Ala. 390; *Travers v. Cook*, 42 Ill. App. 580; *Evans v. Groesbeck*, 42 Tex. Civ. App. 43, 93 S. W. 1005.

³⁷⁷ *Dale v. Taylor* (Kan.) 66 Pac. 993; *Hunter v. Whitfield*, 89 Ill. 229; *Wetsel v. Mayers*, 91 Ill. 497; *Edwards v. Cottrell*, 43 Iowa, 194; *Brody v. Cohen*, 106 Iowa, 309, 76 N. W. 682 (semble); *Groesbeck v. Evans* (Tex. Civ. App.) 83 S. W. 430. In *Marrs v. Lumpkins*, 22 Tex. Civ. App. 448, 54 S. W. 775, it is held that he may maintain an action for "conversion" against the tenant. In *Hilman v. Brigham*, 117 Iowa, 70, 90 N. W. 491; *Hubenka v. Vach*, 64 Neb. 170, 89 N. W. 789, it is decided that he has no right of possession until rent is due, it being asserted, by implication, that thereafter he has.

The possession may, in any case, be given to the landlord by special agreement,³⁷⁸ and after delivery of a portion of the crops in payment of the rent the landlord has the possession thereof for every purpose.³⁷⁹

In North Carolina there is an express statutory provision that, in the case of a lease for agricultural purposes, all crops raised on said lands shall be "held to be vested in possession of the lessor or his assigns" until the rents and any advancements made by the landlord are paid, and all stipulations performed, it being further stated that "this lien shall be preferred to all other liens" and the lessor is given a right to bring "claim and delivery" for the crop against the tenant removing the crop from the land without the landlord's assent, and also against any person who may get possession thereof.³⁸⁰ This statute in effect gives the landlord a lien to secure the payment of rent and advances, and the actual possession is said to be in the tenant in behalf of the landlord.³⁸¹ The landlord is not entitled thereunder to bring an action for the crop until the time has arrived for payment of the rent or advances, or for delivery of the share of the crop to which he is entitled,³⁸² unless the tenant has denied the landlord's right to such share,³⁸³ or unless the tenant is about to remove or dispose of the crop or abandon a growing crop,³⁸⁴ in which cases the action may be brought immediately.

It has been decided that, when it is agreed between the lessor and the lessee that the title to the crops shall remain in the former till payment of the rent, he has the right, upon the abandonment of the crop by the lessee, to enter and complete the cultivation of the crop, if this be reasonably necessary;³⁸⁵ while it was held in the same state that the lessor had no such right if there was no agreement vesting in him the title to the crop.³⁸⁶ But elsewhere there is a contrary decision in the latter regard.³⁸⁷

³⁷⁸ *Chamblee v. McKenzie*, 31 Ark. 155; *Buck v. Lee*, 36 Ark. 525; *Abington v. Steinberg*, 86 Mo. App. 639. ³⁸³ *Livingston v. Farish*, 89 N. C. 79, 16 S. E. 931.

³⁷⁹ *Steinhardt v. Bell*, 80 Ala. 208.

³⁸⁰ Revisal 1905, § 1993.

³⁸¹ *State v. Copeland*, 86 N. C. 691; *Jordan v. Bryan*, 103 N. C. 59, 9 S. E. 135.

³⁸² *Jordan v. Bryan*, 103 N. C. 59, 9 S. E. 135. See *Smith v. Tindall*, 107 N. C. 88, 12 S. E. 121.

³⁸⁴ *Jordan v. Bryan*, 103 N. C. 59, 9 S. E. 135.

³⁸⁵ *Riddle v. Hodge*, 83 Ga. 173, 9 S. E. 786.

³⁸⁶ *Wadley v. Williams*, 75 Ga. 272.

³⁸⁷ *Fry & Co. v. Ford*, 38 Ark. 246. And see *Sanders v. Ohlhausen*, 51 Mo. 163, where it seems to be as-

1. **Enforcement of lien**—(1) **Necessity of legal proceeding.** The statutes ordinarily name methods of proceeding for the enforcement of the landlord's lien for rent or advances, and it has been decided that, the statute providing for its enforcement by the process of a court, the landlord cannot seize the property in satisfaction thereof without legal process and thereby acquire title thereto,³⁸⁸ and he has been held liable as for conversion when he so seized the property.³⁸⁹

Even though the tenant consents to the taking of the property by the landlord, in satisfaction of the latter's claim, the latter's taking of possession without foreclosure, it has been held, does not give him a title which can be asserted as against a levy under a junior lien.³⁹⁰ On the other hand, it has been decided that the landlord has in such case the right of possession, at least at law, as against a subsequent mortgage.³⁹¹ And there is at least one decision to the effect that the landlord may, if the tenant abandons the crop, gather and prepare it for market and retain, as against a subsequent mortgagee, sufficient to satisfy his claim for rent and to reimburse his expenses.³⁹²

sumed that he has a right to enter for this purpose.

³⁸⁸ *Buck v. Lee*, 36 Ark. 525; *Folmar v. Copeland*, 57 Ala. 588; *Duncan v. Clark*, 96 Ga. 263, 22 S. E. 927; *Hall v. McGaughey*, 114 Ga. 405, 40 S. E. 246; *Knox v. Hunt*, 18 Mo. 243. In Arizona the statute (Rev. St. 1901, § 2695) provides for the enforcement of the lien by seizure without any legal process. That the tenant may himself deliver the property subject to the lien in satisfaction thereof see *Coleman Mfg. Co. v. Jones*, 122 Ill. App. 172.

³⁸⁹ *Schwulst v. Neely* (Tex. Civ. App.) 50 S. W. 608.

³⁹⁰ *Duncan v. Clark*, 96 Ga. 263, 22 S. E. 927; *Lightner v. Brannon*, 99 Ga. 606, 27 S. E. 703. The former case distinguishes *Durbin v. Hill*, 75 Ga. 228, 58 Am. Rep. 467, where it was held that, the rent being payable in a part of the crop, a de-

livery to the landlord of a part of the crop in payment of rent entitled him to such part as against a judgment creditor of the tenant.

³⁹¹ *Buck v. Lee*, 36 Ark. 525; *Strauss v. Baley*, 58 Miss. 131; *Holt v. Colyer*, 71 Mo. App. 230; *Dunlap v. Dunsath*, 81 Mo. App. 17; *Auxvasse Milling Co. v. Cornet*, 85 Mo. App. 251.

³⁹² *Fry & Co. v. Ford*, 38 Ark. 246. And see *Sanders v. Ohlhausen*, 51 Mo. 163, apparently to that effect. In *Riddle v. Hodge*, 83 Ga. 173, 9 S. E. 786, it was decided that, upon the death of the tenant, the landlord could enter to complete the cultivation of the crop if necessary to protect his interest, the decision being based on a provision in the instrument of lease vesting title in the landlord until rent and advances were paid. This case distinguishes *Wadley v. Williams*, 75 Ga. 272,

(2) **Form of proceeding.** In a number of states the statute provides for the enforcement of the lien by attachment.^{392a} And in a few it is enforceable by the statutory distress.^{392b} Occasionally the statute provides that it may be enforced by recovery of a judgment and issue of execution thereon.^{392c} In one state the lien for advances is enforceable by the proceedings prescribed by statute for the enforcement of other liens on personalty,^{392d} and in another by those prescribed for the enforcement of liens for advances by third persons for agricultural purposes.^{392e} Even in the absence of any statutory provision as to the mode of enforcing the lien, the statutory distress has been regarded as a proper mode of enforcing the lien for rent.^{392f} But it has been decided that a lien "for the faithful performance of the terms of the lease," so far as it is not a lien for rent, is not enforceable by distress.^{392g} The lien is not enforceable by replevin.^{392h}

(3) **By equitable proceeding.** Even though the statute pro-

where it was decided that the landlord had no right to go on the demised premises to save the crop, on the ground that in that case there was no provision vesting title in the landlord. See, also, ante, § 253 c.

^{392a} *Alabama* Code 1907, § 4739; *Arkansas*, Kirby's Dig. St. 1904, §§ 5040-5043; *District of Columbia* Code 1901, § 1229; *Iowa* Code 1897, § 2993; *Kansas* Gen. St. 1905, §§ 4074, 4078; *Kentucky* St. 1903, § 2324; *Maine* Rev. St. 1903, c. 86, § 11; *Mississippi* Code 1906, §§ 2832, 2838; *Missouri* Rev. St. 1899, § 4115; *Oklahoma* Rev. St. 1903, § 3343; *Tennessee*, Shannon's Code 1896, § 5301; *Utah* Comp. Laws 1907, § 1409; *Virginia* Code 1904, § 2496.

^{392b} *Florida* Gen. St. 1906, § 2240; *Georgia*, Code 1895, §§ 2797, 2800; *Kentucky* St. 1903, § 2324; *Texas* Rev. St. 1895, arts. 3240, 3252; *Virginia* Code 1904, § 2496.

^{392c} *District of Columbia* Code 1901, § 1229; *Tennessee*, Shannon's Code 1896, § 5301.

^{392d} *Georgia* Code 1895, § 2800. See *Mackenzie v. Flannery*, 90 Ga. 590, 16 S. E. 710.

^{392e} *South Carolina* Code 1902, § 3057.

^{392f} *Thompson v. Mead*, 67 Ill. 395; *Kern v. Noble*, 57 Ill. App. 27; *Frink v. Pratt*, 130 Ill. 327, 22 N. E. 819; *Petry v. Randolph*, 85 Ky. 351, 3 S. W. 420. Compare *Price v. Roetzell*, 56 Mo. 500; *Hubbard v. Moss*, 65 Mo. 647, as to the propriety of an attachment to enforce the lien. In *Georgia* a statute was held to provide by implication for the enforcement of the lien by distress, it providing that it should not be enforced by distress till the rent was due. *Worrill v. Barnes*, 57 Ga. 404; *Colclough v. Mathis*, 79 Ga. 394, 4 S. E. 762.

^{392g} *Lord v. Johnson*, 120 Ill. App. 55.

^{392h} *Knox v. Hellums*, 38 Ark. 413. See ante, at note 376.

vides a method for the enforcement of the lien, this is not ordinarily regarded as exclusive,³⁹³ and there are a number of cases in which its foreclosure by a proceeding in equity, or the statutory substitute therefor, has been upheld;³⁹⁴ and the landlord has been regarded as entitled to maintain a proceeding in equity to reach the proceeds of the resale of the property by one who purchased from the tenant.³⁹⁵ It has been said that if the tenant's title to the property is equitable only, the lien must be enforced in equity;³⁹⁶ and the fact that the tenant's death renders the proceeding by attachment unavailable has been referred to as rendering that by foreclosure in equity peculiarly appropriate.³⁹⁷

In one state it has been said that the statutory provision for a distress warrant is intended merely as a simple mode of enabling the landlord to hold the property until he can have a foreclosure of his lien.³⁹⁸

(4) **In collateral proceeding.** The landlord may assert his lien and obtain satisfaction of his claim without instituting a separate proceeding for this purpose, when the property, or the proceeds thereof, are in the custody of the court, as the result of a proceeding instituted by a third person. For instance, if the property has been attached by a third person,³⁹⁹ or has been

³⁹³ See *Staber v. Collins*, 124 Iowa, 543, 100 N. W. 527, as to the right to levy a general execution against the tenant upon property subject to the lien which has passed to a purchaser for value, the statute providing for the enforcement of the landlord's lien by attachment. *landlord's right to maintain a bill in equity to enforce payment of his claim from the proceeds of sales under attachments levied by others was upheld. To the same effect, see Slack v. Koon*, 18 Ky. Law Rep. 1103, 39 S. W. 26.

³⁹⁵ *Reavis v. Barnes*, 36 Ark. 575; *Anderson & Co. v. Bowles*, 44 Ark. 108.

³⁹⁶ *Bingham v. Vandergrift*, 93 Ala. 283, 9 So. 280.

³⁹⁷ *Abraham v. Hall*, 59 Ala. 386.

³⁹⁸ *McKee v. Sims*, 92 Tex. 51, 45 S. W. 564.

³⁹⁹ *Smith v. Huddleston*, 103 Ala. 223, 15 So. 521; *Slack v. Koon*, 18 Ky. Law Rep. 1103, 39 S. W. 26; *Sanders v. Ohlhausen*, 51 Mo. 163; *Sullivan v. Cleveland*, 62 Tex. 677; *Ghio v. Shutt*, 78 Tex. 375, 14 S. W.

³⁹⁴ *Westmoreland v. Foster*, 60 Ala. 448; *Carmen v. Alabama Nat. Bank*, 101 Ala. 189, 13 So. 581; *Dickenson v. Harris*, 48 Ark. 355, 3 S. W. 58; *Newman v. Greenville Bank*, 66 Miss. 323, 5 So. 753; *Boureier v. Edmondson*, 58 Tex. 675; *Scoggins v. Thompson* (Tex. Civ. App.) 45 S. W. 216; *Jackson v. Corley*, 30 Tex. Civ. App. 417, 70 S. W. 570. But see *The Richmond v. Cake*, 1 App. D. C. 447. In *Carmen v. Alabama Nat. Bank*, 101 Ala. 189, 13 So. 581, the

levied on under execution,⁴⁰⁰ the landlord may demand that the amount of his claim be first paid from the proceeds of sale,⁴⁰¹ and he has a like right when the property has passed into the hands of a receiver, an assignee for creditors, or a bankruptcy trustee,⁴⁰² or in case of a sale by a trustee under a chattel mortgage.⁴⁰³ And a landlord who was his tenant's executor has been regarded as entitled to hold the amount of his lien out of the proceeds of a sale made by him of the property.⁴⁰⁴

In one jurisdiction it has been held that the landlord may assert his lien in a replevin suit instituted by another to which he is made a party;⁴⁰⁵ and in the same jurisdiction it was held that he may intervene in such a suit to assert his claim, even though the defendant in the suit is a sheriff in possession under an invalid attachment issued by the landlord.⁴⁰⁶

(5) **Before maturity of claim.** In a number of jurisdictions the statute authorizes the institution of a proceeding to enforce the lien even before the maturity of the claim secured thereby, in case the tenant is about to remove or dispose of the property subject to the lien, so as to endanger the landlord's security or, occasionally, in case he has already done so.⁴⁰⁷ In one state the

860, 22 Am. St. Rep. 56; *Carmen v. of the property subject to a lien Alabama Nat. Bank*, 101 Ala. 189, could be reached by garnishment. 13 So. 581.

⁴⁰³ *Bryan v. Sanderson*, 10 D. C.

⁴⁰⁰ *Gibson v. Gautier*, 12 D. C. (1 (3 MacArthur) 431.

Mackey) 35; *Harris Bros. v. Dam-* ⁴⁰⁴ *Smith's Adm'r v. Bryant's*
mann, 14 D. C. (3 Mackey) 90; *Wilkes Adm'r*, 60 Ala. 235.
v. Adler, 68 Tex. 689, 5 S. W. 497;
Governor v. Bancroft, 16 Ala. 605. 194.

⁴⁰⁵ *Edwards v. Cottrell*, 43 Iowa,

⁴⁰¹ See ante, at note 171.

⁴⁰⁶ *Hipsley v. Price*, 104 Iowa, 282,

⁴⁰² *Lemay v. Johnson*, 35 Ark.

73 N. W. 584.

225; *Loth v. Carty*, 85 Ky. 591, 4
S. W. 314; *Worthington v. Covington*
Roller Skating Rink Co., 10 Ky. Law
Rep. 363; *Rosenberg v. Shafer*, 51
Tex. 134. In *McKleroy v. Cantey*,
95 Ala. 295, 11 So. 258, it was held
that, in view of a statutory provi-
sion authorizing the enforcement of
the lien by attachment in case the
tenant made an assignment for the
benefit of creditors, the proceeds of
a sale by the assignee for creditors

⁴⁰⁷ *Alabama Code* 1907, §§ 4739,
4748; *Arkansas*, Kirby's Dig. St.
1904, § 5040; *District of Columbia*
Code 1901, § 1229; *Georgia Code*
1895, §§ 2797, 2800; *Illinois*, Hurd's
Rev. St. 1905, c. 80, § 33; *Kansas*
Gen. St. 1905, § 4077; *Tennessee*,
Shannon's Code 1896, § 5301; *Texas*
Rev. St. 1895, arts. 3240, 3252; *Utah*
Comp. Laws 1907, § 1409; *Virginia*
Code 1904, § 2496.

landlord may proceed to enforce the lien whenever other legal process is enforced against the property.⁴⁰⁸

Unless the circumstances are such as to bring the case within one of these statutory provisions, no proceeding can be instituted to enforce a lien for rent not due;⁴⁰⁹ and a statute authorizing an attachment if the tenant is about to remove his property does not authorize it after he has removed it.⁴¹⁰ In the absence of such a statute, the remedy of the landlord to prevent removal of the property before maturity of the claim has been decided to be by injunction.⁴¹¹ Such a statute, providing that if the tenant removes the property the landlord may commence an action and sue out an attachment, has been held to authorize an action for conversion and the levy of an attachment in aid thereof.⁴¹²

The feeding of crops to stock has been held to be a removal of the crops within such a statute.⁴¹³

A demand for the payment of the rent is not a prerequisite to the enforcement of the lien, on the ground of the removal of the property, before the maturity of the rent, since there is obviously no right to demand what is not due.⁴¹⁴

(6) **Affidavit and bond.** As elsewhere shown,⁴¹⁵ the statutes, in authorizing an attachment in favor of the landlord, ordinarily require as a prerequisite the filing of an affidavit, showing the existence of circumstances justifying an attachment, and also a bond conditioned that the landlord will pay damages on account of the wrongful procurement of the writ, and occasionally such a requirement is found directly in conjunction with the provisions for the enforcement of the lien by attachment.⁴¹⁶

⁴⁰⁸ Georgia Code 1895, §§ 2797, 2800. ⁴⁰⁹ *thority for attachment to enforce the rent before the rent was due,*

⁴⁰⁹ *Nicrosi v. Roswald*, 113 Ala. 592, 21 So. 338; *Marsalis v. Pitman*, 68 Tex. 624, 5 S. W. 404. See *Hastine v. Ausherman*, 87 Mo. 410; *Knowles v. Sell*, 41 Kan. 171, 21 Pac. 102. ⁴¹⁰ *an attachment before the maturity of the rent must be regarded as a general attachment, giving the landlord no preference over a mortgage prior to the attachment.*

⁴¹⁰ *Wallach v. Chesley*, 13 D. C. (2 Mackey) 209. ⁴¹¹ *Tarpy v. Persing*, 27 Kan. 745.

⁴¹¹ See *Garner v. Cutting*, 32 Iowa, 547; *Clark v. Haynes*, 57 Iowa, 96, 10 N. W. 292, and ante, note 363. In the latter case it was decided that as there was no statutory au-

⁴¹² *Hopkins v. Wood*, 79 Ill. App. 484. ⁴¹³ *Vaughn v. Strickland*, 108 Ga. 659, 34 S. E. 192.

⁴¹⁴ See post, § 348. ⁴¹⁵ See post, § 348.

⁴¹⁶ *Alabama Code 1907, §§ 4740, 4749; Arkansas, Kirby's Dig. St.*

An affidavit which fails to show the statutory prerequisites to the issuance of the attachment is insufficient, though in at least one state such an affidavit is amendable.⁴¹⁷ If the statute provides for an attachment after nonpayment of the rent on demand, the affidavit must show such demand.⁴¹⁸ If it provides for an attachment on removal of the property without the landlord's consent, it must negative that consent,⁴¹⁹ and an affidavit for an attachment on the ground that the landlord has reason to believe that the tenant is about to dispose of the property should ordinarily, it seems, state the grounds of such belief.⁴²⁰ An affidavit for an attachment to enforce a lien for advances should state the nature and purpose of the advances, so as to bring the case within the statute.⁴²¹ An affidavit that the tenant has moved a part of the crop grown on the rented premises will, it has been decided, not justify an attachment under a provision authorizing it when the tenant has removed a part of the crop from the premises.⁴²²

(7) **Parties.** To a proceeding of an equitable nature to foreclose the lien, all persons claiming any interest in the property subject should be made parties.⁴²³ It seems doubtful whether it is necessary to make the tenant a party, if he has disposed of his interest in the property to one who is made a party.⁴²⁴ And it has been decided to be unnecessary to make the original lessor a party to a proceeding by a transferee of the reversion.^{424a} In the case of an attachment to enforce the lien it is not necessary, it appears to have been decided, to make a mortgagee of the property subject a party to the attachment proceeding, in order to

1904, § 5041; *Kansas* Gen. St. 1905, § 4077; *Tennessee*, Shannon's Code § 416, 8 So. 416.

1896, § 5304; *Texas* Rev. St. 1895, art. 3241; *Utah* Comp. Laws 1907, § 1411; *Virginia* Code 1904, § 2496.

⁴¹⁷ *Richards v. Bestor*, 90 Ala. 352, 8 So. 30; *McDougal v. Sanders*, 75 Ga. 140. ⁴²¹ *Ballard v. Stephens*, 92 Ala. 616, 8 So. 416. ⁴²² *Baxley v. Segrest*, 85 Ala. 183, 4 So. 865. ⁴²³ *Templeman v. Gresham*, 61 Tex. 50; *Jackson v. Corley*, 30 Tex. Civ. App. 417, 70 S. W. 570. ⁴²⁴ *In Gill v. Buckingham*, 7 Kan. App. 227, 52 Pac. 897, it is decided that the landlord need not make

⁴¹⁸ *Robinson v. Holt*, 85 Ala. 596, 5 So. 350.

⁴¹⁹ *Robinson v. Holt*, 85 Ala. 596, 5 So. 350.

⁴²⁰ *Baum v. Bell*, 28 S. C. 201, 5 S. E. 485; *Sharp v. Palmer*, 31 S. C. 444, 10 S. E. 98, 17 Am. St. Rep. 40. See *Monday v. Elmore*, 27 S. C. 126, 3 S. E. 65.

^{424a} *Kennard v. Harvey*, 80 Ind. 37.

enable the officer to take the property from the mortgagee's possession.⁴²⁵

It has been decided that an action against a tenant for rent and one to foreclose the lien may be joined with one against other parties, claiming under a mortgage from the tenant, for conversion of the property subject to the lien.⁴²⁶

(8) **Judgment.** In a statutory proceeding to enforce the lien, the landlord cannot, it has been decided in one state, have a general judgment on his claim against the tenant, but only a judgment establishing the lien;⁴²⁷ and in another state it has been decided that he cannot have a personal judgment on his claim against the tenant, in excess of the value of the property,⁴²⁸ though he may have a judgment for costs.⁴²⁹

m. **Persons interfering with property subject—Pecuniary liability.** In a very considerable number of cases the courts have asserted a right in the landlord to maintain an action against a third person who, by purchase or removal of the property subject to the lien, interferes with the effectiveness of the landlord's security. The exact theory on which this right of action is to be regarded as based, and the exact limitations upon the application of the doctrine, do not clearly appear from the decisions.

In a few jurisdictions there are statutory provisions authorizing the recovery by the landlord of damages from one purchasing the crop.⁴³⁰ Such a statute has been regarded as applicable even

⁴²⁵ *Brody v. Cohen*, 106 Iowa, 309, 76 N. W. 682.

⁴²⁶ *Cardwell v. Masterson*, 27 Tex. Civ. App. 591, 66 S. W. 121.

⁴²⁷ *Argo v. Fields*, 112 Ga. 677, 37 S. E. 995.

⁴²⁸ *Hartsell v. Myers*, 57 Miss. 135.

⁴²⁹ *Burrow v. Sanders*, 57 Miss. 211.

⁴³⁰ *District of Columbia Code* 1901, § 1230 (the lien may be enforced "by action against any purchaser of said chattels, with notice of the lien, in which the plaintiff may have judgment for the value of the chattels purchased by the defendant not exceeding the rent in arrear"); *Kansas Gen. St.* 1905, § 4076 (the person

entitled to rent may recover from the purchaser of the crop or any part thereof with notice of the lien the value of the crop purchased, to the extent of the rent due and damages); *Missouri Rev. St.* 1899, § 4123 (the person buying a crop grown on demised premises on which rent is unpaid with knowledge that it was grown on demised premises liable to the landlord for its value); *Tennessee, Shannon's Code* 1896, § 5302 (the person entitled to the rent may recover from the purchaser of the crop, or any part of it, the value of the property, so that it does not exceed the amount of the rent and damages).

though no judgment has been recovered against the tenant on the landlord's claim, and though such claim is not yet due;⁴³¹ and as authorizing an action by an assignee of a note given for rent.⁴³²

With reference to the form of the action which may be brought to enforce a liability of this character, there are a number of decisions to the effect that the landlord, not having the right of possession, cannot maintain trover against a person obtaining possession of the property by purchase or otherwise, and then disposing of it or converting it to his own use;⁴³³ and it is likewise recognized that he cannot maintain trespass⁴³⁴ or detainee.⁴³⁵ There are a number of decisions, on the other hand, asserting his right to maintain an action on the case for the damage caused to him by interference with his security.⁴³⁶ There are also quite

⁴³¹ *Richardson v. Blakemore*, 79 Tenn. (11 Lea) 290.

⁴³² *Biggs v. Piper*, 86 Tenn. 589, 8 S. W. 851.

⁴³³ *Hudson v. Vaughan's Ex'rs*, 57 Ala. 609; *Corbitt v. Reynolds*, 68 Ala. 378; *Baker v. Cotney*, 142 Ala. 566, 38 So. 131, 110 Am. St. Rep. 50; *Worrill v. Barnes*, 57 Ga. 404; *Watt v. Scofield*, 76 Ill. 261; *Frink v. Pratt*, 130 Ill. 327, 22 N. E. 819; *Finney v. Harding*, 136 Ill. 573, 27 N. E. 289, 12 L. R. A. 605, 29 Am. St. Rep. 334. Compare cases cited post, note 449.

It seems to be the law in Illinois that if a third person converts the property after the levy of a distress warrant, the landlord may sue in trover. *Mead v. Thompson*, 78 Ill. 62, and see *Finney v. Harding*, 136 Ill. 573, 27 N. E. 289, 12 L. R. A. 605, 29 Am. St. Rep. 334; *Frink v. Pratt*, 130 Ill. 327, 22 N. E. 819.

⁴³⁴ *Thompson v. Spinks*, 12 Ala. 155; *Hudson v. Vaughan's Ex'rs*, 57 Ala. 609; *Hussey v. Peebles*, 53 Ala. 432; *Peebles v. Lassiter*, 33 N. C. (11 Ired. Law) 73; *Baker v. Cotney*, 142 Ala. 566, 38 So. 131, 110 Am. St. Rep. 50.

⁴³⁵ *Thompson v. Spinks*, 12 Ala. 155; *Hudson v. Vaughan's Ex'rs*, 57 Ala. 609.

⁴³⁶ *Hussey v. Peebles*, 53 Ala. 432; *Hudson v. Vaughan's Ex'rs*, 57 Ala. 609; *Lavender v. Hall*, 60 Ala. 214; *Thompson v. Powell*, 77 Ala. 391; *Shepherd v. Taylor*, 105 Ala. 507, 17 So. 88; *Baker v. Cotney*, 142 Ala. 566, 38 So. 131, 110 Am. St. Rep. 50; *Harvey v. Hampton*, 108 Ill. App. 501; *Dunn v. Kelly*, 57 Miss. 825; *Cohn v. Smith*, 64 Miss. 816, 2 So. 244. In Illinois the right of action is said to be in case and to be based on the "fraudulent act" of the defendant intended to impair the lien. *Watts v. Scofield*, 76 Ill. 261; *Finney v. Harding*, 136 Ill. 573, 27 N. E. 289, 12 L. R. A. 605, 29 Am. St. Rep. 334. In *King v. Henderson*, 142 Ala. 460, 38 So. 118, it is apparently decided that such an action could not be maintained against one interfering with an article advanced, for the value of such article, for which the statute gives a lien on it, unless the landlord states the price at which it was furnished by the landlord to the tenant.

numerous decisions in which his right of action is asserted, without naming any particular form of action, owing, ordinarily, to the abolition, in the particular jurisdiction, of the common-law distinctions in this regard.⁴³⁷

The right of the landlord to maintain assumpsit against the person thus interfering with his lien has been explicitly denied in several cases,⁴³⁸ but there are decisions to the effect that he may maintain such action as for money had and received against one who, having obtained possession of the property, has disposed thereof and refused to account for the amount of the landlord's claim from the proceeds,⁴³⁹ it being considered that he has received money which in justice and equity belongs to the landlord. Assumpsit will lie, it has been decided, in favor of the landlord against a purchaser of the crop, or other person who has taken possession of the crop, if the former is induced, by statements made by the latter, to refrain from taking legal measures to enforce his claim against the crop;⁴⁴⁰ and such an action will also

⁴³⁷ *Merchants' & Planters' Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406; *Ala. 164; Barnett v. Warren*, 82 Ala. 557, 2 So. 457; *Ehrman v. Gates*, 101 Ga. 841; *Saulsbury v. McKellar*, 59 Ga. 301; *Kennard v. Harvey*, 80 Ind. 37; *Holden v. Cox*, 60 Iowa, 449, 15 N. W. 269; *Frerer v. Hammer*, 99 Iowa, 48, 68 N. W. 564; *Cohn v. Smith*, 64 Miss. 816, 2 So. 244; *Eason v. Johnson*, 69 Miss. 371, 12 So. 446; *White v. McAllister*, 67 Mo. App. 314; *Darby v. Jorndt*, 85 Mo. App. 274; *Thigpen v. Maget*, 107 N. C. 39, 12 S. E. 132, 31 S. E. 51; *Boydston v. Morris*, 71 Tex. 697, 10 S. W. 231; *Zapp v. Johnson*, 87 Tex. 641, 30 S. W. 561.

⁴³⁸ *Broughton v. Powell*, 52 Ala. 123; *Worrill v. Barnes*, 57 Ga. 404; *Ballantine v. Greer*, 14 Tenn. (6 Yerg.) 267. In *Carter v. Andrews*, 56 Ill. App. 646, the action appears to have been in assumpsit, but no reference is made to this fact.

⁴³⁹ *Westmoreland v. Foster*, 60 Ala. 448; *Booker v. Jones' Adm'r*, 45 S. E. 70.

55 Ala. 266; Thornton v. Strauss, 79 Ala. 164; *Barnett v. Warren*, 82 Ala. 557, 2 So. 457; *Ehrman v. Gates*, 101 Ga. 841; *Saulsbury v. McKellar*, 59 Ga. 301; *Kennard v. Harvey*, 80 Ind. 37; *Holden v. Cox*, 60 Iowa, 449, 15 N. W. 269; *Frerer v. Hammer*, 99 Iowa, 48, 68 N. W. 564; *Cohn v. Smith*, 64 Miss. 816, 2 So. 244; *Eason v. Johnson*, 69 Miss. 371, 12 So. 446; *White v. McAllister*, 67 Mo. App. 314; *Darby v. Jorndt*, 85 Mo. App. 274; *Thigpen v. Maget*, 107 N. C. 39, 12 S. E. 132, 31 S. E. 51; *Boydston v. Morris*, 71 Tex. 697, 10 S. W. 231; *Zapp v. Johnson*, 87 Tex. 641, 30 S. W. 561.

In *Drake v. Whaley*, 35 S. C. 187, 14 S. E. 397, it was held that assumpsit as for money had and received lies in favor of the landlord against a cotton factor who, having sold the crop, refuses, in spite of instructions from the tenant, to apply the proceeds in discharge of the landlord's claim. It does not appear whether the court would have sustained the action if based on the lien alone and not on the tenant's instructions.

⁴⁴⁰ *Saulsbury v. McKellar*, 59 Ga. 301; *Shealey v. Clark*, 117 Ga. 794,

lie, it seems, if such person promises to pay the landlord's claim from the proceeds of the crop, in consideration of the latter's consent to its removal.⁴⁴¹

There are occasional decisions in which a right in the landlord to proceed in equity against the proceeds of the resale of the property in the hands of the original purchaser has been recognized.⁴⁴² This view is also involved, it would seem, in the decisions before referred to, asserting the landlord's right of recovery as for money had and received.⁴⁴³

As to the character of the act which will render a third person liable in damages to the landlord as for a tort, the cases are by no means explicit. In many of them the language of the opinion suggests that the mere act of purchasing property on which the landlord has a lien constitutes a tort as against the latter,⁴⁴⁴ but it does not seem that he should be entitled to even nominal damages if the sale and purchase of the property in no way affects his ability to enforce his lien, and there is at least one decision to this effect.⁴⁴⁵ In some cases it appears that the person held liable in damages had refused to pay to the landlord the amount of the latter's claim,⁴⁴⁶ or to yield up possession of the crop or other chattels upon demand by the latter,⁴⁴⁷ but the decisions usually make no particular reference to this fact.⁴⁴⁸ In some he is said to be liable as having converted the property to

⁴⁴¹ *McCarty v. Roswald*, 105 Ala. 511, 17 So. 120. *v. Aikins*, 65 Kan. 82, 68 Pac. 1088.

⁴⁴² *Ehrman v. Oats*, 101 Ala. 604, 14 So. 361; *King v. Blount*, 37 Ark. 115; *Anderson & Co. v. Bowles*, 44 Ark. 108. ⁴⁴⁷ *Shepherd v. Taylor*, 105 Ala. 507, 17 So. 88; *Holden v. Cox*, 60 Iowa, 449, 15 N. W. 269; *Evans v. Collins*, 94 Iowa, 432, 62 N. W. 810; *Blake v. Counselman*, 95 Iowa, 219, 63 N. W. 679; *Sugg v. Farrar*, 107 N. C. 123, 12 S. E. 236; *Parks v. Laurens Cotton Mills*, 70 S. C. 274, 49 S. E. 871.

⁴⁴³ See ante at note 439.

⁴⁴⁴ See *Cohn v. Smith*, 64 Miss. 816, 2 So. 244.

⁴⁴⁵ *Ehrman v. Oats*, 101 Ala. 604, 14 So. 361. So in *Jackson v. Corley*, 30 Tex. Civ. App. 417, 70 S. W. 570, it is said that a purchaser is liable if he makes such a disposition of the chattels that they cannot be subjected to the lien.

⁴⁴⁶ *Beck v. Minnesota & Western Grain Co.*, 131 Iowa, 62, 107 N. W. 1032, 7 L. R. A. (N. S.) 930; *Stadel* ⁴⁴⁸ *Hudson v. Vaughan's Ex'rs*, 57 Ala. 609; *Nickelson v. Negley*, 71 Iowa, 546, 32 N. W. 487; *Evans v. Collins*, 94 Iowa, 432, 62 N. W. 810; *Thew v. Miller*, 73 Iowa, 742, 36 N. W. 771; *Hopper v. Hays*, 82 Mo. App. 494; *Zapp v. Johnson*, 87 Tex. 641, 20 S. W. 861; *Ward v. Gibbs*, 10 Tex. Civ. App. 287, 30 S. W. 1125.

his own use,⁴⁴⁹ by which is meant, perhaps, no more than that he is liable to the landlord in an action on the case, or its equivalent, by reason of acts of a character which would at common law render him liable in trover to a person having the right of possession. Occasionally reference is made to the removal of the property by the purchaser as a ground of liability,⁴⁵⁰ and in one decision his mingling of the property with that of others, so as to cause it to lose its identity, was so referred to.⁴⁵¹

Ordinarily, the person on whom liability has thus been imposed for interfering with the landlord's security was a purchaser with notice of the lien;⁴⁵² and in one state it has been explicitly decided that a purchaser without notice is not so liable,⁴⁵³ a view which would ordinarily be adopted in jurisdictions in which a purchaser without notice takes free from the lien.⁴⁵⁴ By other decisions a purchaser even without notice has been regarded as liable.⁴⁵⁵

In some cases the right of action by the landlord against a purchaser or other person interfering with the lien has been regarded

⁴⁴⁹ *Kennard v. Harvey*, 80 Ind. 37; *Campbell v. Bowen*, 22 Ind. App. 562, 54 N. E. 409; *Taylor v. Felder*, 5 Tex. Civ. App. 417, 23 S. W. 480, 24 S. W. 313. In *Church v. Bloom*, 111 Iowa, 319, 82 N. W. 794, it is even said that "it is elementary that one having a lien on property may sue for its conversion."

⁴⁵⁰ *Kelly v. Eyster*, 102 Ala. 325, 14 So. 657; *Hussey v. Peebles*, 53 Ala. 432. Or to a removal to and sale in a foreign market. *Kennard v. Harvey*, 80 Ind. 37.

⁴⁵¹ *Campbell v. Bowen*, 22 Ind. App. 562, 54 N. E. 409.

⁴⁵² *Thornton v. Strauss*, 79 Ala. 164; *Kelly v. Eyster*, 102 Ala. 325, 14 So. 657; *Harvey v. Hampton*, 108 Ill. App. 501; *Stadel v. Aikens*, 65 Kan. 82, 68 Pac. 1088; *White v. McAllister Co.*, 67 Mo. App. 314; *Dunn v. Kelly*, 57 Miss. 825; *Cohn v. Smith*, 64 Miss. 816, 2 So. 244; *Merchants' & Planters' Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406.

⁴⁵³ *Worrill v. Barnes*, 57 Ga. 404; *Lancaster v. Whiteside*, 108 Ga. 801, 33 S. E. 995; *Finney v. Harding*, 136 Ill. 573, 27 N. E. 289, 12 L. R. A. 605, 29 Am. St. Rep. 334; *Scully v. Porter*, 57 Kan. 322, 46 Pac. 313.

⁴⁵⁴ See ante, § 321 f (3) (a).

⁴⁵⁵ *Richardson v. Peterson*, 58 Iowa, 724, 13 N. W. 63; *Blake v. Counselman & Co.*, 95 Iowa, 219, 63 N. W. 679; *Frorer v. Hammer*, 99 Iowa, 48, 68 N. W. 564; *Evans v. Collins*, 94 Iowa, 432, 62 N. W. 810. The statutory right of action in Tennessee (ante, note 430) is independent of whether the purchaser had notice. *Davis v. Wilson*, 86 Tenn. 519, 8 S. W. 151. In *Eason v. Johnson*, 69 Miss. 371, 12 So. 446, it was held that the purchaser's ignorance that the rent was due and unpaid was no defense. In *Kennard v. Harvey*, 80 Ind. 37, it is said that the purchaser is charged with notice of the lien. See ante, § 321 f (2) (b).

as based on the continued existence of the lien, so as to render it necessary to commence the action before the end of the period named by the statute for the duration of the lien.⁴⁵⁶ In other cases it has been considered that, provided the right of action on account of interference with the lien is complete before the expiration of the lien, it may be enforced at a subsequent time.⁴⁵⁷

The landlord has no right of action for damages on account of the purchase or appropriation of the property by a third person, if he consented thereto.⁴⁵⁸

It is no defense to the action by the landlord that he had no title to the land at the time of making the lease.⁴⁵⁹ Nor, it has been decided, that the tenant being solvent, the landlord's claim could still be collected.⁴⁶⁰

The *quantum* of recovery in an action of this character is the amount of the landlord's loss by reason of the impairment of his security, and it is recognized as being equal to the value of the property which has been purchased or removed, unless this exceeds the amount of the landlord's claim, in which case it is for the amount of such claim.⁴⁶¹

§ 322. Conventional liens.

a. Form of stipulation for lien. Stipulations having for their

A surety on a note made by the tenant is not liable in damages to the landlord because the tenant sold the property subject to the lien and with the proceeds of sale paid the note, the surety not participating in the transaction. Overholser v. Christensen, 133 Iowa, 129, 110 N. W. 321.

456 Valentine v. Hamlett, 35 Ark. 538; King v. Blount, 37 Ark. 115; Anderson & Co. v. Bowles, 44 Ark. 108; Nickelson v. Negley, 71 Iowa, 546, 32 N. W. 487.

457 Belshe v. Batdorf, 98 Mo. App. 627, 73 S. W. 888 (action under statute); Davis v. Wilson, 86 Tenn. 519, 8 S. W. 151 (action under statute); Zapp v. Johnson, 87 Tex. 641, 30 S. W. 861.

458 Faith v. Taylor, 69 Ill. App. 419; McCarty v. Roswald, 105 Ala. 511, 17 So. 120; Cohn v. Smith, 64 Miss. 816, 2 So. 244; Wimp v. Early, 104 Mo. App. 85, 78 S. W. 343. See ante, § 321 i (4).

459 Kelly v. Eyster, 102 Ala. 325, 14 So. 657; Wright v. Davis, 29 Tex. Civ. App. 118, 68 S. W. 181.

460 Shealey v. Clark, 117 Ga. 794, 45 S. E. 70.

461 Atkinson v. James, 96 Ala. 214, 10 So. 846; Carter v. Andrews, 56 Ill. App. 646; Harvey v. Hampton, 108 Ill. App. 501; Dawson v. Coffey, 48 Mo. App. 109; White v. McAllister, 67 Mo. App. 314; Biggs v. Piper, 86 Tenn. 589, 8 S. W. 851; Zapp v. Johnson, 87 Tex. 641, 30 S. W. 861; Ward v. Gibbs, 10 Tex. Civ. App. 287, 30 S. W. 1125.

object the creation, in favor of the lessor, of a lien or charge upon property on the demised premises to secure the payment of the rent, or of advances made by him to the lessee, take various forms. The most common is a statement merely to the effect that a "lien" is created upon the crops, or upon the chattels, or upon the furniture, as the case may be;⁴⁶² but quite frequently what is in effect a lien is given by a provision that the ownership or the title to the property in question shall be vested in the lessor till the rent is paid, or as security for the rent.⁴⁶³ Occasionally, there is merely a provision that the property shall not be removed or disposed of by the lessee till the debt is paid.⁴⁶⁴ In several cases a provision that chattels designated shall be "bound" for the rent has been regarded as effective to create a lien;⁴⁶⁵ and it is obvious that this result can be obtained by the giving by the lessee to the lessor of a chattel mortgage.⁴⁶⁶

⁴⁶² See *Fox v. McKinney*, 9 Or. 493; *Broders v. Bohannon*, 30 Or. 599, 48 Pac. 692; *Smith v. Atkins*, 18 Vt. 461; *Pelton v. Draper*, 61 Vt. 364, 17 Atl. 491; *Gray v. Stevens*, 28 Vt. 1, 65 Am. Dec. 216; *Leland v. Sprague*, 28 Vt. 746.

⁴⁶³ See *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647; *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 76 Pac. 243; *DeVaughn v. Howell*, 82 Ga. 336, 9 S. E. 173, 14 Am. St. Rep. 162; *Dunning v. South*, 62 Ill. 175; *Kelley v. Goodwin*, 95 Me. 538, 50 Atl. 711; *Fowler v. Hawkins*, 17 Ind. 211; *Whitecomb v. Tower*, 53 Mass. (12 Metc.) 487, 46 Am. Dec. 698; *Graves v. Walter*, 93 Minn. 307, 101 N. W. 297; *Agne v. Skewis-Moen Co.*, 98 Minn. 32, 107 N. W. 415; *Sanford v. Modine*, 51 Neb. 728, 71 N. W. 740; *McCombs v. Becker*, 3 Hun (N. Y.) 342; *Hawkins v. Beakes*, 80 Hun, 292, 30 N. Y. Supp. 91, affd. 150 N. Y. 562, 44 N. E. 1124; *Johnson v. Crofoot*, 53 Barb. (N. Y.) 574; *Smith v. Atkins*, 18 Vt. 461; *Paris v. Vail*, 18 Vt. 277; *Bellows v. Wells*, 36 Vt. 599, 86 Am. Dec. 679.

⁴⁶⁴ *Mitchell v. Badgett*, 33 Ark. 387; *Albers v. Turley*, 10 Colo. App. 450, 51 Pac. 530; *Weed v. Standley*, 12 Fla. 166; *Ferguson v. Murphy*, 117 Cal. 134, 48 Pac. 1018; *Marshall v. Luiz*, 115 Cal. 622, 47 Pac. 597; *Felker v. Richardson*, 67 N. H. 509, 32 Atl. 830. In *Pendill v. Maas*, 97 Mich. 215, 56 N. W. 597, a provision that buildings and improvements might be removed by the lessee on paying rents and taxes was regarded as giving a lien to secure such payment, and to the same effect see *Ex parte Morrow*, 1 Lowell, 386, Fed. Cas. No. 9,850.

⁴⁶⁵ *Wright v. Bircher's Ex'r*, 72 Mo. 179, 37 Am. Rep. 423; *Faxon v. Ridge*, 87 Mo. App. 299; *Smith v. Taber*, 46 Hun, 313, 14 N. Y. St. Rep. 644. So when it was provided that the crops should be "held" for rent. *Buswell v. Marshall*, 51 Vt. 87.

⁴⁶⁶ See *Rogers v. Vaughan*, 31 Ark. 62; *Morris v. Tillson*, 81 Ill. 607; *Harris v. Frank*, 52 Miss. 155; *Harder v. Plass*, 57 Hun (N. Y.) 540, 11 N. Y. Supp. 226; *McCombs v. Becker*, 3 Hun (N. Y.) 342.

It has been decided that a provision that the proceeds from the sale of certain products of the leased premises shall be paid to the lessor until he receives the amount of his rent does not give him a lien on such products,⁴⁶⁷ and an agreement to pay rent in corn without specifying corn produced on the premises has been held to give no lien on such corn.⁴⁶⁸ It does not seem that the effect would be different even if the corn produced on the premises were specified.⁴⁶⁹

A provision that the grain raised on the farm leased shall be fed out thereon, or to the lessor's cattle included in the lease, has been decided to give the lessor no title or lien on the grain;⁴⁷⁰ and a like decision has been made as to a provision that the lessee shall not dispose of the produce of the farm until the rent had been paid,⁴⁷¹ or without the landlord's consent.⁴⁷²

The fact that a note given for rent states that it constitutes a lien on the crop raised on the land has been regarded as insufficient to make it such a lien.⁴⁷³

An agreement by the lessee to deliver a certain product to the lessor, he to sell it and retain the rent out of the proceeds, has been held to create no lien on that not delivered, an agreement to pledge not being equivalent to a pledge.⁴⁷⁴ Nor does an agreement to give a mortgage to secure the rent create a lien.⁴⁷⁵ A provision of the lease that, in case of default in payment of rent, the machinery and improvements should be forfeited to the landlord, has been decided merely to give a right to establish a lien on default, and not to create a lien as against other creditors.⁴⁷⁶

⁴⁶⁷ Barber v. Marble, 2 Thomp. & Y. 342; Hawkins v. Giles, 45 Hun C. (N. Y.) 114.

⁴⁶⁸ Snell v. Ricketts, 28 Neb. 616, 44 N. W. 729. 55 Vt. 510, 27 Atl. 117. Compare ante, § 250.

⁴⁶⁹ It has been held that a provision that wool cut from sheep on the premises should be delivered in payment of rent gave the lessor no lien thereon. Hitchcock v. Hassett, 71 Cal. 331, 12 Pac. 228. ⁴⁷¹ Beers v. Field, 69 Vt. 533, 38 Atl. 270.

⁴⁷² Ibbetson v. Peairson, 7 Cal. App. 261, 94 Pac. 252.

⁴⁷³ Roberts v. Jacks, 31 Ark. 597, 25 Am. Rep. 584.

⁴⁷⁴ Hitchcock v. Hassett, 71 Cal. 331, 12 Pac. 228.

⁴⁷⁵ Platt v. Stewart, 13 Blatchf. 481, Fed. Cas. No. 11,220.

⁴⁷⁶ Sammis v. Poole, 89 Ill. App. 118, *affd.* 188 Ill. 396, 58 N. E. 934.

⁴⁷⁰ McCombs v. Becker, 3 Hun (N.

The doctrine which obtains in a number of jurisdictions, that a provision in a chattel mortgage that the mortgagor may retain possession of the goods mortgaged and dispose of them in the usual course of business raises a presumption of fraud, invalidating the provision, has been applied in the case of a provision for a lien in favor of the landlord, with a like provision allowing sales by the tenant.⁴⁷⁷

b. **The nature of the lien.** A provision in the instrument of lease, giving a lien on personalty in favor of the lessor, is frequently assimilated by the courts to a chattel mortgage, and the rights of the lessor thereunder determined accordingly.⁴⁷⁸ In jurisdictions where the common-law view of a mortgage, as involving a conveyance of the legal title, subject to a defeasance, no longer prevails, such a lien provision is, it seems, neither more nor less than a mortgage, and it has been so referred to.⁴⁷⁹ In jurisdictions, on the other hand, where the common-law view of a mortgage does prevail, a provision of the lease in terms creating

⁴⁷⁷ *Reynolds v. Ellis*, 103 N. Y. Am. St. Rep. 23; *Gubbins v. Equitable Trust Co.*, 80 Ill. App. 17; *Sioux* 115, 8 N. E. 392, 57 Am. Rep. 701; *Greeley v. Winsor*, 15 S. D. 117, 45 N. W. 325, 36 Am. St. Rep. 720; *Mathes v. Staed*, 67 Mo. App. 399. In *Burgess v. Kattleman*, 41 Mo. 480, a provision, in a lease of land for cutting wood and staves, that the lessors should have a lien upon all timber, staves, cordwood, etc., was construed as not being a chattel mortgage and as not precluding the lessee from disposing of the timber, but as covering only such timber as was left on re-entry for breach of condition.

⁴⁷⁸ *Valentine v. Washington*, 33 Ark. 795; *Stockton Sav. & Loan Society v. Purvis*, 112 Cal. 236, 44 Pac. 561, 53 Am. St. Rep. 210; *Ferguson v. Murphy*, 117 Cal. 134, 48 Pac. 1018; *Weed v. Standley*, 12 Fla. 166; *Hume v. Riggs*, 12 App. D. C. 355; *Packard v. Chicago Title & Trust Co.*, 67 Ill. App. 598; *Borden v. Croak*, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 720.

⁴⁷⁹ See *Mitchell v. Badgett*, 33 Ark. 387; *Valentine v. Washington*, 33 Ark. 795; *Barroilhet v. Battelle*, 7 Cal. 450; *Blakemore v. Taber's Ex'r*, 22 Ind. 466; *Botsinger v. Schnyler*, 46 Hun (N. Y.) 349; *Greeley v. Winsor*, 1 S. D. 117, 45 N. W. 325, 36 Am. St. Rep. 720.

a lien is not a legal mortgage, but is, it seems, cognizable only in a court of equity,⁴⁸⁰ and it has been quite occasionally referred to as creating an equitable lien or charge.⁴⁸¹ It does not effect a pledge, since the possession remains in the debtor.⁴⁸²

c. **The indebtedness secured.** It has been held that a provision for a lien for supplies furnished gives a lien for monies advanced.⁴⁸³ A stipulation securing the rent fixed by the lease was construed as not applying to rent under a renewal of the lease.⁴⁸⁴ A provision, on a lease of a brickyard, that the lessee should keep in the yard sufficient brick to pay one quarter's rent, was held not to subject a particular lot of brick to a lien for more than a quarter's rent, such quarter's rent being paid by the purchaser of the brick.⁴⁸⁵

There are, in two states, statutory provisions authorizing the creation by agreement of a lien on the crops for supplies furnished by the landlord.⁴⁸⁶ These statutes may perhaps be intended to remove any doubt as to the tenant's power to create a lien on crops yet to be planted, which have, that is, a mere potential existence. Ordinarily, a tenant has a right to bind property belonging to him for any indebtedness to his landlord as well as to other persons.^{486a}

⁴⁸⁰ See *Dalton v. Landahn*, 27 718; *Marquam v. Sengfelder*, 24 Or. Mich. 529; *Booth v. Oliver*, 67 Mich. 2, 32 Pac. 676. 664, 35 N. W. 793; *Marquam v. Sengfelder*, 24 Or. 2, 32 Pac. 676; *McLean v. Klein*, 3 Dill. 113, Fed. Cas. No. 8,884; *Metcalf v. Fosdick*, 23 Ohio St. 114.

⁴⁸¹ *Hume v. Riggs*, 12 App. D. C. 355; *Fejavary v. Broesch*, 52 Iowa, 88, 2 N. W. 963, 35 Am. Rep. 261; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *White v. Thomas*, 52 Miss. 49; *Marquam v. Sengfelder*, 24 Or. 2, 32 Pac. 676; *Potter v. Greenleaf*, 21 R. I. 483, 44 Atl. 718; *Esshom v. Watertown Hotel Co.*, 7 S. D. 74, 63 N. W. 229; *McLean v. Klein*, 3 Dill. 113, Fed. Cas. No. 8,884.

⁴⁸² *Borden v. Croak*, 131 Ill. 68, 2 N. E. 793, 19 Am. St. Rep. 23; *Potter v. Greenleaf*, 21 R. I. 483, 44 Atl.

2, 32 Pac. 676. ⁴⁸³ *Strickland v. Stiles*, 107 Ga. 308, 33 S. E. 85, 45 L. R. A. 204, 73 Am. St. Rep. 122.

⁴⁸⁴ *Hume v. Riggs*, 12 App. D. C. 355.

⁴⁸⁵ *Bleakley v. Sullivan*, 140 N. Y. 175, 35 N. E. 433.

⁴⁸⁶ *Georgia Code* 1895, §§ 2800, 3126; *Tennessee*, Shannon's Code 1896, § 5303. See *Jones v. Eubanks*, 86 Ga. 616, 12 S. E. 1065; *Strickland v. Stiles*, 107 Ga. 308, 33 S. E. 85, 45 L. R. A. 204, 73 Am. St. Rep. 122.

^{486a} But in *Von Berg v. Goodman*, 85 Ark. 605, 109 S. W. 1006, 16 L. R. A. (N. S.) 284, it is said that "the landlord's lien cannot be extended beyond the terms of the statute, even by express stipulations contained in the contract."

d. **Property subject to the lien**—(1) **General considerations.** The lessee or tenant may no doubt subject to a lien in favor of the lessor, to secure the payment of rent or the liquidation of other obligations, any property belonging to him, but ordinarily the security is in terms restricted to the property, or to a particular part of the property, upon the demised premises, such as crops, or the furniture in the building thereon. Occasionally a lien is created upon articles annexed by the tenant to the demised premises, constituting fixtures.⁴⁸⁷ There is nothing to prevent the creation of a lien in favor of the landlord upon rights of action, and a stipulation creating a lien upon the subrents to be received by the lessee has been recognized.⁴⁸⁸ The effect of a deposit by the tenant of money or securities to secure the landlord's claim for rent is subsequently considered.⁴⁸⁹

(2) **Property of assignee or subtenant.** There has apparently been no decision upon the question whether the goods of an assignee of the leasehold, or of a subtenant, brought by him upon the premises, can be subjected to a lien created by the lessee, but it would seem that they cannot be so subjected, since the lessee has no right to create a lien upon property in which he has no interest,⁴⁹⁰ and, the provision for a lien cannot be regarded as a covenant which will run with the land, since it concerns chattels and not the land,^{491,492} and there is, moreover, some difficulty in construing a provision for a lien, intended to create a "real" obligation, as creating a personal obligation by way of covenant.

Though it has never been decided that the goods of an assignee or subtenant brought on the premises will be bound by a provision for a lien inserted in the instrument of lease, it has been decided that he is bound by a provision precluding the removal of buildings or improvements until after payment of the rent,⁴⁹³ and a provision for a lien on crops has been held to bind the

⁴⁸⁷ *Barroilhet v. Battelle*, 7 Cal. 450; *Webster v. Nichols*, 104 Ill. 160; *First National Bank v. Adam*, 138 Ill. 483, 28 N. E. 955.

⁴⁸⁸ *Mavor v. Northern Trust Co.*, 93 Ill. App. 314.

⁴⁸⁹ See post, § 323.

⁴⁹⁰ See *Beechier v. Bartlett*, 42 Mich. 60, 3 N. W. 255.

^{491,492} See ante, § 149 b (6).

⁴⁹³ *Barroilhet v. Battelle*, 7 Cal. 450; *Webster v. Nichols*, 104 Ill. 160; *Willard v. Rogers*, 54 Ill. App. 583.

crops of a subtenant,⁴⁹⁴ and, apparently, of an assignee.⁴⁹⁵ The decisions as regards buildings or improvements may be sustained on the theory that the provision of the lease is not so much a provision for a lien as a provision restrictive of the lessee's right to remove fixtures, which seems necessarily effective as against persons claiming under the lessee as well as against the lessee himself. It is an obligation imposed upon the leasehold interest, and not merely upon the lessee, and so a provision giving a lien on the crops raised may properly be regarded as binding crops raised by others claiming under the lessee, since the crops arise from the land, and are, in theory of law, a part thereof. In the case of buildings, moreover, regarding the provision against removal as a covenant, it might, it seems, run with the land, since it concerns fixtures, which constitute a part of the land.⁴⁹⁶

(3) **Description of property.** In order that the lien may be effective, the provision by which it is sought to be created must identify the property to be subject thereto. There have been a number of decisions as to the sufficiency of particular language for this purpose, which are of little general interest. They are referred to in the notes.⁴⁹⁷ Presumably the same *criteria* in this regard are to be applied as in the case of bills of sale and chattel mortgages.

⁴⁹⁴ *Foster v. Reid*, 78 Iowa, 205, 42 N. W. 649, 16 Am. St. Rep. 437. See *Harris v. Frank*, 52 Miss. 155, where it seems to be held that the crop of a subtenant of part is subject to a lien for a proportional part of the rent.

⁴⁹⁵ *Jones v. Webster*, 48 Ala. 109.

⁴⁹⁶ See *Willard v. Rogers*, 54 Ill. App. 583.

⁴⁹⁷ A provision of the lease for a lien upon all the lessee's "property" upon the demised premises has been decided to be sufficiently specific to cover all the property thereon at the time of the lease (*McClain v. Abshire*, 72 Mo. App. 390), but there is a decision to the contrary (*Buskirk v. Cleveland*, 41 Barb. [N. Y.] 610). It has been

questioned whether a provision for a lien for rent "upon the property of the person or persons liable therefor" is sufficiently specific (*Borden v. Croak*, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23), and it seems to be recognized that a lien on "property" generally does not cover after-acquired property (*First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. 955; *Borden v. Croak*, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23). The meaning of the expression "property" may be limited by the context. (*Kuschell v. Campau*, 49 Mich. 34, 12 N. W. 899; *First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. 955).

A provision for a lien "on all goods, implements and other personal property which may be put on

(4) **After-acquired property.** A question has arisen in a number of cases as to the validity of a provision for a lien upon the crops to be grown upon the demised premises, and, less frequently, upon goods to be brought thereon, and the cases are usually in favor of the validity of such a provision.⁴⁹⁸ To create a lien upon chattels thereafter brought on the premises, however, within the

said premises" was apparently regarded as covering crops subsequently raised thereon (*McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644), but one in terms on "grain and straw" was construed not to cover hay (*Briggs v. Austin*, 129 N. Y. 208, 29 N. E. 4). A provision for a lien on "eighty acres of cotton to be grown the present year" was held to be sufficiently descriptive, no greater amount of land being planted in that year. *Strickland v. Stiles*, 107 Ga. 308, 33 S. E. 85, 45 L. R. A. 204, 73 Am. St. Rep. 122.

A provision for a lien on "buildings and improvements" was held not to cover furniture (*Willard v. World's Fair Encampment Co.*, 59 Ill. App. 336), and a provision for a lien on "improvements" was held, in view of the context, not to cover machinery (*Booth v. Oliver*, 67 Mich. 664, 35 N. W. 793). A lien on "furniture and household goods" includes chattels contributing to the use or convenience of the lessee or to the ornament of the house, and all articles of a permanent nature not consumed in enjoyment, but not wines, liquors and groceries (*Marquam v. Sengfelder*, 24 Or. 2, 32 Pac. 676).

A provision for a lien on the "furnishing" of a hotel was held too indefinite, as against third persons, in the absence of evidence showing that the word had a recognized

meaning. *Attaway v. Hoskinson*, 37 Mo. App. 132.

A provision for a lien on "all goods, wares and merchandise, now in or hereafter to be put in, on or about the building," was held not to include horses, harness and wagon not kept on the premises, though used for the delivery of articles in connection with the business conducted on the premises. *Van Patten v. Leonard*, 55 Iowa, 520, 8 N. W. 334.

A lien on fixtures was held not to cover the proceeds of insurance on the fixtures. *Northern Trust Co. v. Snyder*, 22 C. C. A. 47, 76 Fed. 34.

⁴⁹⁸ *Butt v. Ellett*, 86 U. S. (19 Wall.) 544, 22 Law. Ed. 183; *Jones v. Webster*, 48 Ala. 109; *Mitchell v. Badgett*, 33 Ark. 387; *Conner v. Elliott*, 10 Ky. Law Rep. 229 (compare *Marques v. Brandon*, 13 Ky. Law Rep. 686); *De Vaughn v. Howell*, 82 Ga. 336, 9 S. E. 173, 14 Am. St. Rep. 162; *Chissom v. Hawkins*, 11 Ind. 316; *Borden v. Croak*, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23; *Wright v. Bircher's Ex'r*, 72 Mo. 179, 37 Am. Rep. 433; *McClain v. Abshire*, 72 Mo. App. 390; *Everman & Co. v. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626; *Smith v. Atkins*, 18 Vt. 461; *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429.

doctrine of these cases, such property must, it has been decided, be specifically referred to,⁴⁹⁹ and a provision for a lien on the lessee's "property" is consequently insufficient for this purpose.⁵⁰⁰

There are in one state decisions to the effect that a provision for a lien on after-acquired property is invalid for all purposes, apparently,⁵⁰¹ and it would, presumably, everywhere be invalid as against a purchaser without notice, actual or constructive.⁵⁰² The question of the validity of a provision for a lien on such property, as against subsequent creditors and purchasers, is essentially the same as that of the validity of a chattel mortgage on such property, as to which the authorities are in a state of considerable confusion.⁵⁰³

e. **Persons entitled to assert lien.** A provision for a lien in favor of the lessor has been held to enure to the benefit of a transferee of the reversion,⁵⁰⁴ and it has been decided that after the transfer the lessor has no right to enforce the lien.⁵⁰⁵ The same view has, in perhaps three jurisdictions, been taken as to the effect of the transfer of the rent alone,⁵⁰⁶ but in another state it has been held that the assignment of the rent alone, without any express assignment of the lien, gives the assignee no right to enforce it.⁵⁰⁷

In one state there is a statutory provision authorizing the assignment of the landlord's express lien for supplies,⁵⁰⁸ and there it has been held that he may assign the benefit of the stipulation

⁴⁹⁹ Willard v. World's Fair Encampment Co., 59 Ill. App. 336.

⁵⁰⁰ Borden v. Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23; Powell v. Daily, 163 Ill. 646, 45 N. E. 414; First National Bank v. Adam, 138 Ill. 483, 28 N. E. 955.

⁵⁰¹ New Lincoln Hotel Co. v. Shears, 57 Neb. 478, 78 N. W. 25, 43 L. R. A. 588, 73 Am. St. Rep. 524; Brown v. Neilson, 61 Neb. 765, 86 N. W. 498, 54 L. R. A. 328, 87 Am. St. Rep. 525; Thorstesen v. Doxsee, 78 Neb. 40, 110 N. W. 567, 8 L. R. A. (N. S.) 978.

⁵⁰² Wilkinson v. Ketler, 69 Ala. 435; Kelley v. Goodwin, 95 Me. 538, 50 Atl. 711.

⁵⁰³ See 6 Cyclopaedia Law & Proc. 1045. Article by Samuel Williston, Esq., 19 Harv. Law Rev. 557.

⁵⁰⁴ Butt v. Ellett, 86 U. S. (19 Wall.) 544, 22 Law. Ed. 183.

⁵⁰⁵ Hansen v. Prince, 45 Mich. 519, 8 N. W. 584, 40 Am. Rep. 479.

⁵⁰⁶ McRovie v. White, 52 Miss. 406; Ramsey v. Johnson, 7 Wyo. 392, 52 Pac. 1084, 40 L. R. A. 690, 8 Wyo. 476, 58 Pac. 755, 80 Am. St. Rep. 948; Smith v. Atkins, 18 Vt. 461.

⁵⁰⁷ Strickland v. Stiles, 107 Ga. 308, 33 S. E. 85, 45 L. R. A. 204, 73 Am. St. Rep. 122. See Rawls v. Moya, 98 Ga. 564, 25 S. E. 582.

⁵⁰⁸ Georgia Code 1895, § 2800.

for a lien even before the supplies have been furnished to the tenant.⁵⁰⁹

f. **Recording and priorities.** In accordance with the tendency, before referred to,⁵¹⁰ to assimilate a provision creating a lien in favor of a lessor to a chattel mortgage, it has been quite frequently decided that it is not effective, at least as against *bona fide* purchasers, unless the instrument containing the provision is recorded, as is required in the case of a mortgage.⁵¹¹ There are decisions, indeed, to the effect that the provision is entirely ineffective unless so recorded,⁵¹² but ordinarily, it is to be presumed, it would, though unrecorded, be effective as against purchasers with notice, as well as other persons.⁵¹³ Occasionally it has been decided that such a provision, not being a legal mortgage, need not be recorded in order to be effective as against third persons.⁵¹⁴

The record of an instrument containing such a provision, in the

⁵⁰⁹ *Benson v. Gottheimer*, 75 Ga. Tenn. (5 Heisk.) 210; *Faxon v. 642*; *Mercer v. Cross*, 79 Ga. 432, 5 Ridge, 87 Mo. App. 299.
S. E. 245.

⁵¹⁰ See ante, at note 478.

⁵¹¹ *Valentine v. Washington*, 33 Ark. 795; *Ferguson v. Murphy*, 117 Cal. 134, 48 Pac. 1018; *Hume v. Riggs*, 12 App. D. C. 355; *Weed v. Standley*, 12 Fla. 166; *Sioux Valley State Bank v. Honnold*, 85 Iowa, 352, 52 N. W. 244; *Smith v. Dayton*, 94 Iowa, 102, 62 N. W. 650; *Gubbins v. Equitable Trust Co.*, 80 Ill. App. 17; *First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. 955; *Holmes v. Holifield*, 97 Ill. App. 185; *Keiley v. Goodwin*, 95 Me. 538, 50 Atl. 711; *McNeal v. Rider*, 79 Minn. 153, 81 N. W. 830, 79 Am. St. Rep. 437; *Steffin v. Steffin*, 4 Civ. Proc. R. (N. Y.) 179; *Duffus v. Bangs*, 122 N. Y. 423, 25 N. E. 980; *Thomas v. Bacon*, 34 Hun (N. Y.) 88; *Betsinger v. Schuyler*, 46 Hun (N. Y.) 349; *Lake Superior Ship Canal, R. & Iron Co. v. McCann*, 86 Mich. 106, 48 N. W. 692; *Lanphere v. Lowe*, 3 Neb. 131; *Gandy v. Dewey*, 28 Neb. 175, 44 N. W. 106; *Jones v. Chamberlin*, 52

⁵¹² See *Franklin v. Meyer*, 36 Ark. 96; *Wm. W. Kendall Boot & Shoe Co. v. Bain*, 55 Mo. App. 264.

⁵¹³ See, to the effect that the provision is valid as against any purchaser with notice, *Butt v. Ellett*, 86 U. S. (19 Wall.) 544, 22 Law. Ed. 183; *Conner v. Elliott*, 10 Ky. Law Rep. 229 (But compare *Marquess v. Brandon*, 13 Ky. Law Rep. 686); *Wright v. Bircher's Ex'r*, 72 Mo. 179, 37 Am. Rep. 433; *Esshorn v. Wattertown Hotel Co.*, 7 S. D. 74, 63 N. W. 229. These were all cases of liens on crops to be planted or goods to be acquired. See, also, *McGee v. Fitzer*, 37 Tex. 27; *Duffus v. Bangs*, 122 N. Y. 423, 25 N. E. 980; *Zapp v. Davidson*, 21 Tex. Civ. App. 566, 54 S. W. 366.

⁵¹⁴ *Fox v. McKinney*, 9 Or. 493; *Broders v. Bohannon*, 30 Or. 599, 48 Pac. 692.

In *Metcalfe v. Fosdick*, 23 Ohio St. 114, it was held that a provision of the lease that the lessor should have a "lien, in the nature of a mort-

manner appropriate to a chattel mortgage, will ordinarily, it seems, have the effect of charging third persons with notice thereof.⁵¹⁵ Occasionally the record of such instrument as a lease is apparently regarded as sufficient for this purpose,⁵¹⁶ but it does not seem that a purchaser or mortgagee of chattels should ordinarily be affected with notice of an incumbrance thereon by reason of its record among the land records.⁵¹⁷

A provision for a lien is not ordinarily effective against a purchaser of the crops or chattels for value and without notice, actual or constructive,⁵¹⁸ and it has been held that one is not charged with notice of the lien by knowledge that the crop purchased was grown on leased land, even though accompanied by knowledge that the rent was unpaid.⁵¹⁹

The decisions occasionally refer to the fact that the lessee retains the possession of the property sought to be charged as a ground for holding the attempted creation of a lien in favor of the lessor invalid as against third persons.⁵²⁰ At common law such retention of possession apparently raised a presumption of fraud as against subsequent creditors and purchasers.⁵²¹ At the

gage" upon the premises and improvements, accompanied by a clause authorizing the lessee to remove any portion of the machinery thereon, provided he substituted other machinery therefor, did not operate as a chattel mortgage as regards machinery upon the premises when leased, but as a reservation, and consequently was effective as against attaching creditors though not recorded.

⁵¹⁵ *Jones v. Webster*, 48 Ala. 109; *Blakemore v. Taber's Ex'r*, 22 Ind. 466; *Everman & Co. v. Robb*, 52 Miss. 653, 24 Am. Rep. 682. ⁵¹⁶ *Smith v. Taber*, 46 Hun (N. Y.) 313; *Faxon v. Ridge*, 87 Mo. App. 299. ⁵¹⁷ See *Duffus v. Bangs*, 122 N. Y. 423, 25 N. E. 980; *Booth v. Oliver*, 67 Mich. 664, 35 N. W. 793. ⁵¹⁸ *Marshall v. Luiz*, 115 Cal. 622, 47 Pac. 597; *Smith v. Worman*, 19 Ohio St. 145, 2 Am. Rep. 379. And see ante, note 511. ⁵¹⁹ *Wilkinson v. Ketler*, 69 Ala. 425; *Prettyman v. Unland*, 77 Ill. 206; *Wilkerson v. Thorp*, 128 Cal. 221, 60 Pac. 679. But *Graham v. Seignious*, 53 S. C. 132, 31 S. E. 51, appears to be contra.

⁵²⁰ *Ex parte Morrow*, 1 Lowell, 386, Fed. Cas. No. 9,850; *Butterfield v. Baker*, 22 Mass. (5 Pick.) 522 (but see *Whitcomb v. Tower*, 53 Mass. [12 Metc.] 487, 46 Am. Dec. 698); *Bailey v. Fillebrown*, 9 Me. (9 Greenl.) 12, 23 Am. Dec. 529; *Thomas v. Bacon*, 34 Hun (N. Y.) 88; *Crocker v. Cunningham*, 122 Cal. 547, 55 Pac. 404; *Lemon v. Wolff*, 121 Cal. 272, 53 Pac. 801. See *Bellows v. Wells*, 36 Vt. 599, 86 Am. Dec. 679. ⁵²¹ *Coote, Mortgages* (4th Ed.) 430; *May, Fraudulent Conveyances* (2nd Ed.) 116.

⁵²¹ *Coote, Mortgages* (4th Ed.) 430; *May, Fraudulent Conveyances* (2nd Ed.) 116.

present day the absence of any change of possession as rendering the mortgage void as to creditors and purchasers is ordinarily, it seems, to be regarded as a result of the statutes requiring that the possession be transferred, or the mortgage recorded, and has no such result if the mortgage is recorded pursuant to the statute. In the absence of such a statute, the lessee's retention of possession can, it appears, have no other effect than at common law.

It has been decided in several cases that a provision for a lien in favor of the lessor is effective as against creditors of the lessee.⁵²² In some cases it has been decided that such a provision is invalid as against creditors unless it is recorded.⁵²³ Occasionally the priority of the lessor's lien to the claims of the creditors has been regarded as dependent on the question of notice thereof to the latter, without particular reference to whether this is by reason of the record or otherwise.⁵²⁴

That the lien sought to be asserted is upon crops not planted at the time of the execution of the provision for the lien seems at times to have been regarded as a consideration in upholding the priority thereto of the rights of a purchaser or creditor.⁵²⁵ But the exact extent to which this fact operates to make the provision less effective than when the property sought to be charged is in existence at that time does not clearly appear. In the cases re-

⁵²² *McLean v. Klein*, 3 Dill. 113, Jones, 123 Ky. 395, 29 Ky. Law Rep. Fed. Cas. No. 8,884; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Sullivan v. Cleveland*, 62 Tex. 677; *Briswell v. Marshall*, 51 Vt. 87.

⁵²³ *Stockton Sav. & Loan Soc. v. Purvis*, 112 Cal. 236, 44 Pac. 561, 53 Am. St. Rep. 210 (compare *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647; *Farnum v. Hefner*, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174); *Weed v. Standley*, 12 Fla. 166; *Gubbins v. Equitable Trust Co.*, 80 Ill. App. 17 (as against assignee for creditors); *Platt v. Stewart*, 13 Blatchf. 481, Fed. Cas. No. 11,220; *Johnson v. Crofoot*, 53 Barb. (N. Y.) 574, 37 How. Pr. 59; *Packard v. Chicago Title & Trust Co.*, 67 Ill. App. 598 (as against assignee for creditors); *Bowles' Ex'r v.*

Jones, 123 Ky. 395, 29 Ky. Law Rep. 1022, 96 S. W. 1121 (mortgage to secure rent). Contra, *Buswell v. Marshall*, 51 Vt. 87. In *Butterfield v. Baker*, 22 Mass. (5 Pick.) 522, an

attachment was held superior to the claim of the lessor under a provision retaining in him the possession and control of the crop, for the reason that there was no transfer of possession.

⁵²⁴ *Hume v. Riggs*, 12 App. D. C. 355; *Jones v. Avant*, 41 Tex. 650.

⁵²⁵ See *Wilkinson v. Ketler*, 69 Ala. 435; *Gittings v. Nelson*, 86 Ill. 591; *Holmes v. Holifield*, 97 Ill. App. 185; *Chissom v. Hawkins*, 11 Ind. 216. And see *Marquess v. Brandon*, 13 Ky. Law Rep. 686.

ferred to, the purchaser or creditor in question appears to have been without notice. Such a provision for a lien on future crop has in some cases been upheld as against purchasers with notice,⁵²⁶ and as against creditors even without notice, it seems.⁵²⁷

Occasionally a provision in the instrument of lease, that the ownership of the crop to be raised on the premises shall remain in the lessor till certain conditions have been satisfied by the tenant, has been regarded by the courts, not as creating merely a lien in favor of the lessor upon the crop belonging to the tenant, but as vesting the actual ownership in the lessor, so as to leave no interest in the lessee subject to attachment or execution by the latter's creditors, even though without notice of such provision in the lease.⁵²⁸

The lessor's rights under the lien provision have been fully recognized as against a person taking possession of the property without any right thereto,⁵²⁹ and a mortgage on the crop in favor of the lessor to secure the rent has been held valid as against a claim by a factor making advances on the crop.⁵³⁰ But the rights of laborers under a cropping contract with the lessee have been regarded as prior to the claim of the lessor under such a mortgage.⁵³¹

⁵²⁶ *Butt v. Ellett*, 86 U. S. (19 Wall.) 544, 22 Law. Ed. 183; *Wright v. Bircher's Ex'r*, 72 Mo. 179, 37 Am. Rep. 433.

⁵²⁷ *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Buswell v. Marshall*, 51 Vt. 87; *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626. Disapproval of the last cited case is expressed in a learned and discriminating article by Samuel Williston, Esq., in 19 Harv. Law Rev. at p. 573, on "Transfers of After-Acquired Personal Property."

⁵²⁸ *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647 (but see *Stockton Sav. & Loan Soc. v. Purvis*, 112 Cal. 236, 44 Pac. 561, 53 Am. St. Rep. 210; *Tuohy v. Linder*, 144 Cal. 790, 78 Pac. 233; *Lewis v. Lyman*, 39 Mass. (22 Pick.) 437; *Andrew v. Newcomb*, 32 N. Y. 417; *Hawkins v. Beakes*, 80 Hun, 292, 30 N. Y. Supp. 91, *affd.* 150

N. Y. 562, 44 N. E. 1124; *Smith v. Atkins*, 18 Vt. 461; *Leland v. Sprague*, 28 Vt. 746; *Pelton v. Draper*, 61 Vt. 364, 17 Atl. 494. See *Consolidated Land & Irr. Co. v. Hawley*, 7 S. D. 229, 63 N. W. 904. But there are cases to the effect that the lessee has, in spite of such a provision, an assignable interest in the crop. *Lawrence v. Phy*, 27 Or. 506, 41 Pac. 671, 30 L. R. A. 171; *Yates v. Kinney*, 19 Neb. 275, 27 N. W. 132; *Sanford v. Modine*, 51 Neb. 728, 71 N. W. 740; *Bellows v. Wells*, 36 Vt. 599, 86 Am. Dec. 679.

⁵²⁹ *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Fowler v. Hawkins*, 17 Ind. 211.

⁵³⁰ *Booker v. Jones' Adm'r*, 55 Ala. 266.

⁵³¹ *Doty v. Heth*, 52 Miss. 530.

g. Waiver of the lien. The landlord does not, it has been held, waive his conventional lien on property belonging to the tenant by failing to object to its removal from the premises,⁵³² and it is obvious that he does not do so by consenting to the sale or removal of other property.⁵³³ Nor is there any waiver as a result of his action in taking a note for the rent and endeavoring to collect it.⁵³⁴

It has been decided in one state, applying the doctrine which obtains with reference to chattel mortgages, that the landlord's lien is waived if he attaches the property subject to the lien.⁵³⁵

The landlord may lose his right to assert the lien as against a third person by statements to the latter calculated to induce the latter to refrain from any investigation as to the existence of a lien.⁵³⁶

h. Enforcement of the lien. A lien of this character would ordinarily, it appears, be enforced in equity by obtaining a decree of sale.⁵³⁷ It does not seem that the lessor has, by reason of such lien, such title to the property as would justify his seizure of the property and sale thereof, without resort to legal process, though he may, by the instrument creating the lien, be given a power to seize and sell the property on default.⁵³⁸ Such a power does not entitle him to seize, as for a default in rent, until the day after the rent day,⁵³⁹ and it has been held that, after seizure and until sale, he is liable for the value of the use of the property.⁵⁴⁰ The property is, it seems, subject to redemption until sale.⁵⁴¹

In one case, in a proceeding to foreclose a lien of this character

⁵³² *Wisner v. Ocumpaugh*, 71 N. W. 636; *Bourcier v. Edmondson*, 58 Tex. 675. In *Webster v. Nichols*, 104 Ill. 160, it was decided that the lien might be enforced in equity for the reason that it required the taking of an account between the parties.

⁵³³ *Sanger v. Magee*, 29 Tex. Civ. App. 397, 69 S. W. 234.

⁵³⁴ *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429.

⁵³⁵ *Potter v. Greenleaf*, 21 R. I. 483, 44 Atl. 718.

⁵³⁶ *Allen v. Houston Ice & Brew. Co.*, 44 Tex. Civ. App. 125, 16 Tex. Ct. Rep. 942, 97 S. W. 1063.

⁵³⁷ See *Wilkinson v. Ketler*, 69 Ala. 435; *Potter v. Greenleaf*, 21 R. I. 483, 44 Atl. 718; *Monnich v. Schwartz*, 4 Neb. Unoff. 811, 96 N.

W. 636; *Bourcier v. Edmondson*, 58 Tex. 675. In *Webster v. Nichols*, 104 Ill. 160, it was decided that the lien might be enforced in equity for the reason that it required the taking of an account between the parties.

⁵³⁸ *State v. Adams*, 76 Mo. 605; *Whited v. Hamilton*, 15 Hun (N. Y.) 275.

⁵³⁹ *Dalton v. Laudahn*, 27 Mich. 529.

⁵⁴⁰ *State v. Adams*, 76 Mo. 605.

⁵⁴¹ See *Taggart v. Packard*, 39 Vt. 628.

upon the improvements upon the premises, the court, in view of the condition of the premises and of the improvements, and to save the expense of a sale, decreed a strict foreclosure.⁵⁴²

i. **Landlord's rights against third persons.** A lien of this character does not, in most jurisdictions, it would seem, create any possessory rights in the lienor, which he may assert against the lessee or any other person, by an action of trespass, replevin, or trover.⁵⁴³ In one state, however, a different view seems to be taken.⁵⁴⁴ In some states the right to bring trover or replevin may exist by reason of provisions giving the title or right of possession to the lessor after the lessee's default.⁵⁴⁵

It has been said that the lessor is entitled to an injunction against the removal of the property subject to the lien.⁵⁴⁶

The decisions before referred to,⁵⁴⁷ asserting the right of the landlord to recover damages against one purchasing property which is subject to a statutory lien, would seem to support the view that he may recover against the purchasers of property subject to his conventional lien. There are, apparently, no decisions upon the question.⁵⁴⁸

§ 323. Deposits to secure rent.

In some places, particularly in the city of New York, lessors

⁵⁴² *Illinois Starch Co. v. Ottawa* 377. Compare *Streeter v. Ward*, 12 *Hydraulic Co.*, 125 Ill. 237, 17 N. E. N. Y. St. Rep. 333.
486.

⁵⁴³ *Dunning v. South*, 62 Ill. 175;
Sheble v. Curdt, 56 Mo. 437.

⁵⁴⁴ *Baxter v. Bush*, 39 Vt. 465, 70
Am. Dec. 429; *Willmarth v. Pratt*,
56 Vt. 474; *Pelton v. Draper*, 61 Vt.
364, 17 Atl. 494; *Smith v. Atkins*, 18
Vt. 461. In North Carolina the stat-
ute provides that the possession shall
be regarded as in the lessor and that
he shall be entitled to maintain
"claim and delivery" for the crop
See *Durham v. Speeke*, 82 N. C. 87.

⁵⁴⁵ *Becker v. Jones' Adm'r.* 55 Ala.
266; *Whited v. Hamilton*, 15 Hun (N.
Y.) 275. See *Sheble v. Curdt*, 56 Mo.
437; *Agne v. Skewis-Moen Co.*, 93
Minn. 32, 107 N. W. 415; *Aronson v.*
Oppegard, 16 N. D. 595, 114 N. W.

⁵⁴⁶ *Sheble v. Curdt*, 56 Mo. 437.

⁵⁴⁷ See ante, at notes 444, 452.

⁵⁴⁸ In *Crockett v. Bearce*, 104 Mich.
257, 62 N. W. 344, it is apparently
decided that the landlord may sue a
subsequent mortgagee of the prop-
erty subject to the lien, who took
possession for default, the mortgage
being made by the lessee with in-
tent to defraud the landlord. In
Agne v. Skewis-Moen Co., 98 Minn.
32, 107 N. W. 415, the lessor was al-
lowed to recover, as against a pur-
chaser under a subsequent mortgage
of the crop, who had taken posses-
sion thereof, the amount of the les-
sor's share of the crop, together with
damage suffered as a consequence of
the tenant's default.

occasionally require the lessee, at the time the lease is made, to "deposit" a certain sum of money with the lessor to secure the payment of the rent, and occasionally, the performance of other covenants entered into by the lessee. Such a deposit is, in reality, it seems, a loan by the lessee to the lessor,⁵⁴⁹ to be returned to the latter, either by applying the amount so deposited on the rent or particular installments of the rent, or by applying it in satisfaction of claims for damages from breaches of other covenants, if it is agreed that it may be so applied, or by repaying, at the end of the term, the amount deposited, if all claims of the lessor which it was intended to secure are otherwise satisfied. Such a deposit does not create a lien in favor of the lessor, since the lessor obtains the actual ownership of the money and the lessee is divested thereof. The purpose of the deposit being, however, to secure the lessor from loss, and it to that extent resembling a lien, the rights of the parties with reference thereto may be conveniently considered in this place.

It is said that a stipulation for a forfeiture of the whole deposit in case of default by the lessee will be treated as a provision for liquidated damages only in those cases where, from the nature of the transaction, the actual damage consequent upon a breach of the contract is incapable of accurate measurement, or where the sum is not out of all proportion to any damage which could possibly arise from the breach.⁵⁵⁰ It has accordingly been decided in several cases that the tenant could recover from the landlord the excess of the amount of the deposit above the damage suffered by reason of the tenant's default, when the landlord had recovered possession by reason of such default,⁵⁵¹ it being in such case

⁵⁴⁹ See *In re Banner*, 149 Fed. 936.

⁵⁵⁰ *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58.

⁵⁵¹ *Hecklau v. Hauser*, 71 N. J. Law, 478, 59 Atl. 18; *Chaude v. Shepard*, 122 N. Y. 397, 25 N. E. 358; *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58. Compare *Lesser v. Stein*, 39 Misc. 349, 79 N. Y. Supp. 849; *Adler v. Kramer*, 39 Misc. 642, 80 N. Y. Supp. 624; *Slater v. Bonfiglio*, 56 Misc. 385, 106 N. Y. Supp. 861; *Franceschini v. Chaucer*, 110 N. Y. Supp. 775.

When the deposit was to be returned at the expiration of the term of the lease if all conditions thereof were performed by the tenant, the fact that the landlord had re-entered, upon the tenant's abandonment, was held not to impose any obligation immediately to return the deposit, the lease giving the landlord the right to re-enter in such case and re-rent as the tenant's agent, the tenant remaining liable for any deficiency. *O'Brien v. Levine*, 50 Misc. 303, 98 N. Y. Supp. 636.

presumed, it seems, in the absence of evidence to the contrary, that by reason of his recovery of possession the landlord does not suffer on account of the nonpayment of installments of rent falling due after such recovery.⁵⁵² If the landlord does not elect to resume possession by reason of the tenant's default, he may, it seems, apply the deposit in satisfaction of the rent as it becomes due,⁵⁵³ or, presumably, in satisfaction of other claims against the tenant on account of the stipulations of the lease.

It has been decided that when the tenancy comes to an end by reason of surrender,⁵⁵⁴ or a sale under a mortgage prior to the lease,⁵⁵⁵ the tenant may, *prima facie*, recover the amount of the deposit.

Upon the ending of the tenancy by summary proceedings, the tenant may recover the amount of the deposit, less rent previously accrued, and also damages accrued from breach of stipulations other than for rent, if the deposit was intended as security for their performance.⁵⁵⁶ That the order of dispossession is afterwards reversed does not affect the tenant's right to a return of the deposit, he not having elected to accept restitution of the premises.⁵⁵⁷ The issue of a warrant in summary proceedings has been regarded as a "fulfillment" of the lease within the meaning of a provision providing for the return of the deposit on such fulfillment, so that the landlord can retain therefrom only the amount of the rent then due.⁵⁵⁸

⁵⁵² See *Caesar v. Rubinson*, 174 N. Y. 492, 67 N. E. 58.

⁵⁵³ *Caesar v. Rubinson*, 174 N. Y. 492, 67 N. E. 58. In *Blackall v. Morrison*, 170 Ill. 152, 48 N. E. 705, it was decided that a deposit made by a sublessee should, upon his insolvency, be applied to satisfy the sublessor's loss of the difference, for the balance of the term, between the rent reserved on the head lease and that reserved on the sublease, rather than on the rent already due under the sublease.

⁵⁵⁴ *Kahn v. Tobias*, 16 Misc. 83, 37 N. Y. Supp. 632. See *Hawthorne v. Courson*, 18 Misc. 447, 41 N. Y. Supp. 995.

⁵⁵⁵ *Degnario v. Sire*, 34 Misc. 163, 68 N. Y. Supp. 789. But not upon a mere threatened foreclosure of such a mortgage. In *re Banner*, 149 Fed. 936.

⁵⁵⁶ *Scott v. Montells*, 109 N. Y. 1, 15 N. E. 729; *Chaude v. Shepard*, 122 N. Y. 397, 25 N. E. 358; *Caesar v. Rubinson*, 174 N. Y. 498, 67 N. E. 58; *Bernstein v. Heinemann*, 23 Misc. 464, 51 N. Y. Supp. 467. Including rent then due as being payable in advance. *Coro v. Greenwald*, 52 Misc. 548, 102 N. Y. Supp. 752.

⁵⁵⁷ *Niles v. Iroquois Realty Co.*, 57 Misc. 443, 109 N. Y. Supp. 712.

⁵⁵⁸ *Michaels v. Fishel*, 169 N. Y. 381, 62 N. E. 425, 57 L. R. A. 317.

In spite of the fact that the tenancy is, by the express language of the statute, terminated upon the recovery of possession in summary proceedings, the language of the lease may, it has been decided, enable the landlord to retain the deposit until the end of the term named in the lease, to secure him against subsequent loss by reason of re-renting at a reduced rent, or of expenditures incurred by him.⁵⁵⁹ So a provision that the deposit may be retained by the lessor as liquidated damages in case of the dispossession of the lessee by due process of law, and that there shall be "no rebate or allowance in the event of dispossession," has been held to render the deposit available as security for breaches even after dispossession by summary proceedings.⁵⁶⁰

A provision that the lessor should hold the deposit as security for the payment of rent "according to the conditions and provisions of this lease, said security to be paid back to the party of the second part on the full compliance with the provisions of this lease on the part of" the lessee, was held to render the fund deposited security for the payment of rent only, and not for the performance of the covenants generally.⁵⁶¹

A deposit made as security for the rent, to be retained as liquidated damages in case of breach of covenant, was held not applicable to payment of the last month's rent, so as to preclude the tenant's dispossession for nonpayment of such rent in advance as stipulated by the lease.⁵⁶² And it has been held that when the deposit was in terms applicable to any deficiency in performance of the covenants of the lease, or in case there was no such deficiency, then in payment of the rent for the last three months of the lease, the tenant could not demand that the deposit be applied in payment of rent accruing in the early part of the term.⁵⁶³

⁵⁵⁹ *Lesser v. Stein*, 39 Misc. 349, 79 N. Y. Supp. 849; *Anzolone v. Paskusz*, 96 App. Div. 188, 89 N. Y. Supp. 203; *Colderaro v. Kempner*, 107 N. Y. Supp. 41. ⁵⁶¹ *Scott v. Montells*, 109 N. Y. 1, 15 N. E. 729. But compare *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58.

⁵⁶⁰ *Longobardi v. Yuliano*, 33 Misc. 472, 67 N. Y. Supp. 902. ⁵⁶² *Shing v. Sire*, 15 Misc. 139, 36 N. Y. Supp. 466. And see *Rice v. Bliss*, 66 How. Pr. (N. Y.) 186; *O'Brien v. Levine*, 50 Misc. 303, 81 N. Y. Supp. 678.

⁵⁶³ *Brill v. Schlosser*, 40 Misc. 247, 81 N. Y. Supp. 678.

A payment, made at the time of the making of the lease, of the rent for the last two months of the tenancy, could not, it has been decided, be regarded as a deposit to secure the payment of rent, and as such recoverable in a certain contingency.⁵⁶⁴

A covenant by the lessor to return the deposit at the end of the term is not one which runs with the land, and, consequently, recovery thereon must be against the lessor and not against one to whom he has transferred the reversion.⁵⁶⁵

§ 324. Agreement to give security.

Occasionally the courts have considered the effect of the lessee's failure to comply with his agreement to give security for the rent. The presence in an instrument of a provision to that effect has in England been regarded as showing that the instrument constitutes a contract to make a lease rather than a lease.⁵⁶⁶ In this country the courts have tended to regard the instrument as a lease in spite of the presence of such a provision, and the provision itself as constituting a condition precedent, a failure promptly to comply with which renders the lease inoperative.⁵⁶⁷ In one case, however, in which such a provision was present, the instrument seems to have been regarded as a contract to make a lease rather than a lease.⁵⁶⁸

⁵⁶⁴ *Forgotston v. Brafman*, 84 N. (N. Y.) 257; *Andis v. Personett*, 108 Y. Supp. 237.

⁵⁶⁵ *Knutsen v. Cinque*, 113 App. Ind. 202, 9 N. E. 101; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. Div. 677, 99 N. Y. Supp. 911; *Fallert* 134, 67 L. R. A. 571, 110 Am. St. Rep. 963. There is a similar decision in *Brewing Co. v. Blass*, 119 App. Div. 53, 103 N. Y. Supp. 865. Canada. *Murphy v. Scarth*, 16 U. C.

⁵⁶⁶ *John v. Jenkins*, 1 Crompt. & M. Q. B. 48.
⁵⁶⁷ 227.

⁵⁶⁸ *Hard v. Brown*, 18 Vt. 87.

⁵⁶⁷ *McGaunten v. Wilbur*, 1 Cow.

CHAPTER XXXII.

DISTRESS AND ATTACHMENT.

A. DISTRESS.

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A. DISTRESS.

§ 325. The right of distress—General considerations.

Distress is a remedy for the collection of rent, by virtue of which the landlord may take, or have taken, goods and chattels which are upon the demised premises, or, by virtue of statute occasionally, goods and chattels belonging to the tenant wherever found, and sell them, or have them sold, applying the proceeds upon the arrears of rent.

At common law this right of distress existed in favor of every lord to compel the performance of any service due by the tenant, including that to pay rent, but the lord had no right to dis-

pose of the goods and chattels which he might seize, and could only hold them as security until the tenant either performed the services in arrear, or found security to contest in a court of law the justice of the seizure.¹ It was not until the latter part of the seventeenth century that the person distraining was by statute given the power to sell the goods seized and thus actually to obtain payment of arrears of rent by means of a distress.² At the present day, in all jurisdictions in which the remedy by distress exists, the right to sell is incidental thereto.³

At common law the right of distress was incident to every "rent service"⁴ that is, to every rent payable by a tenant to his lord.⁵ It was also incident to a rent reserved on a tenancy at will,⁶ though such a rent was said not to be a rent service.⁷ In the case of a "rent charge,"⁸ the right of distress existed by reason of express stipulation, this being indeed the distinguishing characteristic of such a rent, the rent being "charged" on the land, or more exactly, upon the chattels that might be on the land.⁹ In connection with some rents, as not being incident to a relation of tenancy, and as being created without any express stipulation for distress, there was no right of distress, they being consequently known as "rents seek."¹⁰ But by St. 4 Geo. 2, c. 28, § 5, it was enacted that all persons should have the like remedy by distress in case of rents seek, as in case of rent reserved upon a lease.¹¹ This statute is in force, it seems, in at least one state.¹²

There were a few cases even at common law in which there was a right of distress for rent although this was not in the nature of rent service. So a distress was allowable for any rent granted upon an exchange,¹³ or for a rent granted by one copartner to another for equality of partition,¹⁴ and likewise, a woman en-

¹ Pollock & Maitland, Hist. Eng. Law (2d Ed.) vol. 1, p. 353, vol. 2, p. 576; 3 Blackst. Comm. 14; Bradby, Distresses, 9.

² 2 Wm. & M. sess. 1, c. 5, § 2 (A. D. 1690).

³ See post, § 342.

⁴ Litt. §§ 213-216.

⁵ See ante, § 167.

⁶ Litt. § 72.

⁷ Co. Litt. 57 b.

⁸ See ante, § 167.

⁹ Litt. §§ 217, 218; Co. Litt. 143 b; Den d. Farley v. Craig, 15 N. J. Law, 192. See Cornell v. Lamb, 2 Cow. (N. Y.) 652.

¹⁰ Litt. §§ 218, 225-228.

¹¹ See Blackst. Comm. 7.

¹² Maryland. See Alexander's British Statutes in force in Maryland.

¹³ Bullen, Distresses, 31.

¹⁴ Litt. §§ 252, 253.

dowed of a rent by way of jointure in lieu of dower could distraint for it.¹⁵

In this country the right of distress for rent reserved on a lease for years has been recognized in a number of jurisdictions, apart from any local legislation on the subject. In some of the older states, where the right had existed, in accordance with the English law, before the Revolution, its existence thereafter was assumed, no suggestion being there made apparently that the change of political conditions had changed the rent so reserved from rent service to rent seek.¹⁶ In a few states, while, as before stated,¹⁷ the courts refused to regard such rent as rent service, they recognized the right of distress upon the ground that it had been generally recognized in the older states, that is, as it was expressed, it was a part of the "American common law."¹⁸ In some states the courts have refused to recognize the right of distress, usually upon the ground that, by statute, other remedies for securing the landlord have been substituted, such as a lien for the rent, or the right to recover the premises by summary proceedings on nonpayment.¹⁹ In some states in which the remedy by distress once existed, it has been abolished by statute,²⁰ and in those in which it still exists, it has been modified by statutes, the general tendency of which is more or less to

¹⁵ Co. Litt. 34 b; Gilbert, Rents, 20. 57 Ala. 588); *Colorado* (Herr v. See Pennsylvania Act March 29. Johnson, 11 Colo. 393, 18 Pac. 342); 1832. *Missouri* (Crocker v. Mann, 3 Mo.

¹⁶ See Garrett v. Hughlett, 1 Har. 472, 26 Am. Dec. 684); *Montana* & J. (Md.) 3; Hoskins v. Paul, 9 N. (Behm v. Murphy, 1 Mont. 333); J. Law, 110, 17 Am. Dec. 455; Wog- *North Carolina* (Dalgleish v. Grandy, lam v. Cowperthwaite, 2 Dall. (Pa.) 1 N. C. (Conf. R. 22) 249; Deaver v. 68; Charleston City Council v. Price, Rice, 20 N. C. (4 Dev. & B. Law) 1 McCord Law (S. C.) 299; Elford 567, 34 Am. Dec. 69); *Oklahoma* v. Clark, 2 Brev. (S. C.) 88; Jones (Smith v. Wheeler, 4 Okl. 138, 44 v. Murdaugh, 2 Leigh (Va.) 447. In Pac. 203).

¹⁷ Cornell v. Lamb, 2 Cow. (N. Y.) 652, it was decided that rent incident to a reversionary interest was rent service carrying the right of distress.

¹⁸ See ante, § 167, at note 21.

¹⁹ Penny v. Little, 4 Ill. (3 Scam.) 301; Dutcher v. Culver, 24 Minn. 584; Coburn v. Harvey, 18 Wis. 148.

²⁰ *Alabama* (Folmar v. Copeland,

²⁰ *District of Columbia* (Act Cong. Feb. 22, 1867); *Indiana* (2 Gav. & H. St. 1862, p. 360); *Minnesota* (Rev. Laws 1905, § 3327); *New York* (Laws 1846, c. 369); *Wisconsin* (Rev. St. 1898, § 2181). In South Carolina distress was abolished in 1868, but restored by Act June 8, 1877. See Mobley v. Dent, 10 S. C. 471.

withdraw the control of the proceedings from the landlord and to vest it in public officials, thus assimilating it to the process of attachment. In one state, indeed, the statute names process for the collection of rent "distress or attachment" in the alternative.²¹ In the New England states the right of attachment or mesne process has superseded that of distress, and it is, it seems, in the majority of cases, even more efficacious.

It has been decided that a statute abolishing the remedy by distress is not unconstitutional as applied to the case of a lease made before its enactment,²² though such a statute was regarded as inapplicable to a case in which the tenant's chattels had already been actually seized.²³ It has even been decided that such a statute is effective to exclude the remedy although the prior lease in question contained an express clause allowing distress.²⁴

§ 326. Existence of relation of tenancy.

a. **Is usually necessary.** Since the right of distress is based upon the relation of tenure, a distress for rent reserved on a lease can be made only by one having the reversion, that is, the landlord.²⁵ If there is no demise whatever, that is, if no relation of tenancy exists between the parties, and one is on the other's premises as a trespasser, the owner of the land has obviously no right of distress.²⁶ It has even been decided that a landlord loses his right of distress if he treats his tenant as a trespasser by bringing ejectment against him.²⁷

A lessee who assigns his lease, reserving a rent to be paid by the assignee, has been held to have no power of distress for such

²¹ Mississippi. See Code 1906, § App. 373; *Patty v. Bogle*, 59 Miss. 2838 et seq.

²² *Van Rensselaer v. Snyder*, 13 N. Y. (3 Kern.) 299.

²³ *Dutcher v. Culver*, 24 Minn. 584.

²⁴ *Conkey v. Hart*, 14 N. Y. (4 Kern.) 22.

²⁵ *Hale v. Burton*, Dud. (Ga.) 105; *Sims v. Price*, 123 Ga. 97, 50 S. E. 961; *Marr v. Ray*, 151 Ill. 340, 37 N. E. 1029, 26 L. R. A. 799; *McGillick v. McAllister*, 10 Ill. App. (10 Bradw.) 40; *Murr v. Glover*, 34 Ill.

App. 373; *Patty v. Bogle*, 59 Miss. 491; *Grier v. McAlarney*, 148 Pa. 587,

24 Atl. 119; *Helser v. Pott*, 3 Pa. 179; *Seyfert v. Bean*, 83 Pa. 450; *Manuel v. Reath*, 5 Phila. (Pa.) 11; *McKenzie v. Roper*, 2 Strob. (S. C.) 306.

There can consequently be no distress by a remainderman on the lessee of the life tenant. *Murr v. Glover*, 34 Ill. App. 373.

²⁶ *Cohen v. Broughton*, 54 Ga. 296.

²⁷ *Bridges v. Smyth*, 5 Bing. 410.

rent, since he has no reversion,²⁸ though he has such power if he makes a sublease reserving rent.²⁹

That the lessor had at the time of the lease no title to the premises does not, it has been decided, affect the validity of the distress;³⁰ though in a modern English case³¹ the view has been asserted that a third person whose chattels have been distrained can, though the tenant cannot, assert the lack of title in the lessor. These cases have been previously discussed.³²

In England it has been decided that one may, by express agreement, give a power of distress to another to secure a debt, although no relation of tenancy exists,³³ but that such a power could not authorize a distress on the goods of a stranger.³⁴ Such a power expressly given to another to enter on one's land and seize and sell one's goods is a mere license and power of attorney.

b. Character of demise or lease. It is sometimes said that, in order that a right of distress may exist, there must be an "actual demise." This can mean merely that the relation of landlord and tenant must exist. If this is the case, the particular form of the demise is immaterial, and it may, it seems, as well be created by the actions of the parties as by the use of particular forms of language.³⁵

²⁸ Bac. Abr., Distress (A); Whit- W. 209), or, it seems, if he makes a
ton v. Bye, Cro. Jac. 486; Anony- lease for one or more years. See
mous v. Cooper, 2 Wils. 375; Parm- Mackay v. Mackreth, 4 Doug. 213,
enter v. Webber, 8 Taunt. 593; Pas- and ante, § 14 d, at note 524. A ten-
coe v. Pascoe, 3 Bing. N. C. 898; ant for five years may distrain
Lewis v. Baker [1905] 1 Ch. 46; where he subleases from year to
Prescott v. DeForest, 16 Johns. (N. year. Ege v. Ege, 5 Watts (Pa.) 134.
Y.) 159; Ege v. Ege, 5 Watts (Pa.)
134; Ragsdale v. Estis, 1 Rich Law
(S. C.) 429. It is not entirely clear
why a rent so reserved is not a rent
seek within stat. 4 Geo. 2, c. 28, § 5
(ante, at note 11), but it has never
been so regarded. See Brady, Dis-
tresses, 68, note (g).

²⁹ Burne v. Richardson, 4 Taunt.
720; Harrison v. Guill, 46 Ga. 427.
A tenant from year to year has a
reversion authorizing a distress,
when he makes a lease from year to
year (Curtis v. Wheeler, Moody &
M. 493; Oxley v. James, 13 Mees. &

³⁰ Jolly v. Arbuthnot, 4 De Gex &
J. 224; Morton v. Woods, L. R. 3 Q.
B. 658, L. R. 4 Q. B. 293; Ex parte
Punnett, 16 Ch. Div. 226; Giles v.
Ebsworth, 10 Md. 333.

³¹ Tadman v. Henman [1893] 2 Q.
B. 168.

³² See ante, § 78 c (5).

³³ Chapman v. Beecham, 3 Q. B.
723; Iredale v. Kendall, 40 Law T.
(N. S.) 362.

³⁴ Gibbs v. Cruikshank, 28 Law T.
(N. S.) 104.

³⁵ See ante, § 17.

Provided the lessee enters, the fact that the lease is void as within the statute of frauds does not prevent a distress, the lessee becoming a tenant at will or periodic tenant at the rent named,³⁶ and the landlord of a tenant at will having a right at common law to distrain.³⁷ An attornment by the occupant of land to another at a fixed rent is likewise sufficient to give the latter a right of distress.³⁸

It has been decided that if a lease is invalid as being given for an unlawful purpose, there is no right of distress.³⁹ This is presumably based on the theory that no relation of tenancy is created by such a lease, the intended lessee being in effect one in possession of another's premises without right, but apart from this, the stipulation for the payment of rent for an invalid purpose is void, and there is consequently no rent to support a distress.⁴⁰

c. Possession under contract for lease. When one goes into possession under an executory agreement for a lease, he is ordinarily to be regarded as a tenant at will or periodic tenant,⁴¹ and, consequently, the proposed lessor has a right of distress, provided there is a stipulation for the payment of rent during such occupancy before the conveyance of the legal title.⁴² And that such

³⁶ *Morton v. Woods*, L. R. 4 Q. B. 293; *Roberts v. Tennell*, 14 Ky. (4 Litt.) 286; *Gudgell v. Duvall*, 27 Ky. (4 J. J. Marsh.) 229; *Edwards v. Clemons*, 24 Wend. (N. Y.) 480; *Schuyler v. Leggett*, 2 Cow. (N. Y.) 660; *Marr v. Ray*, 151 Ill. 340, 37 N. E. 1029, 26 L. R. A. 799 n. See ante, § 25 g (1).

³⁷ Litt. § 72; *Morton v. Woods*, 37 L. J. Q. B. at p. 248, per Lord Blackburn.

³⁸ *Pinhorn v. Souster*, 8 Exch. 763; *Brown v. Metropolitan Counties & General Life Assur. Soc.*, 1 El. & El. 832; *Jolly v. Arbuthnot*, 4 De Gex & J. 224; *Morton v. Woods*, L. R. 3 Q. B. 658, 4 Q. B. 293. But in *Coker v. Britt*, 78 Miss. 583, 29 So. 823, the possibility of the creation of the relation by agreement be-

tween one furnishing supplies to one already in possession as another's tenant, so as to give a right of distress under the statute for such supplies, was not recognized.

³⁹ *Gallagher v. McQueen*, 35 New Br. 198.

⁴⁰ See ante, § 40. In the case cited the discussion was entirely directed to the question whether the courts should aid the tenant by allowing him to maintain replevin under such circumstances. The decision in favor of the tenant on this point was by a majority of three judges to two.

⁴¹ See ante, § 65.

⁴² *Anderson v. Midland R. Co.*, 3 El. & El. 614, distinguishing *Dunk v. Hunter*, 5 Barn. & Ald. 322; *Hegan v. Johnson*, 2 Taunt. 148.

rent is payable would ordinarily be shown, for this as for other purposes, by the tenant's payment of one installment thereof,⁴³ or acknowledgment that it is due,⁴⁴ the tenant thereby becoming a periodic tenant.⁴⁵ If there is nothing to show an agreement to pay rent pending the execution of the agreed lease, there is no rent to be distrained for. There are indeed cases which base the inability of the proposed lessor to distrain upon the theory that no tenancy is created by the entry under the agreement unless rent is agreed to be paid or admitted to be due,⁴⁶ but such theory is not in accord with the decisions that one entering under such an agreement, even though not paying rent, is a tenant at will.⁴⁷

d. **Effect of transfer of interest.** At common law, a landlord who has transferred the reversion, retaining the rent, cannot distrain for rent subsequently falling due, the rent being no longer a rent service.⁴⁸ Presumably, however, in England, by force of St. 4 Geo. 2, c. 28, § 5,⁴⁹ he can so distrain at the present day, the rent retained by him being a rent seek within that act. And in several states one who has thus parted with the reversion, retaining the rent, might have a right to distrain by reason of a statutory provision giving the right of distress to persons entitled to rent.⁵⁰ The English statute does not, it appears, enable one who has transferred the reversion without retaining the rent to distrain for rent which accrued while the reversion was in him.⁵¹

⁴³ Knight v. Bennett, 3 Bing. 361; Counties Life Ins. Soc., 1 El. & El. Mann v. Lovejoy, Ryan & M. 355. 832.

⁴⁴ Cox v. Bent, 5 Bing. 185; Vincent v. Godson, 4 De Gex, M. & G. 546. In Walbridge v. Pruden, 102 Pa. 1, it is said that "it cannot be doubted that a lessor who has parted with all his interest in the demised premises

⁴⁵ See ante, § 65, at note 51.

⁴⁶ See Schuyler v. Leggett, 2 Cow. 660, and cases cited in (N. Y.) 660, and cases cited in notes 10 and 11, supra. has no right to distrain for rent in arrear." but there the facts were that a tenant, who had no further interest, since his term had come to an end, merely relinquished possession to his landlord, and it was held that thereafter he could not distrain on a subtenant. The mere relinquishment of possession, to which the tenant had no further right, certainly did not constitute a parting

⁴⁷ See ante, § 65, note 49.

⁴⁸ Litt. § 226.

⁴⁹ See ante, at note 11.

⁵⁰ See Delaware Rev. Code 1893, p. 868, § 20; Georgia Code 1905, § 4818; Florida Gen. St. 1906, § 2240; Virginia Code 1904, § 2788; West Virginia Code 1906, § 3401. with any interest. His inability to

⁵¹ See Brown v. Metropolitan

If there are two or more joint lessors, and one transfers his interest in the reversion to a stranger, the lessors, it has been decided, cannot thereafter distrain for rent due before such transfer, since they have not the reversion. Consequently, one joint tenant of the reversion may thus, by transferring his share, deprive the others of the right of distress.⁵²

The making of a second lease by a lessor, which is to take effect only upon the expiration of a prior lease for years, does not involve a transfer of the reversion,⁵³ and, consequently, does not affect the lessor's right to distrain for rent under the first lease.⁵⁴ But if the second lease is to take effect immediately in interest,⁵⁵ that is, if it is a concurrent lease as distinguished from one in reversion,⁵⁶ the second lessee has the right of distress.⁵⁷

In Texas, where the remedy by distress is essentially a means for the enforcement of a statutory lien on the tenant's goods, one may distrain for rent due to him even after transferring the reversion.⁵⁸

One to whom the rent alone,⁵⁹ or a claim for past due rent,⁶⁰

distrain might have been based on the (questionable) theory that the estoppel of a tenant (here the subtenant) to deny his landlord's title does not preclude him from asserting the termination of such title (ante, § 78 p [3]).

⁵² *Stavely v. Allcock*, 16 Q. B. 636.

⁵³ See ante, § 146 d, at note 23.

⁵⁴ *Smith v. Day*, 2 Mees. & W. 684.

And the reversionary lessee has no right of distress. *Lewis v. Baker* [1905] 1 Ch. 46.

⁵⁵ *Hessel v. Johnson*, 142 Pa. 8, 21 Atl. 794, 11 L. R. A. 855. The case of *Keaton v. Tift*, 56 Ga. 446, perhaps involves the same view. It is there said that when the owner turns over to another the right to control and collect the rent for a certain year, the latter becomes the landlord and may distrain.

⁵⁶ See ante, § 146 d, at note 24.

⁵⁷ Litt. § 228.

⁵⁸ *Meyer v. Oliver*, 61 Tex. 584.

⁵⁹ Litt. §§ 225, 228; *Hutsell v. De-*

posit Bank of Paris, 102 Ky. 410, 43 S. W. 469, 39 L. R. A. 403. In *Scott v. Berry*, 46 Ga. 394, it is said that the holder of a rent note cannot distrain as such, not being the landlord, but that the holder of such a note, though it is made payable to the owner of the demised premises or bearer, is presumed to be a (mesne) landlord and so entitled to distrain. In *Bolton v. Duncan*, 61 Ga. 103, it seems to be assumed that the unqualified assignee of a rent note can distrain.

In *Keeley Brew. Co. v. Mason*, 102 Ill. App. 381, it is decided that an assignment by the lessor of all his right, title and interest in and to the lease is sufficient to pass all the lessor's interest in the land as well as the rents, and enables him to distrain. Ordinarily a transfer in such language would be construed as transferring the rent only. See ante, § 146 b.

is assigned, does not thereby become the landlord or reversioner, and has ordinarily no right of distress. But a statute giving a right of distress to the "assignee" of the lessor has been regarded as authorizing it in favor of one to whom the rent alone is assigned,⁶¹ and the same would seem to be the effect of a statute, such as is found in some states,⁶² giving, in broad terms, the right of distress to persons entitled to rent.⁶³ Where distress is the method named for enforcing the statutory lien for rent, and an assignee of the lien is given by statute all the rights of the assignor,⁶⁴ the remedy is, it seems, available to an assignee of the rent alone.

A statute, similar to that of 32 Hen. 8, c. 34,⁶⁵ giving to the grantee "of demised lands, tenements and rents" the same remedies for the nonperformance of covenants and the nonpayment of rent as his grantor might have had, has been decided to give no right of distress to the assignee of rent in arrear, the intent of the statute being entirely different, to give a right of action on the covenants of the lease.⁶⁶

In one state it has been decided that the landlord may distress in his own name for the use of another.⁶⁷ Such other would ordinarily, it appears, be one to whom the rent has been transferred without the reversion. In England, it seems, one to whom the landlord transfers the rent without the reversion would have a right of distress by force of St. 4 Geo. 2, c. 28 § 5,⁶⁸ giving a right of distress for a rent seek,⁶⁹ a rent so severed from the reversion constituting at common law a rent of that character.⁷⁰

e. **Effect of expiration of term.** At common law there was no right of distress after the expiration of the term, even though the tenant still retained possession, since there then ceased to be any "privity" between him and his former landlord.⁷¹ For

⁶⁰ *Slocum v. Clark*, 2 Hill (N. Y.) 475; *Wright & Co. v. Link*, 34 Miss. 266.

⁶¹ *Coker v. Britt*, 78 Miss. 583, 29 So. 833; *Manis v. Flood*, 19 Tex. Civ. App. 591, 47 S. W. 1017.

⁶² See ante, note 50.

⁶³ See *Lathrop & Co. v. Clewis*, 63 Ga. 282.

⁶⁴ See ante, § 321 e (1) at note 182.

⁶⁵ See ante, § 149 b (1).

⁶⁶ *Slocum v. Clark*, 2 Hill (N. Y.) 475.

⁶⁷ *Joiner v. Singletary*, 106 Ga. 257, 32 S. E. 90.

⁶⁸ See ante, at note 11.

⁶⁹ It is so decided in *Hope v. White*, 17 U. C. C. P. 52, 19 U. C. C. P. 479.

⁷⁰ See ante, § 167, at note 14.

⁷¹ Bro. Abr., Distress, 74; Bradby,

this reason no distress could be made at common law for rent falling due the last day of the term,⁷² since the rent was not in arrear till midnight of that day⁷³ and there could be no distress for rent not due.⁷⁴ It has been decided that the fact that a renewal lease is made by the same landlord to the tenant does not make the term so created a part of the first term so as to extend the right of distress for rent accruing under the first lease till the termination of the second lease.⁷⁵

The common-law rule referred to was changed by St. 8 Anne, c. 14, §§ 6, 7, making it lawful "for any person or persons having any rent in arrear or due upon any lease for life or lives, for years or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined," "provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title and interest, and during the possession of the tenant from whom such arrears became due." This statute, it has been held, does not apply in case the tenant continues in possession of the whole or a part of the premises under a new lease.⁷⁶

The statute referred to is in force in at least one state;⁷⁷ and

Distress, 90; Bac. Abr., Distress (A); Williams v. Stiven, 9 Q. B. 14; Stanfill v. Hickes, 1 Ld. Raym. 280; Soper v. Brown, 4 U. C. Q. B. (O. S.) 103.

⁷² Co. Litt. 47 b.

⁷³ See ante, § 172 h.

⁷⁴ See post, § 333 a.

⁷⁵ Webber v. Shearman, 2 Denio (N. Y.) 362, reversing 6 Hill (N. Y.) 20, and distinguishing Sherwood v. Phillips, 13 Wend. (N. Y.) 479, where, by an obscure process of reasoning, it was held that if a lessee for two years held over for seven more years, the whole time of the holding was to be regarded as one tenancy for nine years, enabling the landlord to distrain for

the whole nine years' rent at the end of that time.

⁷⁶ Wilkinson v. Peel [1895] 1 Q. B. 516. In this case one of the two judges (Lawrence, J.) undertakes to distinguish Nuttall v. Staunton, 4 Barn. & C. 51, but, it is submitted, quite unsuccessfully. In the earlier case it was decided that the statute *did* apply when the tenant remained in possession of part of the premises by agreement with the landlord. Perhaps the cases might be reconciled by regarding the tenant in the earlier case as continuing on the premises as licensee and not as tenant.

⁷⁷ Maryland (see Alexander's

in others it has been re-enacted with little or no change.⁷⁸ In Pennsylvania the statute allows distress after the end of the term, provided only it is during the continuance of the lessor's title and interest,⁷⁹ no particular period of time being named within which the distress must be made;⁸⁰ while in Illinois distress is allowed during six months after the expiration of the tenancy, without the imposition of any other restriction.⁸¹ In Virginia and West Virginia a distress may, it seems, be made at any time after the term, provided only the rent is not more than a named period in arrear;⁸² and elsewhere the statutory right of distress has been regarded as independent of the continuance of the term, owing to the fact that the lien for rent to enforce which distress is allowed continues thereafter.⁸³ In Kentucky it was decided that the requirement of the statute that the tenant must be in possession at the time of the distress was in effect repealed by the statutory change in the law allowing a distress on goods of the tenant without regard to whether they are located on or off the premises.⁸⁴ It was decided in New York that a statute, authorizing a distress six months after the end of the term "either upon any goods remaining on the demised premises, or upon any goods that may have been removed," was not to be regarded as intended to change the former law, by which the tenant was required still to be in possession, so as to authorize a distress upon goods belonging to one of the tenants under the original lease, who had taken a new lease to himself alone.⁸⁵

f. **Effect of forfeiture.** There is at common law no right of

British statutes in force in Maryland.) 246; *Whiting & Co. v. Lake*, 91 Pa. 349.

⁷⁸ *Delaware* Rev. Code 1893, p. 868, § 21 (no six months' restriction); *Mississippi* Code 1906, § 2852; *New Jersey*, 1 Gen. St. 1211, § 17 (or within thirty days if landlord's title has ceased or tenant has removed); *South Carolina* Civ. Code, § 2431. ⁸¹ *Hurd's Rev. St.* 1905, c. 80, § 28. See *Werner v. Ropiequet*, 44 Ill. 522.

⁸² *Virginia* Code 1904, § 2790; *West Virginia* Code 1906, § 3403. ⁸³ *Meyer v. Oliver*, 61 Tex. 584. And see *Scruggs v. Gibson*, 40 Ga. 519.

⁷⁹ *Pepper & Lewis' Dig. Laws*, "Landl. & Ten." § 1. ⁸⁴ *Longee v. Colton*, 41 Ky. (2 B. Mon.) 115.

⁸⁰ See *Lichtenthaler v. Thompson*, 13 Serg. & R. (Pa.) 157, 15 Am. Dec. 581; *Clifford v. Beems*, 3 Watts (Pa.) 497. ⁸⁵ *Bell v. Potter*, 6 Hill (N. Y.) 497.

distress after the enforcement of a forfeiture by the landlord for breach of condition,⁸⁶ and this rule has been regarded as unaffected by the statute 8 Anne, c. 14, above referred to, authorizing a distress after the term is "ended or determined."^{87,88}

g. **Effect of surrender.** Since to support a distress the relation of tenancy must exist, it cannot be made after the tenant has surrendered his leasehold interest.⁸⁹ and even though he agrees to continue to pay "rent," this is a mere personal obligation, and the periodical payments are not rent for which he can distrain.⁹⁰ A mere unexecuted agreement to surrender does not, it seems, affect the right of distress,⁹¹ nor does an alleged surrender to which the landlord has not consented.⁹² A surrender subsequent to the seizure cannot affect the validity thereof.⁹³

By St. 4 Geo. 2, c. 28, § 6, it was provided that where a lease is surrendered in order to be renewed, the lessee shall have the same remedy by distress for rent due from his under lessee as if the original lease had been kept on foot, while the chief landlord shall have the remedy by distress, upon premises comprised in such under lease, for the rent reserved in the new lease, only to the amount of that reserved in the original head lease.

§ 327. For what distress may be made.

a. **Not for periodic payments other than rent.** In the absence of a statutory provision,⁹⁴ or an express provision of the lease,⁹⁵ to the contrary, the landlord has a right to distrain only for services reserved by the lease, or for rent properly so called. Consequently, there is no right to distrain for sums payable for

⁸⁶ Grimwood v. Moss, L. R. 7 C. P. 576. See Coupland v. Maynard, 12 East, 134.

^{87, 88} Patteson, J., in Doe d. David v. Williams, 7 Car. & P. 322; Willes, J., in Grimwood v. Moss, L. R. 7 C. P. 365. See Baker v. Atkinson, 11 Ont. 735, 14 Ont. App. 409; Linton v. Imperial Hotel Co., 16 Ont. App. 337.

⁸⁹ Bain v. Clark, 10 Johns. (N. Y.) 424; Greider's Appeal, 5 Pa. 422; Dailey v. Grimes, 27 Md. 440 (semble); Lewis v. Brooks, 8 U. C. Q. B.

⁹⁰ Bain v. Clark, 10 Johns. (N. Y.) 424. See ante, § 182 g, at note 899.

⁹¹ See Coupland v. Maynard, 12 East, 134. There the agreement was to surrender on a condition, which condition had not been performed.

⁹² Cahill v. Lee, 55 Md. 319.

⁹³ Nichol's v. Dusenbury, 2 N. Y. (2 Comst.) 283.

⁹⁴ See post, § 327 g.

⁹⁵ See post, § 327 h.

the enjoyment of a mere license,⁹⁶ or easement,⁹⁷ though there is for sums payable for the exclusive enjoyment of part of a building⁹⁸ or of a room.⁹⁹

"Rent" so called, reserved to a person other than the lessor, is, as we have seen,¹⁰⁰ not rent, properly speaking, and accordingly is not recoverable by distress.¹⁰¹ And "water rent" which the lessee has agreed with the lessor to pay to the municipality cannot be collected by the lessor by this means.¹⁰²

Sums reserved in a lease over and above the rent, by way of compensation for good will,¹⁰³ or by way of penalty for breach of a covenant,¹⁰⁴ are not rent for which distress may be made, nor are periodic sums which the tenant, after the making of the lease, agrees to pay in consideration of the making of improvements by the landlord.¹⁰⁵

In one state it has been held that where the lessee agreed to pay the lessor for all gas consumed by him, distress might be made for a sum due on that account.¹⁰⁶ And there it was also held, without discussion, that a sum agreed to be added to the rent due, in consideration of the landlord's consent to accept an immediate surrender of the lease, was rent for this purpose.¹⁰⁷

b. **Sums reserved on lease of land and chattels.** When the lease includes both land and chattels, as in the case of a lease of a house with furniture therein¹⁰⁸ or of a farm with live stock thereon,¹⁰⁹ the rent is, by the common-law authorities, regarded as issuing entirely out of the land,¹¹⁰ and consequently it may be distrained for to the full amount due.¹¹¹ This view, that the

⁹⁶ Ward v. Day, 4 Best & S. 337;
Rendell v. Roman, 9 Times Law R. 192.

⁹⁷ Hancock v. Austin, 14 C. B. (N. S.) 634; Capel v. Buszard, 6 Bing. 150.

⁹⁸ Marshall v. Schofield & Co., 52 L. J. Q. B. 58.

⁹⁹ Selby v. Greaves, L. R. 3 C. P. 594.

¹⁰⁰ See ante, § 170.

¹⁰¹ See Ryerson v. Quackenbush, 26 N. J. Law, 236.

¹⁰² Evans v. Lincoln Co., 204 Pa. 448, 54 Atl. 321.

¹⁰³ Smith v. Mapleback, 1 Term R. 441.

¹⁰⁴ Latimer v. Groetzinger, 139 Pa. 207, 21 Atl. 22.

¹⁰⁵ Hoby v. Roebuck, 7 Taunt. 157.

¹⁰⁶ Fernwood v. Masonic Hall Ass'n, 102 Pa. 307. See ante, § 169 d.

¹⁰⁷ Brisben v. Wilson, 60 Pa. 452. Compare ante, § 169.

¹⁰⁸ Newman v. Anderton, 2 Bos. & P. (N. R.) 224.

¹⁰⁹ See Spencer's Case, 5 Coke, 17.

¹¹⁰ See ante, § 169 c.

¹¹¹ Newman v. Anderton, 2 Bos. & P. (N. R.) 224.

inclusion of chattels in the lease does not affect the right of distress, has been expressly adopted in several decisions in this country.¹¹² In one state, however, it is apparently the rule that there can be no distress in such case unless the lease specifies what proportion of the rent is to be regarded as for the use of the chattels,¹¹³ a view which considerably restricts the availability of the remedy, since a lease not infrequently includes chattels along with the land, without any such specification.

It has in one state been decided that there is no right of distress when a lump sum is named to be paid for the use of the land and for the purchase price of various articles thereon of such character as to be consumed in their use, unless at least the value of these articles is shown.¹¹⁴

c. **Sums reserved on lease of land and incorporeal things.** Where land and incorporeal things were let together for a single rent, and the lease was invalid as to the latter for lack of a seal, no distress could be levied, it was held, since the rent, though issuing out of the land alone for purposes of distress, was payable in part in respect to the incorporeal thing, and there was no definite sum payable in respect to the land.^{115, 116} The incorporeal thing involved in this case was tithes, and the principle of the decision would seem to have no application in the case of a lease of land alone, although easements or rights of profit pass with the land as appurtenant thereto, they not being a distinct subject of the lease.

d. **Certainty of rent.** It is quite frequently stated that to support a distress a *certain* rent must have been reserved,¹¹⁷ and occasionally the courts have stated at some length the grounds

¹¹² *Toler v. Seabrook*, 39 Ga. 14; ^{115, 116} *Gardiner v. Williamson*, 2 Lathrop & Co. v. Clewis, 63 Ga. 282; *Barn. & Adol.* 336.

Sapp v. Elkins, 125 Ga. 459, 54 S. E. 98; *Mickle v. Miles*, 31 Pa. 20, disapproving *Com. v. Contner*, 18 Pa. 439; *Stein v. Stely* (Tex. Civ. App.) 32 S. W. 782; *Williams v. Howard*, 3 Munf. (Va.) 277.

¹¹³ *Stewart v. Gregg*, 42 S. C. 392, 20 S. E. 193.

¹¹⁴ *Cranston v. Rogers*, 83 Ga. 750, 10 S. E. 364.

¹¹⁷ See e. g., *Regnart v. Porter*, 7 Bing. 451; *United States v. Williams*, 2 Cranch C. C. 438, Fed. Cas. No. 16,710; *Smoot v. Strauss*, 21 Fla. 611; *Marr v. Ray*, 151 Ill. 340, 37 N. E. 1029, 26 L. R. A. 799; *Briscoe v. McElween*, 43 Miss. 556; *Smith v. Fyler*, 2 Hill (N. Y.) 648; *Jacks v. Smith*, 1 Bay (S. C.) 315; *Reeves v. McKenzie*, 1 Bailey L. (S. C.) 497.

on which such a rule is to be regarded as based,¹¹⁸ it being said that such certainty must have existed at common law to enable the tenant to know what sum to pay in order to redeem the goods taken as a pledge, and also to enable the landlord, upon the avowry, to recover damages for nonpayment or nonperformance by the tenant. But, it is conceived, the true and sufficient ground for the requirement of a "certain rent" is that, as has been before stated,¹¹⁹ there is no such thing as a rent which is not certain. The assertion that there must be a certain rent to support a distress is usually based, directly or indirectly, on a statement of Lord Coke,¹²⁰ which is, however, not that rent must be certain, but that any service must be certain, to support a distress for the nonrendition thereof, citing the case of a tenancy in *francalmoign*, in which there is no right of distress owing to the uncertainty of the services. The asserted rule above referred to, that there must be a certain rent reserved, has been applied when the circumstances were such as to support a recovery for the reasonable value of the use and occupation of the premises,¹²¹ though no rent was reserved, the fact that such value can be so recovered not authorizing a distress for such value.¹²² The reasonable value of the use and occupation thus recoverable by action is not rent, certain or uncertain,¹²³ and it is for this reason, it is conceived, rather than because the amount is uncertain, that it cannot be recovered by distress.

In connection with the statement of Lord Coke, above referred

¹¹⁸ See *Valentine v. Jackson*, 9 Wend. (N. Y.) 302; *Melick v. Benedict*, 43 N. J. Law, 425. The latter of these two grounds is stated by Lord Coke. See Co. Litt. 96 a; Bac. Abr., Distress (A). In *Scruggs v. Gibson*, 40 Ga. 511, however, it was decided that where, upon the making of a lease of a farm, nothing was said as to rent, the fact that in that neighborhood the agreed rent was usually a certain proportion of the crops authorized a distress for such proportion. The decision was by a majority of two judges to one, and was to some extent based upon the language of the local statute. Apart from the statute it was clearly wrong, by common-law standards.

¹¹⁹ See ante, § 173 a.

¹²⁰ Co. Litt. 96 a.

¹²¹ See ante, c. 30.

¹²² *Stayton v. Morris*, 4 Har. (Del.) 224; *Smoot v. Strauss*, 21 Fla. 611; *Tift v. Verden*, 19 Miss. (11 Smedes & M.) 153; *Valentine v. Jackson*, 9 Wend. (N. Y.) 302; *Farrington v. Baley*, 21 Wend. (N. Y.) 65; *Wells v. Hornish*, 3 Pen. & W. (Pa.) 31.

¹²³ See ante, § 302.

to, he expressly says that there is sufficient certainty if the services can be reduced to a certainty, or, as he expresses it, "there may be certainty in uncertainty," and he instances the case of a holding upon services consisting of the shearing of all the lord's sheep within the manor, in which case a distress is allowable, although the lord has there sometimes a greater number and sometimes a less. So in the case of a provision for money payments in return for the use of the land, the fact that they are fluctuating in amount, or that they are to be determined by contingencies or facts which can be ascertained only from time to time during the tenancy, does not impair the right of distress.¹²⁴ The sums payable are ascertainable, and there is consequently a valid rent. Accordingly, periodic payments proportioned to the amount of the minerals extracted from the leased premises,¹²⁵ or the bricks made thereon,¹²⁶ or the acres of land cultivated,¹²⁷ are sufficiently certain. And a distress has been upheld when made for a monthly rent, due under an attornment clause in a building society mortgage, consisting of the monthly dues for subscriptions, interest and fines,¹²⁸ as well as for a rent to consist of a certain proportion of the tolls of the mill on the premises,¹²⁹ of the gross receipts of the hotel leased,¹³⁰ and of the profits of the business to be conducted on the premises, the amount of which appears from an examination of books of account stipulated to be kept.¹³¹ It has, however, been decided that no distress can be made when the compensation for the land is to be ascertained by arbitration.¹³²

A distress may be made, it has been decided, for an increase of rent of a certain amount, as named in the lease, for each acre of land converted into tillage,¹³³ or for an increase agreed to be

¹²⁴ *Ex parte Voisey*, 21 Ch. Div. 442. See ante, § 173 b.

¹²⁵ *Daniel v. Gracie*, 6 Q. B. 145; *Cross v. Tome*, 14 Md. 247; *Everett v. Neff*, 28 Md. 176.

¹²⁶ *Daniel v. Gracie*, 6 Q. B. 145.

¹²⁷ *Thrasher v. Gillespie*, 52 Miss. 840.

¹²⁸ *Ex parte Voisey*, 21 Ch. Div. 442.

¹²⁹ *Fry v. Jones*, 2 Rawle (Pa.) 11.

¹³⁰ *Dutcher v. Culver*, 24 Minn. 584.

¹³¹ *Melick v. Benedict*, 43 N. J. Law, 425.

¹³² *Myers v. Mayfield*, 70 Ky. (7 Bush) 212.

¹³³ See *Roulston v. Clarke*, 2 H. Bl. 563; *Ex parte Voisey*, 21 Ch. Div. 442.

paid in case of the making by the landlord of improvements to an extent named.¹³⁴ And a distress has been upheld for rent which was made payable upon a contingency, the contingency having occurred.¹³⁵ Likewise, the right to distrain is not affected by the fact that, on a contingency named, the rent is to be reduced¹³⁶ or is to cease entirely.¹³⁷

It has been decided that no distress can be made when the agreement for compensation for the use of the land is so indefinite as not to state when it is to accrue or whether it is for the future or previous occupation of the land.¹³⁸ There would seem, in such case, to be no valid reservation of rent.

There is no right of distress as for rent accruing during a wrongful holding over by a tenant,¹³⁹ since there is no agreed rent for such period of over holding. The landlord's remedy is by an action for use and occupation,¹⁴⁰ or preferably, it would seem, in some jurisdictions, for the statutory penalty.¹⁴¹

In the case of an apportionment of rent by a partition of the reversion,¹⁴² the person entitled to the reversion in part may distrain for his portion.¹⁴³ And so on apportionment by eviction under title paramount, the landlord retains a right of distress for an apportioned part of the rent.¹⁴⁴ In such cases the

¹³⁴ *Detwiler v. Cox*, 75 Pa. 200 (\$30 for each \$500 of improvements). See *Ex parte Voisey*, 21 Ch. Div. 442.

¹³⁵ *Goodwin v. Sharkey*, 88 Pa. 149; *Ege v. Ege*, 5 Watts (Pa.) 134.

¹³⁶ *Selby v. Greaves*, L. R. 3 C. P. 594 (deductions in case of failure of power); *Bickle v. Beatty*, 17 U. C. Q. B. 465 (deduction in case of sale of part).

¹³⁷ *Reeves v. McKenzie*, 1 Bailey Law (S. C.) 497.

¹³⁸ *Dailey v. Grimes*, 27 Md. 440.

¹³⁹ *Alford v. Vickery*, Car. & M. 280; *Jenner v. Clegg*, 1 Moody & R. 213; *Soper v. Brown*, 4 U. C. Q. B. (O. S.) 103. See *Diller v. Roberts*, 13 Serg. & R. (Pa.) 60, 15 Am. Dec. 578. In *Sherwood v. Phillips*, 13 Wend. (N. Y.) 479; *Webber v.*

Shearman, 3 Hill (N. Y.) 547, in which a right to distrain for rent accruing after the termination of the original lease is supported,

there seems to have been a permissive holding over, in effect an extension of the original term. The case first cited is exceedingly obscure. See ante, note 75.

¹⁴⁰ See ante, §§ 211, 306 d.

¹⁴¹ See ante, § 213.

¹⁴² See ante, § 175 b.

¹⁴³ 2 Co. Inst. 503, 504; *Roberts v. Snell*, 1 Man. & G. 577; *Rivis v. Watson*, 5 Mees. & W. 255; *De Coursey v. Guarantee Trust & Deposit Co.*, 81 Pa. 217.

¹⁴⁴ *Tunis v. Grandy*, 22 Grat. (Va.) 109; *Neale v. Mackenzie*, 1 Mees. & W. 747.

fact that the proportionate part of the rent has to be ascertained does not exclude the remedy.

The tenant cannot by his own act apportion the rent for the purpose of distress, and consequently, if by assignment the leasehold interest in different parts of the premises becomes vested in different persons, distress may be made on one of such parts for the whole rent.¹⁴⁵

e. **Rent payable in specific articles.** The fact that the agreed rent consists of the delivery of articles other than money, as, for instance, of a certain amount of minerals,¹⁴⁶ or of a certain number of bales of cotton or bushels of wheat,¹⁴⁷ or that the sum named as rent is to be paid by the delivery of specific articles at the market price,¹⁴⁸ does not impair the right of distress.

In several jurisdictions it has been held that distress may be made even when the rent named in the lease is not a specific quantity of the articles produced on the land, but merely a named fractional part, as a quarter or a half, of what may be produced in each year,¹⁴⁹ a character of rent which, as we have before seen, is very common in this country.¹⁵⁰ In one jurisdiction, however, it has been held that such a rent does not satisfy the requirement of certainty.¹⁵¹ In several jurisdictions distress for rent payable in crops, produce, or other things, is expressly authorized.¹⁵² It has been decided that, even though a

¹⁴⁵ 1 Rolle's Abr. 671; Curtis v. App. 349; Fry v. Jones, 2 Rawle Spitty, 1 Bing. N. C. 756; Woodcock (Pa.) 12; Steel v. Frick, 56 Pa. 172; v. Titterton, 12 Wkly. Rep. 865. Brown v. Jaquette, 94 Pa. 113, 39

¹⁴⁶ Owens v. Conner, 4 Ky. (1 Am. Rep. 770; Brown v. Adams, 35 Bibb) 605; Jones v. Gundrim, 3 Tex. 447; Tucker v. Hasson, 32 Tex. Watts & S. (Pa.) 531; Brooks v. 536; Prestons v. McCall, 7 Grat. Wilcox, 11 Grat. (Va.) 411. (Va.) 121 (two-thirds of salt manu-

¹⁴⁷ Toler v. Seabrook, 39 Ga. 14; factured).

Wilkins v. Taliaferro, 52 Ga. 208; ¹⁵⁰ See ante, §§ 20, 253.

Clark v. Fraley, 3 Blackf. (Ind.) ¹⁵¹ Clark v. Fraley, 3 Blackf. (Ind.) 264; Bowser v. Scott, 8 264; Brooks v. Cunningham, 43 Miss. Blackf. (Ind.) 86. In Indiana it was 556; Fraser v. Davie, 5 Rich. Law also held that rent payable in Indi-

(S. C.) 59. ana scrip could not be distrained for, the agreement being in effect mere-

¹⁴⁸ Thompson v. Marsh, 2 U. C. Q. ly to pay the market value of the scrip. Purcell v. Thomas, 7 Blackf. B. (O. S.) 389. (Ind.) 306.

¹⁴⁹ Nowery v. Connolly, 29 U. C. ¹⁵² Delaware Rev. Code 1893, p. Q. B. 39 (semble); Dick v. Winkler, 12 Manitoba, 624; Payne v. Holt, 61 Ga. 355; Sheetz v. Baker, 38 Ill.

lease for a rent to consist of a certain proportion of the crop provided that the damage resulting from the tenant's failure to grow a crop of reasonable size should be regarded as rent, and though the statute gave a lien for the faithful performance of the terms of the lease, the amount of such damage could not be recovered by distress.¹⁵³

f. **Distress for services other than rent.** Distress may be made for services not involving the payment of money or the delivery of any specific articles to the landlord.¹⁵⁴ Thus, a distress has been regarded as valid when the tenant held by the service of cleaning the parish church,¹⁵⁵ or of ringing the church bell at stated hours.¹⁵⁶

It has in one state been decided that distress might be made upon the tenant's failure to put the premises in repair, when he had agreed to do this in part return for the use of the land.¹⁵⁷ Whether such an obligation to make certain repairs would at common law be regarded as a subject for distress may be questioned, the services referred to in the books being periodical in character, and not to be performed once for all. In the case referred to it is said that "the repairing must be agreed to be done as rent and not be a mere shifting from the landlord to the tenant of the duty to repair," but in any case such an agree-

868, § 19, p. 870, § 27; *Maryland* Code Pub. Gen. Laws 1904, art. 53, §§ 10, 11; *Virginia* Code 1904, § 2795; *West Virginia* Code 1906, § 3408. In these states the statute provides the method of ascertaining the pecuniary value of the articles to be delivered as rent for the purpose of distress.

¹⁵³ *Bates v. Hallinan*, 220 Ill. 21, 77 N. E. 115.

¹⁵⁴ *Co. Litt.* 76 a; *Bradby, Distresses*, c. 7.

¹⁵⁵ *Doe d. Edney v. Benham*, 7 Q. B. 976.

¹⁵⁶ *Doe d. Edney v. Billett*, 7 Q. B. 976.

¹⁵⁷ *Wilkins v. Taliafero*, 52 Ga. 208. In this case a lessee for a year had agreed to pay a certain amount

of cotton and to "fix the kitchen." And see *Fountain v. Whitehead*, 119 Ga. 241, 46 S. E. 104, where this case seems to be approved. So in *Price v. Thompson*, 4 Ga. App. 46, 60 S. E. 800, where the lessee agreed to repair fences as part of the rent. In *Briscoe v. McElween*, 43 Miss. 556, it was held that no distress could be levied for the tenant's failure to perform his agreement to fence the premises, trim the trees, and to fill the "washes," the character of the fence not being named, nor the mode and extent of the trimming, nor the mode or material of filling, the service thus not being sufficiently definite to support distress.

ment on the tenant's part would presumably be considered in determining the amount of other rent to be paid, and to that extent the repairing would be in return for the use of the land.

If a definite money rent is reserved, the fact that the lease provides for its payment in services does not affect the right of distress.¹⁵⁸

g. Statutory distress for advances. In a few states the statute authorizes a distress not only for rent, but also for sums due by the tenant to the landlord on account of "advances" or "supplies" furnished by the latter to the former.¹⁵⁹ And this is the effect of a statute giving the landlord a lien for such advances and supplies and authorizing the enforcement of the lien by distress.¹⁶⁰

h. Express stipulations. Even though particular sums named in the lease to be paid by the lessee to the lessor are not, properly speaking, rent, the lease may, it seems, by express provision, give a right of distress therefor,¹⁶¹ such a provision being in effect the grant of a license or power to seize the chattels belonging to the grantor. Such an express stipulation cannot enable the landlord to seize the property of a person other than the original lessee, since the latter has control of his own property only,¹⁶² and it cannot, it seems, be effective for the purpose of authorizing a statutory distress as distinguished from the seizure by the landlord allowed by the common law.¹⁶³

§ 328. Things subject to and exempt from distress.

a. Things not belonging to the tenant—(1) Ordinarily subject to distress. At common law it is immaterial as regards the

¹⁵⁸ *Smith v. Colson*, 10 Johns. (N. Y.) 91; *Smith v. Fyler*, 2 Hill (N. Y.) 648. may be made for a penalty, if so stipulated, in *Latimer v. Groetzinger*, 139 Pa. 207, 21 Atl. 22, where it was held that there could be no distress for a penalty to be paid in

¹⁵⁹ *Florida* Gen. St. 1906, § 2240; *Mississippi* Code 1906, § 2501.

¹⁶⁰ See ante, § 321 c (2), 1 (2).

¹⁶¹ See ante, at notes 33, 34. In *Becker v. Werner*, 98 Pa. 555, there is a dictum that a distress may be made for taxes, if it is so stipulated in the lease, and there is an apparent implication to the effect that it

case of a particular use of the premises, since the lease gave in terms only a right of distress for rent.

¹⁶² *Thomas v. Cameron*, 8 Ont. 441.

¹⁶³ See *Paxton v. Kennedy*, 70 Miss. 865, 12 So. 546.

right to distrain particular goods that they do not belong to the tenant, the theory being that the rent is owed by the land rather than by any particular person.¹⁶⁴ The goods of a stranger¹⁶⁵ or of a subtenant¹⁶⁶ are liable to distress to the same extent as the goods of the tenant. The owner of the goods cannot demand that the goods of the tenant be first taken,¹⁶⁷ and it is immaterial that there are on the premises goods belonging to the tenant which are sufficient in themselves to satisfy the landlord's claim.¹⁶⁸

It has been remarked by a great authority upon the common law¹⁶⁹ that the rule making the goods of a stranger, as well as those of the tenant, subject to seizure on distress, originally caused no harm, since the landlord, being, at common law, unable to sell the distress,¹⁷⁰ he usually gave up the goods as soon as he found that they did not belong to the tenant, since their retention by him would not induce the tenant to pay; but that the passage of the St. 2 Wm. & M. sess. 1, c. 5, authorizing the landlord to sell any goods seized, and to apply the proceeds to the payment of the rent unless the tenant or owner of the goods first paid it, held out a great temptation to a landlord to seize the goods of a stranger, though knowing them to belong to him and not to the tenant.

(2) **Things belonging to tenant's wife.** Goods constituting the separate property of the tenant's wife have in one jurisdiction been held to be liable to distress, like goods belonging to others, in spite of the married woman's property act,¹⁷¹ and in

¹⁶⁴ 2 Pollock & Maitland, Hist. Whart. (Pa.) 452; McComb's & Eng. Law, 129. Howden's Appeal, 43 Pa. 435; Jimi-

¹⁶⁵ Gilbert, Distresses, 33; 3 son v. Reifsneider, 97 Pa. 136; Whit- Blackst. Comm. 8; Bradby, Distress- ing & Co. v. Lake, 91 Pa. 349 (dis- es, 73; Gorton v. Falkner, 4 Term R. tress after term).

at p. 568; Jones v. Gundrim, 3 ¹⁶⁷ Mitchell v. Franklin, 26 Ky. (3 Watts & S. (Pa.) 531; Spencer v. J. J. Marsh.) 477; Jimison v. Reif- McGowen, 13 Wend. (N. Y.) 256. sneider, 97 Pa. 136.

Articles "leased" to the tenant are ¹⁶⁸ Jimison v. Reifsneider, 97 Pa. subject to distress (Myers v. Esery, 136; Pegg v. Starr, 23 Ont. 83.

134 Pa. 177, 19 Atl. 488; Price v. Mc- ¹⁶⁹ Lord Blackburn, in Lyons v Callister, 3 Grant's Cas. (Pa.) 248), Elliott, 1 Q. B. Div. 210.

as are those "leased" to his wife ¹⁷⁰ See ante, at note 2. (Kleber v. Ward, 88 Pa. 93). ¹⁷¹ Blanche v. Bradford, 38 Pa.

¹⁶⁶ Howard v. Ramsay, 7 Har. & 344, 80 Am. Dec. 489. J. (Md.) 113; Quinn v. Wallace, 6

one it has been decided that they are so liable in spite of a constitutional provision exempting the wife's property from levy and sale for her husband's debts.¹⁷² In another jurisdiction, however, a contrary view has been adopted as to the effect of such a constitutional provision.¹⁷³

(3) **Things belonging to prior or subsequent lessee.** It has in England been decided that crops sown by a tenant at will are exempt from a distress for rent under a subsequent lease, made by the landlord after having terminated the tenancy at will, since otherwise the right to emblements incident to a tenancy at will could at any time be destroyed by the action of the landlord in terminating the tenancy at will and leasing to another subject to a rent payable before the maturity of the crop.¹⁷⁴ And in Pennsylvania it has been decided that if a lease is surrendered and the lessor then leases to another, since one who held as subtenant under the prior lessee is not affected by the surrender,¹⁷⁵ his chattels rightfully remaining on the premises until the expiration of the term named in the first lease are not subject to distress for rent under the second lease.¹⁷⁶ It does not seem, however, that, ordinarily, chattels left on the premises by a prior lessee after the expiration of his term would be exempt from distress for rent due by a subsequent lessee.¹⁷⁷

There are decisions in the state above referred to that a distress for rent due under a lease which has come to an end cannot be made upon goods placed on the premises by one entering under a subsequent lease, though the local statute expressly authorizes a distress after the end of the term.¹⁷⁸

(4) **Things on premises in way of trade.** Things delivered to a person exercising a trade, to be carried, wrought, worked, managed, or kept in security, in the way of his trade are ordinarily exempt from distress, on the theory, it seems, that other-

¹⁷² *Emig v. Cunningham*, 62 Md. 458.

¹⁷³ *Wallace v. Johnson*, 17 S. C. 454.

¹⁷⁴ *Eaton v. Southby*, Willes, 131.

¹⁷⁵ See ante, § 191 b.

¹⁷⁶ *Hessel v. Johnson*, 129 Pa. 173, 18 Atl. 754; 15 Am. St. Rep. 716; *Id.*, 142 Pa. 8, 21 Atl. 794, 11 L. R. A. 855.

¹⁷⁷ *Bradby*, *Distresses* (at p. 79), asserts that they are so exempt. The author cites merely *Pollexfen* 130, which does not support his statement.

¹⁷⁸ *Clifford v. Beems*, 3 Watts (Pa.) 246; *Beltzhoover v. Waltman*, 1 Watts & S. (Pa.) 416; *Whiting & Co. v. Lake*, 91 Pa. 349.

wise the conduct of the trade would be greatly hampered, if not entirely prevented.¹⁷⁹ In England it has been said that the trade must be "public,"¹⁸⁰ meaning thereby, it seems, that it must be one carried on for the purpose of dealing with any persons who may choose to avail themselves of it, as distinguished from a case where a person is employed by one or more particular individuals;¹⁸¹ and it has been held that an artist to whom a picture has been sent to be altered does not have possession of it as a public trader within the rule.¹⁸² In this country the question whether the tenant conducts a regular trade or business, in the course of which the goods in question were received by him, appears to have been regarded as immaterial. Thus, goods sent to the tenant to be sold on commission have been decided to be exempt, though his business appeared to be that of a regular dealer rather than of one selling as a factor,¹⁸³ and it has been held that though the business of the tenant is primarily that of factor or commission merchant, goods delivered to him for storage and safekeeping are exempt.¹⁸⁴

The general rule of exemption has been applied, or has been recognized as applicable, in the following cases, so as to exempt from distress goods of the character named: Corn sent to a miller to be ground;¹⁸⁵ logs sent to a sawmill to be made into boards;¹⁸⁶ a horse sent to a farrier to be shod;¹⁸⁷ raw material sent to a manufacturer or weaver to be worked up,¹⁸⁸ even

¹⁷⁹ Willes, C. J., in *Simpson v. painted are exempt. Mauro v. Bote-Hartopp*, Willes, 512, 1 Smith's lor, 2 Cranch C. C. 372, Fed. Cas. Leading Cases; Blackburn, J., in No. 9,311.

Lyons v. Elliott, 1 Q. B. Div. 210.

Parke, B., in *Joule v. Jackson*, 7 Mees. & W. 450; *Gibson, C. J.*, in *Brown v. Sims*, 17 Serg. & R. (Pa.) 138; *Stewart, J.*, in *McCreery v. Claflin*, 37 Md. 435, 11 Am. Rep. 542.

¹⁸⁰ *Simpson v. Hartopp*, Willes, 512.

¹⁸¹ See per *Parke, J.*, in *Muspratt v. Gregory*, 1 Mees. & W. 653. Compare *Gibson v. Ireson*, 3 Q. B. 39.

¹⁸² *Von Knoop v. Moss*, 7 Times Law R. 500. But it has in this country been decided that chairs left with a painter to be

¹⁸³ *Howe Sewing Mach. Co. v. Sloan*, 87 Pa. 438, 30 Am. Rep. 376; *Clothier v. Braithwaite*, 22 Pa. Super. Ct. 521; *McCreery v. Claflin*, 37 Md. 435, 11 Am. Rep. 542.

¹⁸⁴ *Brown v. Sims*, 17 Serg. & R. (Pa.) 138; *Walker v. Johnson*, 4 McCord (S. C.) 552.

¹⁸⁵ *Co. Litt.* 47 a; *Gilbert, Distresses*, 37.

¹⁸⁶ *Paterson v. Thompson*, 9 Ont. App. 326, 46 U. C. Q. B. 7.

¹⁸⁷ *Y. B.* 22 Ed. 4, 49 b; *Co. Litt.* 47 a.

¹⁸⁸ *Read v. Burley*, Cro. Eliz. 596; *Gibson v. Ireson*, 3 Q. B. 39;

though this is to be done at the weaver's own home;¹⁸⁹ and the product of such raw material.¹⁹⁰ Also cloth sent to a tailor to be made up into garments;¹⁹¹ beasts sent to a butcher to be slaughtered;¹⁹² goods deposited with a factor or commission agent,¹⁹³ or with an auctioneer,¹⁹⁴ for the purpose of being sold, though not goods sent to the tenant to be sold at such prices as he can obtain, he to account to the owner only for the invoice price, retaining the balance.¹⁹⁵ Also goods placed in a warehouse or other public depositary for safekeeping,¹⁹⁶ or pledged with a pawnbroker.¹⁹⁷ Likewise, goods delivered to a carrier to be conveyed by him to some place, even though he is not strictly a common carrier, provided he carries the goods of all persons indifferently, are privileged from distress while in his charge.¹⁹⁸

In the case of a factor or commission merchant it is immaterial, it has been decided, whether the goods are deposited by him in his own warehouse or in that of another;¹⁹⁹ and in the case of

Knowles v. Pierce, 5 Houst. (Del.) 178; Hoskins v. Paul, 9 N. J. Law, 110, 17 Am. Dec. 455.

¹⁸⁹ Wood v. Clarke, 1 Crompt. & J. 484.

¹⁹⁰ Knowles v. Pierce, 5 Houst. (Del.) 178.

¹⁹¹ Co. Litt. 47 a.

¹⁹² Brown v. Shevill, 2 Adol. & E. 138.

¹⁹³ Gilman v. Elton, 3 Brod. & B. 75; Matthias v. Mesnard, 2 Car. & P. 353; Findon v. McLaren, 6 Q. B. 891; McCreery v. Claffin, 37 Md. 435, 11 Am. Rep. 542; Connah v. Hale, 23 Wend. (N. Y.) 462; Howe Sewing Mach. Co. v. Sloan, 87 Pa. 438, 30 Am. Rep. 376; Brown v. Stackhouse, 155 Pa. 582, 26 Atl. 669, 35 Am. St. Rep. 908; Walker v. Johnson, 4 McCord (S. C.) 552. Contra, Elford v. Clark, 2 Brev. (S. C.) 88.

In the recent case of Challoner v. Robinson [1908] 1 Ch. 49, it was held that pictures delivered to the proprietor of a club, by the members thereof, to be sold by him, in accordance with the usage of the

club, were not exempt as having been delivered to him to be "managed in the way of his trade," his trade being that of club proprietor and not that of a picture dealer.

¹⁹⁴ Adams v. Grane, 1 Crompt. & M. 380; Williams v. Holmes, 8 Exch. 861; In re Bailey, 2 Fed. 850; Himeley v. Wyatt, 1 Bay (S. C.) 102, 1 Am. Dec. 598.

¹⁹⁵ Hurd v. Davis, 23 U. C. Q. B. 123. It was so held in Dorsh v. Lea, 18 Pa. Super. Ct. 447, though there the court refers to the fact that the person sending the goods had reserved no right to take them back.

¹⁹⁶ Thompson v. Mashiter, 1 Bing. 283; Miles v. Furber, L. R. 8 Q. B. 77; Beall v. Beck, 3 Cranch C. C. 666, Fed. Cas. No. 1,161; Owen v. Boyle, 22 Me. 47; Brown v. Sims, 17 Serg. & R. (Pa.) 133; Briggs v. Large, 30 Pa. 287.

¹⁹⁷ Swire v. Leach, 18 C. B. (N. S.) 479.

¹⁹⁸ Gisbourn v. Hurst, 1 Salk. 249.

¹⁹⁹ Matthias v. Mesnard, 2 Car. & P. 353; Briggs v. Large, 30 Pa. 287.

an auctioneer the privilege exists whether the goods are lying in a public auction room or in a yard which forms part of his premises,²⁰⁰ or in a place hired by him for the occasion of the sale,²⁰¹ or even in a place of which he has taken possession wrongfully.²⁰² But the fact that an auctioneer has the custody of goods on premises not occupied by him, but in the possession of a tenant, does not entitle the owner of the goods, whether the tenant or another, to assert an exemption.²⁰³

In England it has been decided that horses and carriages sent to a livery stable to be cared for are not exempt from distress.²⁰⁴ This seems inconsistent with the spirit of the rule above stated, and a different view has been taken in this country,²⁰⁵ and would possibly be taken in England at the present day.²⁰⁶ In England it has also been stated that cattle at agistment, that is, delivered to the tenant to be fed and pastured on his premises, are not exempt from distress.²⁰⁷ This view can apparently be supported only on the ground that a contract of agistment is not made in the exercise of a public trade.²⁰⁸ In this country agisted cattle have in one state been regarded as not liable to distress.²⁰⁹

It has been decided in England that things left on the premises by a stranger, not for the benefit of these things themselves, nor in order that work may be done upon them, but as incidental to the working or handling of other things, are not exempt within the rule, and the privilege has thus been denied to a brewer's casks sent to a public house and left there until emptied by the tenant of the house;²¹⁰ and to machinery sent along with raw

²⁰⁰ *Williams v. Holmes*, 8 Exch. Dec. 698. See *Brown v. Sims*, 17 Serg. & R. (Pa.) 138.

²⁰¹ *Adams v. Grane*, 1 Crompt. & M. 380.

²⁰² *Brown v. Arundell*, 10 C. B. 54.

²⁰³ *Lyons v. Elliott*, 1 Q. B. Div. 210.

²⁰⁴ *Francis v. Wyatt*, 3 Burrow, 1498, 1 Wm. Bl. 483; *Parsons v. Gingell*, 4 C. B. 545.

²⁰⁵ *Himely v. Wyatt*, 1 Bay (S. C.) 422.

²⁰⁶ 1 Am. Dec. 598; *Youngblood v. Lowry*, 2 McCord (S. C.) 39, 13 Am. 450.

²⁰⁶ See *Miles v. Furber*, L. R. 8 Q. B. 77. In Delaware and Maryland these are exempt by statute. *Delaware Rev. Code* 1893, p. 869, § 22; *Maryland Code Pub. Gen. Laws* 1904, art. 53, § 17.

²⁰⁷ 1 Rolle's Abr. 669, pl. 23.

²⁰⁸ See ante, at note 180.

²⁰⁹ *Cadwalader v. Tindall*, 20 Pa.

²¹⁰ *Joule v. Jackson*, 7 Mees. & W.

material to a weaver to aid in working up such material;²¹¹ and a boat belonging to a purchaser of salt, left in a private canal upon salt works leased, to await a load of salt, was held not to be exempt.²¹² It has, however, been said that instruments of conveyance by which goods, which are themselves exempt under the general rule, are sent to or brought from the premises where they are worked up or deposited, are also exempt. "The article must be conveyed, and it is privileged from distress; therefore all things necessary for that purpose are privileged also. Thus, the horse or carriage conveying goods is so privileged; and so also the basket or package in which they are enveloped."²¹³

It has been decided that articles are not privileged from distress under the rule unless they are actually delivered to the tenant by or on behalf of their owner, and that consequently a vessel constructed by a shipbuilder on premises leased to him, of materials purchased by him, is not exempt, although the price has been paid by the person for whom it is built.²¹⁴

Articles which are allowed to remain on the leased land as a matter of favor on the tenant's part, and not in the exercise of any trade or calling by him, are not within this rule of exemption.²¹⁵

If the tenant has an interest in the goods thus on the premises in the way of trade, they are, it has been held, liable to distress to the extent of his interest.²¹⁶

²¹¹ Wood v. Clarke, 1 Crompt. & J. 484.

²¹² Muspratt v. Gregory, 1 Mees. & W. 633, 3 Mees. & W. 677.

²¹³ Muspratt v. Gregory, 1 Mees. & W. 633, per Alderson, J. See Read v. Burley, Cro. Eliz. 549, 546; Beall v. Beck, 3 Cranch C. C. 666, Fed. Cas. No. 1,161.

²¹⁴ Clarke v. Millwall Dock Co., 17 Q. B. Div. 494. It had previously been decided in Canada that, where a vessel had been left by its owner in a ship yard to be refitted, not only the vessel was exempt, but also timber to be used for the purpose

of refitting, though the timber was purchased for the purpose from the ship-builder by the owner of the vessel, while the timber was lying in the yard. Gildersleeve v. Ault, 16 U. C. Q. B. 401.

²¹⁵ Mitchell v. Coffee, 5 Ont. App. 525; Page v. Middleton, 118 Pa. 546, 12 Atl. 415.

²¹⁶ McElderry v. Flannagan's Adm'r, 1 Har. & G. (Md.) 308; Paterson v. Thompson, 9 Ont. App. 326 (semble). In the former case it was held that the tenant had such an interest by reason of his right to compensation for his work.

Cattle in,²¹⁷ or on their way to,²¹⁸ market, are exempt from distress for rent due from the owner of the market, or from the owner of premises upon which they are pastured for a night while on their way to market. This exemption is, like that above referred to, apparently based on the theory that such exemption conduces to the benefit of trade.

(5) **Things belonging to guest or lodger.** It seems that, even at common law, articles belonging to a guest at an inn are exempt from distress for nonpayment of rent by the innkeeper,²¹⁹ and this view has been adopted in several cases in this country.²²⁰ This view has in one jurisdiction been extended to the case of a permanent boarder at an inn or boarding house,²²¹ while in another such extension was denied.²²²

Articles which, though belonging to a guest at an inn, are not in use by him, but are loaned by him to the innkeeper for use by his other guests, have been held not to be within the principle of the exemption,²²³ and articles left there by a guest after his de-

²¹⁷ Co. Litt. 47 a.

²¹⁸ Tate v. Gleed, 2 Wms. Saund. 290 a, note q; Nugent v. Kirwan, 1 Jebb & S. 97; Muspratt v. Gregory, 1 Mees. & W. 633, per Alderson, B. In Delaware the statute (Rev. Code 1893, p. 869, § 22) exempts "beasts of a drover depastured while passing through the county."

²¹⁹ It is frequently said that a horse at an inn cannot be distrained. Bro. Abr., pl. 43, 57, 99; Co. Litt. 47 a; 3 Blackst. Comm. 8, and note. That the goods of a guest at an inn are exempt is assumed in the argument in Francis v. Wyatt, 3 Burrow, 1498, 1 Wm. Bl. 483; Robinson v. Walter, 3 Bulst. 269, and in the opinions in Gorton v. Falkner, 4 Term R. 567; Crosier v. Tomkinson, 2 Keny. 439; Fowkes v. Joyce, 2 Vern. 129; Lyons v. Elliott, 1 Q. B. Div. 210. It is so stated in Bac. Abr., Inns and Innkeepers (B); Bradby, Distresses, 144.

²²⁰ Beall v. Beck, 3 Cranch C. C.

666, Fed. Cas. No. 1,161; Kellogg Newspaper Co. v. Peterson, 162 Ill. 158, 44 N. E. 411, 53 Am. St. Rep. 300; Riddle v. Welden, 5 Whart. (Pa.) 9; Karns v. McKinney, 74 Pa. 389; Elford v. Clark, 2 Brev. (S. C.) 88.

²²¹ Riddle v. Welden, 5 Whart. (Pa.) 9. See Beall v. Beck, 3 Cranch. C. C. 666, Fed. Cas. No. 1,161. Delaware Rev. Code 1893, p. 869, § 22, exempts the "property of boarders in a boarding house."

²²² Trieber v. Knabe, 12 Md. 491, 71 Am. Dec. 607.

²²³ Jones v. Goldbeck, 14 Phila. (Pa.) 173, and it was so adjudged as to a statutory exemption of the goods of a boarder or sojourner at a hotel or boarding house. Leitch v. Owings, 34 Md. 262. Contra, Stone v. Matthews, 7 Hill (N. Y.) 428, reversing 1 Hill (N. Y.) 565.

parture, for safekeeping, the innkeeper making no charge for giving them shelter, have been held not to be exempt.²²⁴

The privilege as to chattels belonging to a guest at an inn has been held not to extend to a horse placed in a stable at a distance from the inn, the use of which was loaned to the innkeeper.²²⁵

(6) **Straying cattle.** It is the rule in England that while, if a stranger's cattle escape into the tenant's land by breaking fences which are not defective, or which the owner or occupant is under no obligation to repair, the cattle may be distrained for rent even before they are *levant et couchant*,²²⁶ if they escape into the tenant's land through defects in fences which the owner or occupant of such land is bound to repair, they cannot be distrained for rent by the landlord, even though *levant et couchant*, unless their owner refuses or neglects to drive them away after receiving notice of their presence on the land, since it is the duty of the owner of the land in such case either to repair the fences or obtain from his tenant a covenant to repair them, and he should not be enabled to distrain on the stranger's cattle by reason of his neglect of this duty.²²⁷

(7) **Circumstances creating estoppel on landlord.** The landlord cannot distrain upon a stranger's goods as being on the premises, when they were brought there by the landlord himself without the owner's authority,²²⁸ nor when the landlord prevented their removal before distraining.²²⁹ Otherwise the landlord would profit by his unlawful act. It has also been held that the landlord was estopped to distrain on goods deposited with the tenant, when the latter was allowed by the landlord to carry on the business of the depositary in the latter's name.²³⁰ It has even been suggested that the fact that the premises were leased for a boarding house is ground for excluding any right in the lessor to distrain goods brought on the premises by a boarder.²³¹

²²⁴ Mitchell v. Coffee, 5 Ont. App. tresses, 39; Co. Litt. 47 b, Hargrave's note.

²²⁵ Crosier v. Tomkinson, 2 Keny. 439.

²²⁶ Kempe v. Crews, 1 Ld. Ravm. 167; Jones v. Powell, 5 Barn. & C. 647.

²²⁷ 2 Wms. Saund. 290, note (7) to Poole v. Longueville; Gilbert, Dis-

²²⁸ Paton v. Carter, Cab. & El. 183.

²²⁹ Seigling v. Main, 1 McMull. Law (S. C.) 252.

²³⁰ Miles v. Furber, L. R. 8 Q. B.

²³¹ Per Cranch C. J., in Beall v.

(8) **Reimbursement of owner by tenant.** A stranger whose goods are distrained for rent due by another may redeem them,²³² or buy them in at the sale,²³³ and recover the amount paid from the tenant; or he may in some cases bring an action for damages against the tenant for allowing them to be taken.²³⁴ There is one decision to the effect that the owner cannot demand to be reimbursed if he left the goods on the premises for his own convenience and not for the convenience of the tenant,²³⁵ but this decision has been strongly disapproved.²³⁶

(9) **Statutory changes of rule.** In several states the common-law rule by which the goods of a stranger are subject to distress has been changed by a statute providing that only the tenant's goods shall be so subject,²³⁷ and such is presumably the effect of various statutes which in terms provide that the distress may be levied on the tenant's property,²³⁸ this by implication exempting the property of others.²³⁹ In three of these states, in which the goods of the tenant only are ordinarily liable, it is provided that those of a subtenant or assignee, found on the premises, may also be subjected to distress.²⁴⁰ But in the absence of such a provision, a statute exempting the goods of persons other than the tenant exempts those of a subtenant,²⁴¹ except in states where, by reason of the prohibition of subleases, the head landlord has the right to treat the subtenant as

Beck, 3 Cranch C. C. 666, Fed. Cas. No. 1,161.

²³² *Exall v. Partridge*, 8 Term R. 308. See *Pegg v. Starr*, 23 Ont. 83.

²³³ *Wells v. Porter*, 7 Wend. (N. Y.) 119.

²³⁴ See 3 Blackst. Comm. 8; *Crosier v. Tomkinson*, 2 Keny. 439; *Barnes*, 472; *O'Donnel v. Seybert*, 13 Serg. & R. (Pa.) 54.

²³⁵ *England v. Marsden*, L. R. I. C. P. 529.

²³⁶ *Edmunds v. Wallingford*, 14 Q. B. Div. 811.

²³⁷ *Illinois*, Hurd's Rev. St. 1905, c. 80, § 16; *Mississippi* Code 1906, § 2867; *New Jersey* 1 Gen. St. p. 1208, § 8; *South Carolina* Civ. Code 1902, § 2429.

²³⁸ *Georgia* Code 1895, § 4818; *Kentucky* St. 1903, § 2307; *Texas* Rev. St. 1895, art. 3240; *Virginia* Code 1904, § 2791; *West Virginia* Code 1906, § 3404. In Florida there is an implication to the effect that property of the person liable for rent is alone distrainable, from the fact that the statute (Gen. St. 1906, § 2246) provides for proceedings to try the claims of third persons to the property distrained.

²³⁹ See *Scruggs v. Gibson*, 40 Ga. 511.

²⁴⁰ *Kentucky* St. 1903, § 2307; *Virginia* Code 1904, § 2791; *West Virginia* Code 1906, § 3404.

²⁴¹ *Gray v. Rawson*, 11 Ill. 527; *Gibson v. Mullican*, 58 Tex. 430.

his own tenant.²⁴² An assignee, as distinguished from a sub-tenant,²⁴³ is obviously a "tenant" whose goods are subject to distress.²⁴⁴⁻²⁴⁶

Under a statute exempting the property of strangers from liability to distress, property *bona fide* sold by the tenant for a valuable consideration is exempt, even though it remains on the premises,²⁴⁷ and even though the purchaser knew that the landlord was about to distrain.²⁴⁸

A statute of this character does not affect the landlord's right to distrain on goods in which another has a joint interest with the tenant, though the tenant's interest only can be sold.²⁴⁹

Though the tenant mortgages his chattels, he has still such an interest therein as may be subjected to distress.²⁵⁰ The mortgagee's interest cannot, however, be affected by the distress, provided the mortgage was in good faith and for value,²⁵¹ and provided, presumably, in some states, it was properly registered before the distress.²⁵² There are suggestions to the effect that the fact that the condition of the mortgage is not broken before distress might possibly give the latter priority,²⁵³ but, it is submitted, there is no proper ground for a distinction in this regard.²⁵⁴ The mortgagee may, however, by representing to the landlord that he will not assert any claim as against the latter,

²⁴² See *Barlow v. Jones*, 117 Ga. Law, 417; *Holladay v. Bartholomae*, 412, 43 S. E. 690. 11 Ill. App. (11 Bradw.) 206.

²⁴³ See ante, § 151.

²⁴⁴⁻²⁴⁶ See *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274. ²⁵¹ *Woodside v. Adams*, 40 N. J. Law, 417; *Mackin v. Blythe*, 35 Ill. App. 216; *Stamps v. Gilman & Co.*, 43 Miss. 456; *Ex parte Knobloch*, 26 S. C. 331, 2 S. E. 612.

²⁴⁷ *Kellogg Newspaper Co. v. Peterson*, 162 Ill. 158, 44 N. E. 411, 53 Am. St. Rep. 301; *Howdyshell v. Gary*, 21 Ill. App. 288; *Snyder v. Hitt*, 32 Ky. (2 Dana) 204. ²⁵² See *Stamps v. Gilman & Co.*, 43 Miss. 456.

²⁴⁸ *Hadden v. Knickerbocker*, 70 Ill. 677, 22 Am. Rep. 80. ²⁵³ *Stamps v. Gilman & Co.*, 43 Miss. 456; *Ex parte Knobloch*, 26 S. C. 331, 2 S. E. 612.

²⁴⁹ *Allen v. Agnew*, 24 N. J. Law, 443; *Newell v. Clark*, 46 N. J. Law, 373; *Prewett v. Dobbs*, 21 Miss. (13 Smedes & M.) 431 (under statute subjecting any limited property or interest). ²⁵⁴ See *Bischoff v. Trenholm*, 36 S. C. 75, 15 S. E. 346, commenting on *Ex parte Knobloch*, 26 S. C. 331, 2 S. E. 612, supra. In this state the statute provides that the distress takes priority over a mortgage made after the lease. See Civ. Code

²⁵⁰ *Woodside v. Adams*, 40 N. J. 1902, § 2429.

thus inducing him to make the lease, be precluded from thereafter asserting any rights as against the distress.²⁵⁵

Any other person having a lien on the goods would presumably be in the same position as a mortgagee, and would, in jurisdictions where only the goods of the tenant are subject, be entitled to claim priority over the distress if his lien represents a *bona fide* indebtedness. In Kentucky the statute provides that a person acquiring a lien on property on the leased premises may remove such property on paying the rent in arrear and securing that still to become one, the total of what is so paid and secured not being more than a year's rent.²⁵⁶ The Virginia and West Virginia statutes make the goods of the tenant or under tenant found on the premises liable to distress, with a provision that, if they are subject to a lien when placed on the premises, his interest only shall be liable to distress, while if the lien be created while they are on the premises, they shall be liable for not more than one year's rent. They also provide that one who has acquired a lien on the goods after the commencement of the tenancy may remove them, provided he pays the rent in arrear and secures so much as is to become due, the whole amount paid or secured not to exceed one year's rent.²⁵⁷ It has been held under such a statute that a holding over by a tenant after the expiration of his term, though without any express agreement, was under a new tenancy, so that one having a mortgage on the chattels made during the original term was entitled to remove the chattels without paying or securing rent due upon the holding over, the lien not being created "after the commencement of the tenancy;"²⁵⁸ and the same view was taken as to rent accruing under a renewal lease, when the lien was created during the previous lease.²⁵⁹ But a lien which was created after the commencement of the tenancy cannot be asserted as against the landlord's right to a year's rent, although this accrued after the creation of the lien.²⁶⁰

It has ordinarily been held that a statute exempting from distress property of persons other than the tenant does not exempt

²⁵⁵ *Crine v. Davis*, 68 Ga. 138.

²⁵⁶ Kentucky St. 1903, § 2314.

²⁵⁷ *Virginia* Code 1904, § 3404;

West Virginia Code 1906, §§ 2791, 2792.

²⁵⁸ *Richmond v. Duesberry*, 27

Grat. (Va.) 210.

²⁵⁹ *Upper Appomattox Co. v. Hamilton*, 83 Va. 319, 2 S. E. 195.

²⁶⁰ *Wades v. Figgatt*, 75 Va. 575.

property assigned by the tenant to another for the benefit of creditors, the assignee not being a purchaser for value, and so taking subject to all equities.²⁶¹ A different view has, however, been adopted in one state, where the statute exempts from distress all property not belonging to the tenant "in his own right."²⁶²

Chattels of the tenant passing to his personal representative have been held not thereby to become the property of a person other than the tenant, so as to be exempt.²⁶³

If, by what is known as a "conditional sale," goods are sold to the tenant, but the title is retained by the vendor, the rights of the latter take precedence of a distress,²⁶⁴ unless he fails to comply with the local requirements as to the record of such a transaction.²⁶⁵

In one state, the statute providing that the property of the tenant only shall be distrained has been construed as not applying to grain on the premises, in view of another provision authorizing the landlord to distrain on all such grain.²⁶⁶

Besides the statutes of the class above referred to, entirely exempting the property of persons other than the tenant from liability to distress, there are in some states statutes exempting particular classes of things temporarily in possession of the tenant but belonging to others.²⁶⁷

²⁶¹ *Paine v. Aberdeen Hotel Co.*, 60 Miss. 360; *Paine v. Sykes*, 72 Miss. 351, 16 So. 903; *Hoskins v. Paul*, 9

N. J. Law (4 Halst.) 110, 11 Am. Dec. 455; *Harvie v. Wickham*, 6 Leigh (Va.) 236.

²⁶² *Bischoff v. Trenholm*, 36 S. C. 75, 15 S. E. 346.

²⁶³ *Brown v. Howell*, 66 N. J. Law, 25, 48 Atl. 1020.

²⁶⁴ *Bean v. Edge*, 84 N. Y. 510; *Reischmann v. Masker*, 69 N. J. Law, 353, 55 Atl. 301.

²⁶⁵ *Huffard v. Akers*, 52 W. Va. 21, 43 S. E. 124, 59 L. R. A. 556. See *Simpson v. McDonald*, 79 S. C. 277, 60 S. E. 674, 15 L. R. A. (N. S.) 425. Compare *Reischmann v. Masker*, 69 N. J. Law, 353, 55 Atl. 301.

²⁶⁶ *Guest v. Opdyke*, 31 N. J. Law, 552; *Bird v. Anderson*, 41 N. J. Law, 392.

²⁶⁷ *Delaware* Rev. Code 1893, p. 869, § 22 (horses and carriages in livery stable; property of boarders; beasts depastured while passing through county; stoves hired by tenant; and beasts escaping into the premises through defective fences which the tenant or his landlord was bound to repair); *Maryland* Code Pub. Gen. Laws 1904, art. 53, § 17, as amended by Laws 1908, c. 93 (spinning wheel, loom, sewing machine, typewriter, stove, piano or other musical instrument rented, hired, or loaned to a tenant; horses and carriages, or motor vehicles and

b. **Fixtures.** Articles annexed to the land by the tenant so as to become part thereof are not liable to distress,²⁶⁸ and the question whether an article is so annexed is, it seems, as in other cases,²⁶⁹ to be determined with reference to the mode and purpose of the annexation.²⁷⁰ Articles which, by reason of their annexation to the land, have been regarded as exempt from distress, are windows, doors, chimney pieces, and furnaces,²⁷¹ flooring,²⁷² mill stones and anvils,²⁷³ ranges, stoves, coppers, and grates,²⁷⁴ houses,²⁷⁵ a railway, the rails of which were nailed to sleepers imbedded in packed ballast,²⁷⁶ hop poles deeply imbedded in the ground,²⁷⁷ and trees growing in a nursery,²⁷⁸ while a spinning machine fastened to the floor of a mill has been held not to be so annexed as to be exempt from distress.²⁷⁹

The fact that the tenant has a right to remove a fixture annexed by him does not, by the weight of authority, as elsewhere stated,²⁸⁰ render the article personalty before removal, and consequently does not render it subject to distress.²⁸¹

their equipment, not the property of the tenant, in livery stable, barn or garage; and property of boarder or sojourner in hotel or boarding house, or vehicle left for repair; and also the goods and chattels of the innocent tenant who has paid his rent to the owner of the leasehold estate to be exempt from distress for ground rent if any due and owing to the ground rent landlord by the owner of the leasehold estate); *Pennsylvania* Act May 13, 1876 (hired melodeons and pianos); Act June 25, 1895 (hired sewing machines and typewriting machines); Act April 28, 1899 (hired soda water apparatus).

²⁶⁸ Co. Litt. 47 b; Gilbert, Distresses, 42.

²⁶⁹ See ante, §§ 236-238.

²⁷⁰ *Hellawell v. Eastwood*, 6 Exch. 295; *Turner v. Cameron*, L. R. 5 Q. B. 306.

²⁷¹ Co. Litt. 47 b; 2 Blackst. Comm. 79.

²⁷² *Howell v. Listowell Rink and Park Co.*, 13 Ont. 476.

²⁷³ *Wistow's Case*, Y. B. 14 Hen. 8, 25 b.

²⁷⁴ *Darby v. Harris*, 1 Q. B. 895.

²⁷⁵ *Kassing v. Keohane*, 4 Ill. App. (4 Bradw.) 460; *Vausse v. Russel*, 2 McCord (S. C.) 329.

²⁷⁶ *Turner v. Cameron*, L. R. 5 Q. B. 306.

²⁷⁷ *Alway v. Anderson*, 5 U. C. Q. B. 34.

²⁷⁸ *Clark v. Gaskarth*, 8 Taunt. 431; *Clark v. Calvert*, 3 Moore. 96.

²⁷⁹ *Hellawell v. Eastwood*, 6 Exch. 295; *Furbush v. Chappell*, 105 Pa. 187. The first of these decisions has, however, been questioned in so far as it regards a machine of this character as not part of the land. *Mather v. Fraser*, 2 Kay & J. 536; 25 L. J. Ch. 361; *Holland v. Hodgson*, L. R. 7 C. P. 328.

²⁸⁰ See ante, § 241.

²⁸¹ *Darby v. Harris*, 1 Q. B. 895; *Turner v. Cameron*, L. R. 5 Q. B.

If the article is permanently severed from the land, though left lying thereon, it becomes subject to distress as personal property,²⁸² while it does not become so subject if the severance is merely temporary.²⁸³

It has been stated that a fixture may be made liable to distress by express stipulation in the lease.²⁸⁴

c. **Things not restorable in same plight as when taken.** Things which cannot be restored to the owner in the same plight as when they were taken cannot be distrained.²⁸⁵ For instance, perishable articles, such as milk and fruit,²⁸⁶ and fresh meat,²⁸⁷ are exempt. On the same ground, and for the further reason that they are not susceptible of identification for the purpose of replevin, it is said that loose pieces of money cannot be distrained, though money in a sealed bag can.²⁸⁸

d. **Grain and growing crops.** At common law, on the ground that it could not be returned in the same condition, and also because not susceptible of identification, growing grain and grain in sheaves was exempt from distress.²⁸⁹ This has been changed by statute in England,²⁹⁰ and in several states there is an express provision making such property subject.²⁹¹ Presumably under a statute in general terms making the tenant's property subject to distress,²⁹² his grain and other produce is so subject. In some states, however, the right to levy on growing crops under

306. The cases of *Spencer v. Darlington*, 74 Pa. 286; *Furbush v. Chappell*, 105 Pa. 187, are contra. This would seem to be in accordance with other Pennsylvania cases which regard a removable fixture as personal property. See ante, § 241, note 82.

²⁸² *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323.

²⁸³ *Gorton v. Falkner*, 4 Term R. 567; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Wistow's Case*, Y. B. 14 Hen. 8, 25 b.

²⁸⁴ *Schenley's Appeal*, 70 Pa. 98.

²⁸⁵ Co. Litt. 47 a.

²⁸⁶ 2 Blackst. Comm. 82.

²⁸⁷ *Morley v. Pincombe*, 2 Exch. 101.

²⁸⁸ Y. B. 22 Ed. 4, 50 b; 1 Rolle's Abr. 667; Bac. Abr., Distress (B).

²⁸⁹ Co. Litt. 47 a; Bro. Abr., Distress, pl. 29; Rolle, Abr., 666; *Wilson v. Duckett*, 2 Mod. 61; *Simpson v. Hartopp*, Willes, 512; *Given v. Blann*, 3 Blackf. (Ind.) 64.

²⁹⁰ 2 Wm. & M. sess. 1, c. 5, § 3, 11 Geo. 2, c. 19, § 8.

²⁹¹ *Delaware* Rev. Code 1893, p. 869, § 22; *Illinois*, Hurd's Rev. St. 1905, c. 80, § 30; *New Jersey*, 1 Gen. St. p. 1208, §§ 7, 8; *Pennsylvania*, *Pepper & Lewis' Dig. Laws*, "Landl. & Ten." § 4.

²⁹² See ante, note 238.

a distress may be restricted by express statutory provisions applicable as well to levies under execution or attachment.²⁹³

e. **Things in actual use.** Things in actual use are privileged from distress on the ground that an attempt to distrain them might lead to a breach of the peace. Thus, a horse which is being ridden,²⁹⁴ or driven;²⁹⁵ tools with which a man is working;²⁹⁶ yarn being carried by a man to be weighed,²⁹⁷ would all be exempt under this rule. The use must, it has been held, be such as to make it appear probable that a distress would lead to a breach of the peace.²⁹⁸

f. **Things in custodia legis.** Things in the custody of the law are not subject to distress.²⁹⁹ By force of this rule goods which have been levied upon under an execution³⁰⁰ or an attachment³⁰¹ are not subject to distress, though the landlord ordinarily, as elsewhere stated, has a right to demand that the sheriff pay to him a year's rent before the removal of goods under an execution.³⁰²

In one state it has been decided that since, by the local law, a levy under execution can be made without disturbing the de-

²⁹³ See e. g., *Virginia Code* 1904, § 904; *West Virginia Code* 1906, § 1314; *Scott v. Russell*, 72 Ga. 35.

²⁹⁴ *Co. Litt.* 47 a; *Storey v. Robinson*, 6 Term R. 138.

²⁹⁵ *Simpson v. Hartopp*, Willes, 512; *Field v. Adams*, 12 Adol. & E. 649; *Co. Litt.* 47 a, Hargrave's note.

²⁹⁶ *Co. Litt.* 47 a; *Simpson v. Hartopp*, Willes, 512.

²⁹⁷ *Read v. Burley*, Cro. Eliz. 549.

²⁹⁸ *Bunch v. Kennington*, 1 Q. B. 679; *Couch v. Crawford*, 10 U. C. C. P. 491; *Beall v. Beck*, 3 Cranch C. C. 666, Fed. Cas. No. 1,161.

²⁹⁹ *Co. Litt.* 47 b; *Gilbert, Distresses*, 44; *Eaton v. Southby*, Willes, 131; *Bowser v. Scott*, 8 Blackf. (Ind.) 86; *Mulherin v. Porter*, 1 Ga. App. 153, 58 S. E. 60; *Karns v. McKinney*, 78 Pa. 387; *Seigling v. Main*, 1 McMull. (S. C.) 252; *Cooley v. Perry*, 34 S. C. 554, 13 S. E. 853; *Meyer v. Oliver*, 61 Tex. 584.

³⁰⁰ *Peacock v. Purvis*, 2 Brod. & B. 362; *Wharton v. Naylor*, 12 Q. B. 673; *Wright v. Dewes*, 1 Adol. & E. 641; *Herron v. Gill*, 112 Ill. 247; *Bowser v. Scott*, 8 Blackf. (Ind.) 86; *Craddock v. Riddlesbarger*, 32 Ky. (2 Dana) 205; *Van Horn v. Goken*, 41 N. J. Law, 499; *Alexander v. Mahon*, 11 Johns. (N. Y.) 185; *Pierce v. Scott*, 4 Watts & S. (Pa.) 344; *Skiles v. Sides*, 1 Pa. Super. Ct. 15; *Hamilton v. Reedy*, 3 McCord (S. C.) 38; *Sullivan v. Ellison*, 20 S. C. 481.

³⁰¹ *Thomson v. Baltimore & Susquehanna Steam Co.*, 33 Md. 312; *White v. Hoeninghaus*, 74 Md. 127, 21 Atl. 700; *Pierce v. Scott*, 4 Watts & S. (Pa.) 344; *Ayres v. Depras*, 2 Speers Law (S. C.) 367; *Meyer v. Oliver*, 61 Tex. 584.

³⁰² See ante, § 183.

fendant's possession of the goods, the adoption of the common-law rule that goods levied on are exempt from distress would enable a tenant, by means of a judgment, execution, and levy, to secure to himself immunity from distress while still enjoying the possession of the goods, and that, consequently, goods levied on under execution may be distrained, the distress being subject to such rights as the execution creditor obtained by his levy, unless the officer refused to proceed to sell under the execution, which refusal would be regarded as a withdrawal from possession.³⁰³ In another state the statute expressly provides that goods levied on under execution or attachment may be distrained, the distress not to affect the levy or vary the rights of the parties as to the application of the proceeds of sale.³⁰⁴

A void levy under attachment or execution does not affect the right of the landlord to distrain upon the goods levied upon.³⁰⁵

There are decisions to the effect that the mere issue of an execution against the tenant's goods, without any levy thereunder, deprives the landlord of the right to distrain thereon.³⁰⁶ It does not seem, however, even though the issue of execution does create a lien on the goods,³⁰⁷ that this should be regarded as placing them in the custody of the law, so as to be exempt from distress.³⁰⁸ There is in one state a decision that a "dormant" execution against the tenant, that is, an execution not renewed within the legal period, could not affect the right of distress, or justify a subsequent levy on the property distrained.³⁰⁹

In England, to protect the goods levied on under execution from a subsequent distress, it is ordinarily necessary that the sheriff continue in possession of the goods.³¹⁰ And if the goods are allowed to remain on the premises after the making of a fictitious bill of sale under an execution, they are, it has been

³⁰³ *Newell v. Clark*, 46 N. J. Law, Cas. No. 7,550; *Rogers v. Dickey*, 6 Ill. (1 Gilm.) 636, 41 Am. Dec. 204.

³⁰⁴ Delaware Rev. Code 1893, p. 872, §§ 40, 41.

³⁰⁵ *St. John's College v. Murcott*, 7 Term R. 251; *Wanamaker v. Bowes*, 26 Md. 42; *Sherry v. Schuyler*, 2 Hill (N. Y.) 204.

³⁰⁶ *In re Joslyn*, 2 Biss. 240, Fed. S. 711.

³⁰⁷ See *Freeman, Executions*, § 200.

³⁰⁸ See 2 *Freeman, Executions*, § 268; *Shuster v. Robinson*, 3 Har. (Del.) 50.

³⁰⁹ *Blake v. De Liesseline*, 4 McCord (S. C.) 496.

³¹⁰ *Blades v. Arundale*, 1 Maule &

held, liable to distress, as before.³¹¹ Whether the sheriff has, by withdrawing from the premises, abandoned possession of the goods, is a question of fact, and such withdrawal will, it seems, be given such effect, if for the convenience of the debtor.³¹²

In jurisdictions where the goods of a third person are, as at common law, subject to distress, one who purchases the tenant's goods under execution sale should ordinarily remove the goods immediately, in order to prevent their being taken under a subsequent distress.³¹³ But if they are not capable of immediate removal, they are protected from distress until they can properly be removed, that is, until a reasonable time to remove them has elapsed.³¹⁴ So growing crops are protected from distress until they are ripe and the purchaser has time to cut them and either carry them away or consume them.³¹⁵

Goods in the hands of a receiver are not subject to distress unless leave of court to distrain is first obtained.³¹⁶ But the mere appointment of a receiver for property on the premises does not, it has been decided, affect the landlord's right of distress, so long as the receiver has not taken possession.³¹⁷

The fact that the tenant has been adjudicated a bankrupt, and that his goods are in the possession of his trustee in bankruptcy, does not, in England, affect the landlord's right of distress.³¹⁸ A different view has been taken of the effect of the United States Bankruptcy Law,³¹⁹ the landlord being, however, given the benefit of the statute of Anne, before referred to.³²⁰

³¹¹ *Smith v. Russell*, 3 Taunt. 400. are subject even without leave of

³¹² *Bagshawes v. Deacon* [1898] 2 Q. B. 173. court, see *Walsh v. Walsh*, 1 Ir. Eq. 209.

³¹³ *In re Benn Davis*, 55 L. J. Q. B. 217.

³¹⁷ *Everett v. Neff*, 28 Md. 176.

³¹⁴ *Wharton v. Naylor*, 12 Q. B. 673; *Gilbert v. Moody*, 17 Wend. (N. Y.) 354, 31 Am. Dec. 303.

³¹⁸ *Ex parte Grove*, 1 Atk. 104; *Briggs v. Sowry*, 8 Mees. & W. 729.

³¹⁵ *Peacock v. Purvis*, 2 Brod. & B. 362; *Wright v. Dewes*, 1 Adol. & E. 641; *Pierce v. Scott*, 4 Watts & S. (Pa.) 344.

³¹⁹ *Morgan v. Campbell*, 89 U. S. (22 Wall.) 381, 22 Law. Ed. 796; *In re Duble*, 117 Fed. 794. A like view has been taken as to the effect of a state insolvent law. *Buckey v. Snouffer*, 10 Md. 149, 69 Am. Dec. 129; *Powell v. Daily*, 61 Ill. App. 552, *afid.* 163 Ill. 646, 45 N. E. 414. *Contra*, *Hoskins v. Paul*, 9 N. J. Law (4 Halst.) 110, 17 Am. Dec. 455.

³¹⁶ *In re Sutton*, 32 L. J. Ch. 437; *Everett v. Neff*, 28 Md. 177; *Paine v. Sykes*, 72 Miss. 351, 16 So. 903; *Noe v. Gibson*, 7 Paige (N. Y.) 513; *Martin v. Black*, 9 Paige (N. Y.) 641, 38 Am. Dec. 574. But that such goods

³²⁰ See ante, § 183 c.

That goods have been assigned to one for the benefit of the assignor's creditors is not regarded as placing them in the custody of the law, so as to exempt them from distress.³²¹

Goods which have been replevied after distress are regarded as in the custody of the law, and so are not subject to another distress because left on the premises, until a reasonable time for their removal has elapsed.³²² But if goods so replevied are removed to other premises, they are liable to distress by the landlord of the latter premises.³²³

Cattle distrained damage *feasant* are not subject to distress for rent.³²⁴

So far as the distress may be merely a mode of enforcing a lien existing from the time of the lease in favor of the landlord, the fact that the goods are exempt from distress as being *in custodia legis* cannot, it is evident, affect the ultimate right of the landlord to priority in the distribution of the proceeds of the goods.³²⁵

g. Beasts of the plough and sheep. If there is other property sufficient to satisfy the distress, beasts of the plough and sheep are exempt.³²⁶ The sufficiency of such other property is to be determined with reference to the reasonable probability of its sufficiency, and the distress is not wrongful because it afterwards appears that the other property is sufficient.³²⁷ Furthermore, the landlord has the right to resort to subjects of distress which are immediately available, and consequently the presence of growing crops on the land, which cannot be productive till a later period, does not affect the right to distrain on the articles thus conditionally privileged.³²⁸

The exemption of beasts of the plough does not extend to cart-

³²¹ See *Hoskins v. Paul*, 9 N. J. Law (4 Halst.) 110, 17 Am. Dec. 455; *Dall. (Pa.)* 68, 1 Am. Dec. 260.

Paine v. Aberdeen Hotel Co., 69 Miss. 360; *Paine v. Sykes*, 72 Miss. 351, 16 So. 903; *Harvie v. Wickham*, 6 Leigh (Va.) 236; *Morris v. Parker*, 1 Ashm. (Pa.) 187; *Bischoff v. Trenholm*, 36 S. C. 75, 15 S. E. 346; *Dial v. Levy*, 39 S. C. 265, 17 S. E. 776, 39 Am. St. Rep. 716; *Eacrett v. Kent*, 15 Ont. 9.

³²² *Milliken v. Selye*, 6 Fill (N. Y.) 623; *Commonwealth v. Lelar*, 1 W. 441. Phila. (Pa.) 173.

³²³ *Woglam v. Cowperthwaite*, 2

Dall. (Pa.) 68, 1 Am. Dec. 260.

³²⁴ *Co. Litt.* 47 b.

³²⁵ See *Meyer v. Oliver*, 61 Tex. 584; *Lewis v. Washington County Sup'rs*, 62 Miss. 16.

³²⁶ *Co. Litt.* 47 b. It is so provided by statute in New Jersey. See 1 Gen. St. p. 1207, § 3.

³²⁷ *Jenner v. Yollana*, 6 Price, 3.

³²⁸ *Piggott v. Birtles*, 1 Mees. &

colts, young steers and heifers, not broken in or used for harness or the plough.³²⁹

h. Implements of husbandry and trade. Even though not in actual use,³³⁰ implements of husbandry and trade, like beasts of the plough and sheep, cannot, at common law, be distrained, if there are sufficient other chattels to satisfy the distress.³³¹ It is said that the books of a scholar would be exempt under this rule,³³² and it has been decided that books of account of a tradesman or merchant are so exempt.³³³

The expression "the necessary tools of a tradesman" in a statute exempting such tools from distress has been regarded as including all appliances necessary for the ordinary prosecution of his business, and not merely such instruments as are taken into his hand to be used.³³⁴

i. Animals *ferae naturae*. Animals *ferae naturae* are not subject to distress, for the reason, it is said, that there is no valuable property in them.³³⁵ If, however, animals that were once wild are tamed, the right of distress attaches.³³⁶ Dogs are distrainable as being, at the present day, recognized subjects of property.³³⁷

j. Choses in action. A debt due the tenant is evidently not upon the demised premises so as to be liable to distress, and even though evidence of the debt, such as a note or account book, be thereon, and conceding that such note or book could itself be the subject of distress,³³⁸ this would not render the debt subject thereto.³³⁹ Whether a debt due the tenant by a resident of the

³²⁹ Keen v. Priest, 4 Hurl. & N. 236.

³³⁰ See ante, § 328 e.

³³¹ Gorton v. Falkner, 4 Term R. 565; Fenton v. Logan, 9 Bing. 676; Nargett v. Nias, 1 El. & El. 439.

³³² Co. Litt. 47 a; 3 Blackst. Comm. 9.

³³³ Davis v. Arledge, 3 Hill Law (S. C.) 170, 30 Am. Dec. 360. This was apparently assumed in Gauntlett v. King, 8 C. B. (N. S.) 59, but there is a *dictum* contra by Williams, J., in that case.

³³⁴ McDowell v. Shotwell, 2 Whart. (Pa.) 26.

³³⁵ Co. Litt. 47 a; 3 Blackst. Comm. 8.

³³⁶ Davies v. Powell, Willes, 46.

³³⁷ See Ford v. Tynte, 2 Johns. & H. 150; 31 L. J. Ch. 177.

³³⁸ See Davies v. Powell, Willes, 46; Bunch v. Kennington, 1 Q. B. 679. There is a *dictum* by Lord Coke that dogs are not distrainable (Co. Litt. 47 a) as not being the subject of property.

³³⁹ As to the right to distrain on account books, see ante, at note 333.

That choses in action are not liable to distress, see Mitchell v. Coates, 47 Pa. 202; Davis v. Arledge,

state or county could be regarded as property therein belonging to the tenant, within the meaning of local statutes³⁴⁰ making the tenant's property subject without regard to its location, appears never to have been judicially considered. Since a debt is in its nature not susceptible of levy and sale, and can ordinarily be reached only by proceedings in the nature of garnishment, it would presumably not be regarded as subject to distress.

k. **Things exempt by statute.** There are in some states statutes allowing certain exemptions to the tenant, these ordinarily following the statutory provisions as to exemptions from execution.³⁴¹ In one state it was decided that a statute providing that property to a certain value, "owned by or in possession of any debtor," should be exempt from execution or distress, was not available to a person whose goods were seized under distress, but who was not personally liable for the rent, he not being a "debtor" therefor.³⁴²

l. **Things not on the premises—(1) Not ordinarily subject at common law.** Apart from statute, with one or two exceptions presently to be noticed, only goods upon the demised premises can be distrained for the rent thereof, or, as it is frequently expressed, the distress must be made upon the premises.³⁴³ The statute of Marlebridge (52 Hen. 3, c. 15), providing that no man should take distresses out of his fee, is said to be merely declaratory of the common law.³⁴⁴

3 Hill Law (S. C.) 170, 30 Am. Dec. 360.

³⁴⁰ See post, note 379.

³⁴¹ *Illinois*, Hurd's Rev. St. 1905, c. 80, § 30 (property, other than crops grown on premises, which is exempt from execution); *New Jersey*, 1 Gen. St. p. 1213, § 24 (goods and chattels to value of \$200 and wearing apparel); *Pennsylvania*, Pepper & Lewis' Dig. Laws "Landl. & Ten." § 6 (property to value of \$300, exclusive of wearing apparel, and bibles and school books).

³⁴² *Rosenberger v. Hallowell*, 35 Pa. 369, 3 Phila. (Pa.) 330. It was accordingly in this case held that neither a subtenant nor an assignee claiming under an assignment made

in violation of a stipulation of the lease could claim the exemption.

It would seem, however, that such an assignee is a debtor for the rent, the assignment itself not being void by reason of the fact that it is prohibited. See ante, § 152 j (2).

³⁴³ Co. Litt. 161 a; Gilbert, Distresses, 45; Capel v. Buszard, 6 Bing. 150; White v. Hoeninghaus, 74 Md. 127, 21 Atl. 700; Crocker v. Mann, 3 Mo. 472, 26 Am. Dec. 684; Weiss v. Jahn, 37 N. J. Law, 93; Pemberton v. Van Rensselaer, 1 Wend. (N. Y.) 307; Clifford v. Beems, 3 Watts (Pa.) 246; Mosby v. Leeds, 3 Call (Va.) 439.

³⁴⁴ 2 Co. Inst. 131.

It has in England been decided that the half of a highway adjacent to the premises in possession of the tenant being presumptively a part of the land demised,³⁴⁵ goods placed thereon are *prima facie* subject to distress.³⁴⁶ In this country there are contrary decisions, to the effect that goods on the highway in front of the demised premises are not subject to distress, even though the land under the highway belonged to the lessor at the time of the lease.³⁴⁷ These decisions seem to be in harmony with the provision of the statute of Marlebridge, forbidding distresses in the king's highway.

In accordance with the rule that a distress must be made upon the demised premises, it has been decided that there is no right to distrain things lying upon land in which the tenant is, by the lease, given merely an easement of passage.³⁴⁸ So, where a demise of land upon tide water did not include the land between high and low-water mark, a barge lying between those lines was held not to be liable;³⁴⁹ and where the lease was in terms of a certain wharf and all the privileges thereto belonging, a vessel attached to the wharf by the usual fastenings was held not to be subject.³⁵⁰ For the same reason, if two pieces of land are let by separate demises, though both demises are incorporated in one instrument, a distress cannot be made on one piece of land for rent due on account of the other.³⁵¹

It has been decided that a right to distrain things belonging to the lessee off the premises may be given by special stipulation.³⁵²

(2) **Cattle seen on premises and driven therefrom.** An exception to the general rule exists at common law in case cattle, seen on the premises by the landlord or his agent when about to

³⁴⁵ See Leake, *Uses & Profits of Land*, 487; Norton, *Deeds*, 232; 2 Land, 141, 6 Bing. 150.

Tiffany, *Real Prop.* § 360.

³⁴⁶ *Hodges v. Lawrence*, 18 J. P. R. Co., 3 U. C. Q. B. 168.

347.

³⁴⁷ *Robelen v. National Bank of Wilmington*, 1 Marvel (Del.) 346, 41 Atl. 80; *Pickering v. Breen*, 22 Pa. Super. Ct. 4.

³⁴⁸ *Winslow v. Henry*, 5 Hill (N. Y.) 481.

³⁴⁹ *Buszard v. Capel*, 8 Barn. & C. 141, 6 Bing. 150.

³⁵⁰ *Sanderson v. Kingston Marine*

³⁵¹ *Rogers v. Birkmire*, 2 Strange,

1040, Lee t. Hardw. 245; *Phillips v.*

Whitsed, 2 El. & El. 804, 809.

³⁵² *In re Roundwood Colliery Co.*

[1897] 1 Ch. 373; *Gold v. Gleason*.

26 Pittsb. L. J. (N. S.) 10; *Dinner*

v. McAndrews, 10 Pa. Dist. R. 221.

distrain, are driven away therefrom to avoid distress, and the landlord may follow and distrain the cattle.³⁵³

(3) **Statutory right as to things removed.** The statute 11 Geo. 2, c. 19, § 1, provided that if a tenant "fraudulently or clandestinely convey away or carry off from" the premises his goods or chattels, "to prevent the landlord from distraining the same for arrears of rent," the landlord or his agent might, "within thirty days next ensuing such conveying away or carrying off," seize such goods and chattels, wherever they might be found, as a distress for the said arrears of rent, and sell or otherwise dispose of them as if distrained on the premises. There are in several states provisions of the same general character, giving the landlord a right, under certain circumstances, to distrain goods of the tenant removed from the premises,³⁵⁴ and so far as in any state a lien may exist on goods or crops on the premises and distress may be a proper mode of enforcing the lien, such goods, can, it would seem, be distrained after as well as before removal.^{355, 356}

The English statute authorizes a distress only on goods removed during an actually existing tenancy,³⁵⁷ or, if the tenancy has ended, within such a period thereafter and under such circumstances³⁵⁸ that a distress on the premises would be authorized.³⁵⁹

The English statute, and likewise several state statutes, in terms authorize the landlord to distrain, after removal, on the goods of the tenant,³⁶⁰ and such language does not authorize a

³⁵³ Co. Litt. 161 a; 2 Co. Inst. 132; *Bradby, Distresses*, 94.

³⁵⁴ *Delaware* Rev. Code 1893, p. 869, § 23; *Maryland*, Code Pub. Gen. Laws 1904, art. 53, § 18; *Mississippi* Code 1906, § 2850; *New Jersey*, 1 Gen. St. p. 1210, § 14; *Pennsylvania*, Pepper & Lewis Dig. Laws, "Landl. & Ten." § 8; *South Carolina* Civ. Code 1902, §§ 2428, 2429; *Virginia* Code 1904, § 2791; *West Virginia* Code 1906, § 3404.

^{355, 356} See ante, § 321 j.

³⁵⁷ See *Angell v. Harrison*, 17 L. J. Q. B. 25; *Ashmore v. Hardy*, 7 Car. & P. 501.

³⁵⁸ *Gray v. Stait*, 11 Q. B. Div. 668. But see *Dorsey v. Hays*, 7 Har. & J. (Md.) 370. The same construction was placed on the New York statute, since repealed. *Burr v. Van Buskirk*, 3 Cow. (N. Y.) 263; *Pemberton v. Van Rensselaer*, 1 Wend. (N. Y.) 307; *Williams v. Terboss*, 2 Wend. (N. Y.) 148, 19 Am. Dec. 561.

³⁵⁹ See ante, § 326 e.

³⁶⁰ See *Delaware* Rev. Code 1893, p. 869, § 23; *Mississippi* Code 1906, § 2850; *New Jersey*, 1 Gen. St. p. 1210, § 14; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landl. & Ten." §

distress upon the goods of another person,³⁶¹ even though he be an undertenant,³⁶² or even though such person, claiming the goods under a *bona fide* mortgage or sale made by the tenant, himself removed the goods from the premises.³⁶³

In order that the landlord may follow the goods removed, the removal must, by the English statute, have been made "fraudulently or clandestinely," and the Pennsylvania statute is similar in this regard.³⁶⁴ In other states the statute does not require that the removal shall have been fraudulent.³⁶⁵ Goods may, it has been decided, be removed fraudulently, although not clandestinely, as when removed in open day with notice to the landlord.³⁶⁶ But that a removal, made in the daytime, is without the landlord's knowledge, does not show it to be fraudulent or clandestine within the statute.³⁶⁷ A removal is not fraudulent when made by a *bona fide* creditor of the tenant, for the purpose of securing his debt, though this is done with the consent of the tenant.³⁶⁸

8; *South Carolina* Civ. Code 1902, § 2428.

³⁶¹ *Thornton v. Adams*, 5 Maule & S. 38; *Postman v. Harrell*, 6 Car. & P. 225; *Robelen v. National Bank of Wilmington*, 1 Marvel (Del.) 346, 41 Atl. 80; *Neale v. Clautice*, 7 Har. & J. (Md.) 372; *Adams v. La Comb*, 1 Dall. (Pa.) 440; *Sleeper v. Parrish*, 7 Phila. (Pa.) 247; *Frisbey v. Thayer*, 25 Wend. (N. Y.) 397; *Slocum v. Clark*, 2 Hill (N. Y.) 475.

³⁶² *New v. Pyle*, 2 Houst. (Del.) 9; *Coles v. Marquand*, 2 Hill (N. Y.) 447; *Acker v. Witherell*, 4 Hill (N. Y.) 112. But goods of an assignee of the lessee are liable, he being a tenant. See *Acker v. Witherell*, 4 Hill (N. Y.) 112; *Morris v. Parker*, 1 Ashm. (Pa.) 187; *Jones v. Gundrim*, 3 Watts & S. (Pa.) 531. In *Virginia* (Code 1904, § 2791) and *West Virginia* (Code 1906, § 3404), the landlord may follow and distrain on the goods of the undertenant as well as on those of the tenant, within thirty days after their removal.

³⁶³ *Frisbey v. Thayer*, 25 Wend. (N. Y.) 396; *Bussing v. Bushnell*, 6 Hill (N. Y.) 382. See *Bach v. Meats*, 5 Maule & S. 200.

³⁶⁴ That the lease expressly gives a right of distress upon removal does not authorize a distress on the goods removed unless the removal was fraudulent or clandestine. *Grant's Appeal*, 44 Pa. 477; *Owens v. Shovlin*, 116 Pa. 371, 9 Atl. 484.

³⁶⁵ See *Delaware* Rev. Code 1893, p. 869, § 23; *Maryland*. Code Pub. Gen. Laws 1904, art. 53, § 18; *Mississippi* Code 1906, § 2850; *New Jersey*, 1 Gen. St. p. 1210, § 14; *South Carolina* Civ. Code 1902, § 2428; *Virginia* Code 1904, § 2791; *West Virginia* Code 1906, § 3404.

³⁶⁶ *Opperman v. Smith*, 4 Dowl. & R. 33.

³⁶⁷ *Grace v. Shiveley*, 12 Serg. & R. (Pa.) 217; *Grant's Appeal*, 44 Pa. 477; *Purfel v. Sands*, 1 Ashm. (Pa.) 120.

³⁶⁸ *Bach v. Meats*, 5 Maule & S.

A state statute, giving a right to distrain goods removed, has been held not to apply to goods removed by the sheriff under an attachment.³⁶⁹

Even though the landlord would otherwise be entitled to follow the goods, he cannot, by the express terms of most of the statutes, do so if the goods have passed into the hand of a *bona fide* purchaser for value.³⁷⁰

There are decisions to the effect that the English statute applies only if rent is actually due at the time of the removal of the goods.³⁷¹ The correctness of this view has, however, been questioned,³⁷² and it has been decided that the landlord can at any rate distrain goods removed on the morning of the day on which the rent became due.³⁷³ The Pennsylvania statute likewise has been construed to apply only when the removal is after the rent is due,³⁷⁴ and it has been decided in that state that equity cannot prevent the removal of the goods until the landlord can distrain.³⁷⁵ In some states, as hereafter stated,³⁷⁶ the landlord may distrain before the rent is due, upon the removal of the property from the premises, and in one state the statute giving a right to follow the goods removed authorizes a distress on property removed within sixty days before or after the rent falls due.³⁷⁷

In a number of states there is a statutory provision for an attachment in case of the removal of goods for the purpose of avoiding payment of rent.³⁷⁸

(4) Statutory right as to tenant's goods. In at least three

200. See *Frisbey v. Thayer*, 25 v. Bealmear, 79 Md. 36, 28 Atl. 898. Wend. (N. Y.) 396.

³⁶⁹ *White v. Hoeninghaus*, 74 Md. 127, 21 Atl. 700. See *Peacock v. Hammitt*, 15 N. J. Law (3 J. S. Green) 165, 28 Am. Dec. 400, as to removal under execution.

³⁷⁰ See *St. 11 Geo. 2, c. 19, § 2*; *Delaware* Rev. Code 1893, p. 869, § 25; *Maryland*, Code Pub. Gen. Laws 1904, art. 53, § 18; *Mississippi* Code 1906, § 2850; *New Jersey*, 1 Gen. St. p. 1210, § 14; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landl. & Ten." § 8; *South Carolina* Civ. Code 1902, § 2429. A trustee for creditors is not such a *bona fide* purchaser. *Burnett*

³⁷¹ *Watson v. Main*, 3 Esp. 15;

Rand v. Vaughan, 1 Bing. N. C. 767.

³⁷² *Furneaux v. Fotherby*, 4 Camp.

³⁷³ *Dibble v. Bowater*, 2 El. & Bl. 564.

³⁷⁴ *Grace v. Shiveley*, 12 Serg. & R. (Pa.) 217; *Jackson's Appeal* (Pa.) 9 Atl. 306.

³⁷⁵ *Jackson's Appeal* (Pa.) 9 Atl. 306.

³⁷⁶ See post, § 333 b.

³⁷⁷ *Maryland*, Code Pub. Gen. Laws 1904, art. 53, § 18.

³⁷⁸ See post, § 347.

states the common-law requirement that the goods be upon the demised premises no longer exists, and the goods of the tenant may be distrained wherever located.³⁷⁹

§ 329. Loss of right of distress.

a. **By extinction of rent.** Any matter which will extinguish or suspend the rent will necessarily deprive the landlord of the right to distrain for the rent which would otherwise have become due. Thus, after partial or total eviction of the tenant by the landlord, or his total eviction by title paramount, rent ceases to accrue,³⁸⁰ and there can be no distress as for rent subsequently accruing.³⁸¹ And the fact that the lessee is prevented taking possession through the landlord's fault may have the same effect.³⁸² So after the tenancy has come to an end by reason of a re-entry for breach of condition,³⁸³ there can be no distress as for rent subsequently to accrue.³⁸⁴ Likewise, the fact that the rent has been garnished in the hands of the tenant by a creditor of the landlord suspends the rent and the right to distrain therefor.³⁸⁵

b. **By tender of rent due.** There can be no valid distress after the tenant has made a legal tender of the full amount of the rent in arrear.³⁸⁶ The requirements of a legal tender for this purpose are the same as for other purposes.³⁸⁷ The tender must be unconditional, and, consequently, it is insufficient if conditioned upon the landlord's admission that no greater sum is due,³⁸⁸ though the tender is not vitiated by the fact that it is

³⁷⁹ *Georgia Code* 1895, § 4818; *Illinois*, Hurd's Rev. St. 1905, c. 80, § 16; *Kentucky* St. 1903, § 2307.

³⁸⁰ See ante, § 182 e.

³⁸¹ *Hopcraft v. Keys*, 9 Bing. 613; *Baker v. Jeffers*, 4 Cranch C. C. 707, Fed. Cas. No. 772; *Wade v. Halligan*, 16 Ill. 511; *Tunis v. Grandy*, 22 Grat. (Va.) 109.

³⁸² *Lewis v. Payn*, 4 Wend. (N. Y.) 423; *Lawrence v. French*, 25 Wend. (N. Y.) 443, 7 Hill (N. Y.) 519; *Hatfield v. Fullerton*, 24 Ill. 278; *Spencer v. Burton*, 5 Blackf. (Ind.) 57. See ante, § 182 a (3).

³⁸³ See ante, § 182 j.

³⁸⁴ *Bridges v. Smyth*, 5 Bing. 410.

³⁸⁵ *Patterson v. King*, 27 Ont. 56.

³⁸⁶ *Six Carpenters' Case*, 8 Coke,

146 a; *Holland v. Bird*, 10 Bing. 15; *Willims v. Mangum*, 122 Ga. 295, 50 S. E. 110; *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496; *Davis v. Henry*, 63 Miss. 110; *Hunter v. Le Conte*, 6 Cow. (N. Y.) 728; *Lyon v. Houk*, 9 Watts (Pa.) 193; *Rees v. Emerick*, 6 Serg. & R. (Pa.) 286. See *Tripp v. Grouner*, 60 Ill. 474.

³⁸⁷ See ante, § 178.

³⁸⁸ *Finch v. Miller*, 5 C. B. 423.

accompanied by a statement on the part of the tenant that he owes nothing more.³⁸⁹

A tender of the rent may, at common law, be made at any time before entry by the landlord or his bailiff to make distress,³⁹⁰ and a distress thereafter is wholly wrongful.³⁹¹ If made after the levy but before the impounding, the tender must, it seems, include the costs of the distress,³⁹² but if such a tender is made, a subsequent detention³⁹³ or removal³⁹⁴ of the tenant's goods by the landlord is wrongful.

At common law, a tender made after the impounding is too late;³⁹⁵ but it has been decided in England, in view of the change in the law by St. 2 W. & M. sess. 1 c. 5, entitled "an act for enabling the sale of goods distrained for rent, in case the rent be not paid within a reasonable time," and providing for their sale if not replevied within five days after notice,³⁹⁶ and in view also of the fact that by St. 11 Geo. 2, c. 19, the goods can be impounded on the premises, and hence the tenant would ordinarily have no opportunity for payment after entry and before impounding,³⁹⁷ that the tenant is entitled to tender the rent and costs within the statutory five days, and so prevent a sale, without being compelled to institute a replevin suit, which must necessarily be unsuccessful.³⁹⁸ In this country it has been decided that, under a statute similar to that of 2 W. & M. sess. 1,

³⁸⁹ *Bowen v. Owen*, 11 Q. B. 130; *Jones v. Bridgman*, 39 Law T. (N. S.) 500; *Manning v. Lunn*, 2 Car. & K. 13. were tendered, but the opinion makes no reference to that fact in holding the tender good.

³⁹⁰ *Bennett v. Bayes*, 5 Hurl. & N. 391. ³⁹³ *Evans v. Elliott*, 5 Adol. & E. 142; *Loring v. Warburton*, El. Bl. & El. 507; *Newell v. Clark*, 46 N. J. Law, 377; *Hilson v. Blain*, 2 Bailey Law (S. C.) 168.

³⁹¹ *Six Carpenter's Case*, 8 Coke, 146 a; *Branscomb v. Bridges*, 1 Barn. & C. 145; *Holland v. Bird*, 10 Bing. 15. ³⁹⁴ *Vertue v. Beasley*, 1 Moody & R. 21.

³⁹² In *Hunter v. Le Conte*, 6 Cow. (N. Y.) 728, it is held that a tender, even before distress, must include costs of warrant to bailiff, the statute authorizing the retention of such costs from the proceeds of sale. ³⁹⁵ *Six Carpenters' Case*, 8 Coke, 146 a; *Ladd v. Thomas*, 12 Adol. & E. 117; *Thomas v. Harries*, 1 Man. & G. 695.

³⁹⁶ See *Vertue v. Beasley*, 1 Moody & R. 21; *Loring v. Warburton*, El. Bl. & El. 507. In *Hilson v. Blain*, 2 Bailey Law (S. C.) 168, such costs

See post, § 342 a.

See post, § 339.

³⁹⁸ *Johnson v. Upham*, 2 El. & El. 250, overruling *Ellis v. Taylor*, 8 Mees. & W. 415.

c. 5, the tenant may tender the balance of rent due and costs at any time previous to the completion of the sale, though not within the five days named, and that the landlord is liable in trespass for the value of goods thereafter sold by him.³⁹⁹

By St. 11 Geo. 2, c. 19, a tender might, in the case of a distress levied on growing crops, be made at any time before they were ripe and cut or gathered.⁴⁰⁰

The tender may be made to the landlord, or to his agent having authority to receive the rent.⁴⁰¹ And one authorized by the landlord to distrain is usually regarded as an agent for this purpose.⁴⁰²

c. By release, suspension, or waiver of right. The right of distress may, it seems, be excluded by an express release of such right on the part of the landlord, or a provision to that effect in the lease.⁴⁰³ And if the landlord induces a third person to put goods on the premises by agreeing not to distrain on them, he is estopped to do so.⁴⁰⁴ Moreover, the right of distress may by express provision be made subject to a condition precedent, as that the landlord shall first have paid the rent due to a chief landlord,⁴⁰⁵ or it may be postponed until a certain period after default,⁴⁰⁶ or be excluded as to certain goods,⁴⁰⁷ or it may be conditioned upon a previous demand.⁴⁰⁸

It has been decided that an agreement that the tenant shall apply the rent as it falls due to the payment of the lessor's debts is inconsistent with, and excludes, the right of distress;⁴⁰⁹ but that such right is not excluded by the lessor's acceptance of an assignment by the tenant in trust for creditors.⁴¹⁰

³⁹⁹ Richards v. McGrath, 100 Pa. 339.

⁴⁰⁰ Section 9. See Owen v. Legh, 3 Barn. & Ald. 470, per Abbott, C. J.

⁴⁰¹ Smith v. Goodwin, 4 Barn. & Adol. 413; Bennett v. Bayes, 5 Hurl. & N. 391; Browne v. Powell, 4 Bing. 230.

⁴⁰² Hatch v. Hale, 15 Q. B. 10; Howell v. Listowell Rink & Park Co., 13 Ont. 476; Hilson v. Blain, 2 Bailey Law (S. C.) 168.

⁴⁰³ See opinion of Willes, J., in Giles v. Spencer, 3 C. B. (N. S.) 244.

⁴⁰⁴ Horsford v. Webster, 1 Crompt. M. & R. 696; Wallace v. Fraser, 2 Can. Sup. Ct. 522.

⁴⁰⁵ Giles v. Spencer, 3 C. B. (N. S.) 244.

⁴⁰⁶ Giles v. Spencer, 3 C. B. (N. S.) 244; Oxenham v. Collins, 2 Fost. & F. 172.

⁴⁰⁷ Wallace v. Fraser, 2 Can. Sup. Ct. 522.

⁴⁰⁸ See post, § 335 a.

⁴⁰⁹ Ege v. Ege, 5 Watts (Pa.) 134.

⁴¹⁰ Dutcher v. Culver, 24 Minn. 584.

d. **Effect of existence of other remedies.** The right of distress is not affected by the existence of other remedies for the collection of rent,⁴¹¹ and it has occasionally been decided that the fact that the landlord has procured a personal judgment for the rent does not affect the right to distrain.⁴¹² In England, however, there are two decisions by individual judges to the contrary effect, that the recovery of a judgment for rent extinguishes the right of distress.⁴¹³

That the tenant has given to the landlord a note, secured by chattel mortgage, for the amount of the rent, does not involve a waiver of the right of distress,⁴¹⁴ nor does the fact that the landlord is by the lease given a lien for rent upon chattels on the land affect the right.⁴¹⁵ And if he has by statute a lien, enforceable by distress, upon certain classes of property on the premises, he may, it has been held, levy on such property and also on other property on the premises by one distress.⁴¹⁶ In one state it is expressly provided by statute that the acceptance of security for rent shall not affect the right of distress.⁴¹⁷

⁴¹¹ In *Block v. Latham*, 63 Tex. Law R. 445, per Cave, J. In *Foa*, 414, it was held that creditors of the tenant could not, on the theory of marshalling assets, compel the landlord to proceed on a covenant by a third person to pay the rent before selling goods of the tenant on which he had levied a distress.

⁴¹² *Chipman v. Martin*, 13 Johns. (N. Y.) 240; *Bantleon v. Smith*, 2 Bin. (Pa.) 146, 4 Am. Dec. 430. In New York, after the first of the above decisions, a statute was adopted providing that no distress should be made for rent for which a judgment had been recovered in a personal action, but this was held not to apply to a judgment confessed upon a bond and warrant of attorney, executed at the time of the making of the lease, as collateral security. *Bates v. Nellis*, 5 Hill (N. Y.) 651.

⁴¹³ *Chancellor v. Webster*, 9 Times Law R. 568, per Knight Bruce, J.; *Potter v. Bradley & Co.*, 10 Times

Landl. & Ten. (2d Ed.) 436, these decisions are criticized on the ground that "the right of distress is a remedy collateral to and concurrent with the right of action, and that, in conformity with principle, the judgment being only a security for the original cause of action, cannot operate to change that remedy until it has been made productive in satisfaction." Citing *Drake v. Mitchell*, 3 East, 251; *Wegg-Prosser v. Evans* [1895] 1 Q. B. 108.

⁴¹⁴ *Atkins v. Byrnes*, 71 Ill. 326.

⁴¹⁵ *O'Hara v. Jones*, 46 Ill. 288.

⁴¹⁶ *McDougal v. Landers*, 75 Ga. 140. Nor, it has been held, does a restriction in the instrument of lease as to the amount for which the statutory lien may be asserted affect the remedy by distress. *Parrott v. Malpass*, 49 S. C. 4, 26 S. E. 884.

⁴¹⁷ Maryland, Code Pub. Gen. Laws 1904, art. 53, § 15.

The landlord may, it has been decided, concurrently distrain for rent and enforce a forfeiture for breach of covenants other than that for rent.⁴¹⁸

e. Effect of acceptance of note, draft, or bond for rent. That the landlord has accepted a note, draft, or bond for the amount of the rent does not, unless it was accepted in absolute satisfaction of the rent, preclude him from thereafter distraining.⁴¹⁹

It has in this country been held that the acceptance of a note or draft for the rent raises a presumption of an undertaking not to distrain until the maturity of the note and its nonpayment.⁴²⁰ In England there seems to be no presumption in this regard, but the acceptance of the note or draft is evidence from which the jury may infer an undertaking to suspend the remedy by distress.⁴²¹

When the landlord accepts absolutely, in lieu of a grain rent due to him, a money indebtedness evidenced by notes of his tenant, there is no right to distrain for the money.⁴²²

f. Effect of tenant's death. In England the death of a tenant for a term of years does not affect the right of the landlord to distrain for rent upon the chattels on the premises,⁴²³ though

⁴¹⁸ *Becker v. Werner*, 98 Pa. 555. *Rich. Law (S. C.)* 226; *Hornbrooks v. Lucas*, 24 W. Va. 493, 49 Am. Rep. 277. And see *Crone v. Bane*, 48 Ill. App. 287, where by request of the tenant a debtor of the latter agreed with the landlord to pay the rent due.

⁴¹⁹ *Griffin v. Woodward*, 4 Cranch C. C. 709, Fed. Cas. No. 5,813; *Alexander v. Turner*, 1 Cranch C. C. 86, Fed. Cas. No. 176; *Giles v. Ebsworth*, 10 Md. 333; *Atkins v. Byrnes*, 71 Ill. 326; *Snyder v. Kunkleman*, 3 Pen. & W. (Pa.) 487; *Price v. Limehouse*, 4 McCord (S. C.) 544; *Printemps v. Helfried*, 1 Nott & McC. (S. C.) 187.

And it has been held that the remedy of distress was not extinguished by the taking of a bond and warrant of attorney as collateral security for the rent, and the entry of judgment thereon. *Bates v. Nellis*, 5 Hill (N. Y.) 651.

⁴²⁰ *Giles v. Ebsworth*, 10 Md. 333; *Judge v. Fiske*, 2 Speers Law (S. C.) 436, 42 Am. Dec. 382; *Fife v. Irving*, 1

⁴²¹ *Palmer v. Bramley* [1895] 2 Q. B. 405, distinguishing *Davis v. Gyde*, 2 Adol. & E. 623, as having been decided on the pleadings. On the authority of this case it was held in *Colpitts v. McCullough*, 32 Nova Scotia, 502, that the right of distress was suspended by the giving of a note, while a contrary decision was rendered in *Simpson v. Howitt*, 39 U. C. Q. B. 610, on the authority of the earlier English case.

⁴²² *Warren v. Forney*, 13 Serg. & R. (Pa.) 52.

⁴²³ *Braithwaite v. Cooksey*, 1 H. Bl. 465; 2 Williams, Executors, 660.

the rule is different in the case of the death of a tenant at will, since in such case the tenancy is ended, and the statute of Anne, allowing a distress after the end of a tenancy,⁴²⁴ is not applicable because the person from whom the arrears are due is not in possession.⁴²⁵ The same view, that the death of a tenant for years does not affect the right of distress, has occasionally been asserted in this country.⁴²⁶ In other cases the right is asserted to exist, in case of the death of the tenant intestate, only after the appointment of an administrator, on the theory that the proceeding must be *against* some person.⁴²⁷ And in some jurisdiction all right to distrain after the tenant's death has been denied, on the various grounds that the local statute, fixing the priority of the respective classes of claims against a decedent's estate, might be nullified,⁴²⁸ that the local statute did not in terms authorize the proceeding against an administrator,⁴²⁹ and that the landlord had already, in the particular case, a statutory lien on the property sought to be levied on, and there was no danger of the removal of the property by the administrator.⁴³⁰

§ 330. Successive distresses.

A person cannot ordinarily distrain a second time for the same rent if he could have taken sufficient at first to satisfy his claim,⁴³¹ nor can he, after distraining, abandon that distress and again distrain for the same rent.⁴³² If, however, there is a mistake

⁴²⁴ See ante, § 326 e.

⁴²⁵ Turner v. Barnes, 2 Best & S. 435.

⁴²⁶ McLaughlin v. Riggs, 1 Cranch C. C. 410, Fed. Cas. No. 8,872; Keller v. Weber, 27 Md. 660. In Rauh v. Ritchie, 1 Ill. App. (1 Bradw.) 188, it was decided that the distress proceeding does not abate by the tenant's death, the statute providing that it shall be prosecuted in the same manner as an attachment proceeding.

⁴²⁷ Hughs' Adm'r v. Sebre, 9 Ky. (2 A. K. Marsh.) 227; Hovey v. Smith, 1 Barb. (N. Y.) 372; Brown v. Howell, 66 N. J. Law, 25, 48 Atl. 1020.

⁴²⁸ Hoskins v. Houston, 2 Clark

(Pa.) 489; Gandy v. Dickson, 3 Pa. Dist. R. 411; Salvo v. Schmidt, 2 Speers Law (S. C.) 512; Perkins v. Traynham, 3 Willson, Civ. Cas. Ct. App. (Tex.) § 78. But in Mickle's Adm'r v. Miles, 1 Grant's Cas. (Pa.) 320, it was held that the landlord could distrain on the property of a subtenant remaining on the premises after the tenant's death.

⁴²⁹ Dumes v. McLosky, 5 Ala. 239.

⁴³⁰ Lillard v. Noble, 159 Ill. 311, 42 N. E. 844.

⁴³¹ Anonymous, Moore, 7; Wallis v. Savill, 2 Lutw. 1532; Anonymous, Cro. Eliz. 13; Dawson v. Cropp, 1 C. B. 961.

⁴³² Bagge v. Mawby, 8 Exch. 641;

as to the value of the goods, and the landlord fairly supposed that the first levy was on sufficient goods to satisfy his claim, and afterwards finds them insufficient, he may, it has been decided, distrain for the balance,⁴³³ and he may, it seems, justify his second distress by showing that there were, at the time of the first distress, insufficient goods on which he could have distrained.⁴³⁴ There is a case to the effect that the landlord may include in a second distress, made for rent accruing subsequently to the first distress, arrears of rent which he might have included in the first distress, but which he failed to include therein.⁴³⁵

There may be a second distress for the same rent if the person distraining forbore to realize the first distress at the tenant's request.⁴³⁶ And so if a distress is withdrawn under an arrangement with the tenant for the payment of the rent, and the arrangement is not carried out, the landlord may again distrain.⁴³⁷ The landlord may also distrain again if he is prevented by the unlawful act of the tenant from realizing on the first distress, as when the tenant prevents a purchaser at the sale from taking away the article purchased.⁴³⁸ That the landlord or his bailiff has previously undertaken to distrain, but in such a way as to constitute his action not a distress but a trespass *ab initio*, does

Dawson v. Cropp, 1 C. B. 961; Smith v. Goodwin, 4 Barn. & Adol. 413; Harris v. Wier, 2 N. S. Dec. 466; Everett v. Neff, 28 Md. 176. Delaware Rev. Code 1893, p. 872, § 43, provides that a distress without a sale shall not satisfy the rent for which such distress was taken, but that a second distress shall not be taken for said rent.

⁴³³ Hutchins v. Chambers, 1 Burrow, 589; Bagge v. Mawby, 8 Exch. 641. The first of these cases is cited in Brooks v. Wilcox, 11 Grat. (Va.) 411, in favor of a decision that an officer may make a second levy under the distress warrant if he thinks the first insufficient. There are occasionally statutes authoriz-

ing a second distress under similar circumstances. See *Delaware*, Rev. Code 1893, p. 871, § 34; *New Jersey*, 1 Gen. St. p. 1212, § 21; *West Virginia*, Code 1906, § 4189.

⁴³⁴ Quinn v. Wallace, 6 Whart. (Pa.) 452; Dawson v. Cropp, 1 C. B. 961.

⁴³⁵ Gambrell v. Falmouth, 4 Adol. & E. 73.

⁴³⁶ Bagge v. Mawby, 8 Exch. 641; Hutchins v. Chambers, 1 Burrow, 589; Owens v. Wynne, 4 El. & Bl. 579; Harpelle v. Carroll, 27 Ont. 240.

⁴³⁷ Thwaites v. Wilding, 12 Q. B. Div. 4.

⁴³⁸ Lee v. Cooke, 2 Hurl. & N. 584, 3 Hurl. & N. 203.

not, it has been decided, preclude the landlord from subsequently distraining for the same rent.⁴³⁹

There is no objection, it appears, to a second distress for rent which has fallen due since the first distress, nor to a levy thereunder on the same goods as were before distrained.⁴⁴⁰

§ 331. Amount for which distress allowable.

It has in England and in one state been decided that a landlord is not liable in damages because he distrains for more rent than is due, that is, the making of a distress is not actionable because accompanied by a pretense that more is due than is really due.⁴⁴¹ And this has been decided to be so although the excessive claim was made maliciously.⁴⁴² These decisions necessarily involve the view that the distress is not invalid because of the excessive claim.⁴⁴³ If, however, in the endeavor to satisfy such excessive claim, more goods are seized than are reasonably sufficient to satisfy the sum actually due, the landlord is liable as in any other case of excessive distress.⁴⁴⁴ In several decisions in this country, a rule different from that above stated is asserted, to the effect that a distress for an excessive amount is actionable.⁴⁴⁵

In a few jurisdictions the statute allows a distress for such rent only as has fallen due within a specified period previous to the distress,⁴⁴⁶ and in one it is provided that a distress shall not, at one time, be made for more than one year's rent in arrear.⁴⁴⁷

⁴³⁹ Grunnell v. Welch [1905] 2 K. B. 650. Crowder v. Self, 2 Moody & R. 190. See post, § 346 d (7).

⁴⁴⁰ Wilton v. Wiffen, 8 L. J. K. B. (O. S.) 303. And see Hefford v. Alger, 1 Taunt. 218. ⁴⁴⁵ Harms v. Solem, 79 Ill. 460; McElroy v. Dice, 17 Pa. 163; Thomas v. Gibbons, 21 Pa. Super. Ct. 635; McKee v. Sims, 92 Tex. 51, 45 S. W. 564.

⁴⁴¹ Tancred v. Leyland, 16 Q. B. 669; Glynn v. Thomas, 11 Exch. 870; Hamilton v. Windolf, 36 Md. 301, 11 Am. Rep. 491; Bonaparte v. Thayer, 95 Md. 548, 52 Atl. 496. The distress is not for an excessive amount merely because the landlord fails to deduct claims available to the tenant by way of set-off. Spencer v. Clinefelter, 101 Pa. 219. See post, at note 450.

⁴⁴² Stevenson v. Newnham, 13 C. B. 285.

⁴⁴³ See Jean v. Spurrier, 35 Md. 110, 6 Am. Rep. 360.

⁴⁴⁴ Tancred v. Leyland, 16 Q. B. 669; Glynn v. Thomas, 11 Exch. 870; ⁴⁴⁶ See post, § 333 c.

⁴⁴⁷ New Jersey, 1 Gen. St. p. 1209, § 8.

The landlord has no right to distrain for interest on the rent,⁴⁴⁸ nor for an attorney's fee stipulated to be paid in case a proceeding to enforce payment is instituted.⁴⁴⁹

§ 332. Set-off and counterclaim.

At common law the fact that the tenant has a valid claim or claims against the landlord does not affect the right of the latter to distrain for the full amount of rent in arrear.⁴⁵⁰ Occasionally in this country the courts have undertaken to distinguish in this connection, as in actions for rent,⁴⁵¹ between a right of "set-off," arising from a distinct claim, and a right of "recoupment," arising from a breach by the landlord of a covenant of the lease, and have considered that the tenant is entitled to assert the latter right as against the right of distress in an action growing out of the distress.⁴⁵²

Even at common law a payment by the tenant of ground rent to a superior landlord, under threat of distress,⁴⁵³ or of a tax upon the land,⁴⁵⁴ could be asserted by him as a payment of the rent *pro tanto*,⁴⁵⁵ as against the right of distress.

Occasionally the statute expressly allows the tenant to assert a set-off in connection with distress proceedings.⁴⁵⁶ In Illinois this is done in a proceeding instituted by the filing of a copy of the distress warrant,⁴⁵⁷ and the landlord may, as against such

⁴⁴⁸ *Dennison v. Lee*, 6 Gill & J. 383; *Lansing v. Rattoone*, 6 Johns. (N. Y.) 43; *Vechte v. Brownell*, 8 Paige (N. Y.) 212; *Bantleon v. Smith*, 2 Bin. (Pa.) 146, 4 Am. Dec. 430.

⁴⁴⁹ *Jones v. Findley*, 84 Ga. 52, 10 S. E. 541; *Tanton v. Boomgaarden*, 89 Ill. App. 500.

⁴⁵⁰ *Willson v. Davenport*, 5 Car. & P. 531; *Laycock v. Tufnell*, 2 Chit. 531; *Townrow v. Benson*, 3 Madd. 203; *McMahan v. Tyson*, 23 Ga. 43 (semble); *Wolgamot v. Bruner*, 4 Har. & McH. (Md.) 89. See *Spencer v. Clinefelter*, 101 Pa. 219.

⁴⁵¹ See ante, § 296.

⁴⁵² *Lindley v. Miller*, 67 Ill. 244; *Lynch v. Baldwin*, 69 Ill. 210; *Nich-*

ols v. Dusenbury, 2 N. Y. (2 Comst.) 283 (semble); *Guthman v. Castleberry*, 48 Ga. 172; *Jones v. Findley*, 84 Ga. 52, 10 S. E. 541; *Johnston v. Patterson*, 86 Ga. 725, 13 S. E. 17.

⁴⁵³ See *Taylor v. Zamira*, 6 Taunt. 524; *Sapsford v. Fletcher*, 4 Term R. 511.

⁴⁵⁴ *Denby v. Moore*, 1 Barn. & Ald. 123; *Stubbs v. Parsons*, 3 Barn. & Ald. 516; *Franklin v. Carter*, 1 C. B. 750; *Saunderson v. Hanson*, 3 Car. & P. 314.

⁴⁵⁵ See ante, § 177 c.

⁴⁵⁶ Illinois, Hurd's Rev. St. 1905, c. 80, § 21. See *Kellogg v. Boehme*, 71 Ill. App. 643.

⁴⁵⁷ See post, at note 636.

claim of set-off, assert other demands on his part against the tenant.⁴⁵⁸ In Florida the statute⁴⁵⁹ provides that, in an action commenced by the filing of an affidavit for distress,⁴⁶⁰ the defendant may set up in defense any claim or demand which might be pleaded by way of set-off or recoupment in an ordinary action at law.

The Pennsylvania statute,⁴⁶¹ which applies only when the claim for rent is below one hundred dollars, authorizes ancillary proceedings before a justice of the peace to determine the amount of set-off to be allowed, without deciding anything as to the amount of rent due, the landlord then distraining for the difference between the amount adjudged and the rent claimed by him.⁴⁶² The landlord is, it has been decided, under no obligation to deduct from his claim for purposes of distress a claim for unliquidated damages asserted by the tenant but upon which no adjudication is obtained from the justice until after the distress.⁴⁶³

§ 333. Time for distress.

a. **Usually after rent due.** There can ordinarily be no distress for rent till it is in arrear,⁴⁶⁴ and since rent is not in arrear till the day named for payment has elapsed,⁴⁶⁵ distress cannot be made till the day after the rent day.⁴⁶⁶ If the rent is payable

⁴⁵⁸ *Cox v. Jordan*, 86 Ill. 560. It is immaterial that the claim asserted as a set-off accrued before the beginning of the rent period for which distress is made. *Kellogg v. Boehme*, 71 Ill. App. 643.

⁴⁵⁹ Florida Gen. St. 1906, § 2247.

⁴⁶⁰ See post, § 344.

⁴⁶¹ *Pepper & Lewis' Dig. Laws, "Land. & Ten."* § 14 (Act March 20, 1810, § 20).

⁴⁶² See *Hilke v. Eisenbeis*, 104 Pa. 514; *Fowler v. Eddy*, 110 Pa. 117, 1 Atl. 789.

⁴⁶³ *Spencer v. Clinefelter*, 101 Pa. 219.

⁴⁶⁴ *Dozier v. Robinson*, 82 Ala. 408, 3 So. 45; *James v. Benjamin*, 72 Ga. 185; *Harms v. Solem*, 79 Ill. 400;

First Nat. Bank of Joliet v. Adam, 138 Ill. 483, 28 N. E. 955; *Myers v. Mayfield*, 70 Ky. (7 Bush) 212; *Myers v. Smith*, 27 Md. 91; *Evans v. Herring*, 27 N. J. Law, 243; *Wells v. Hornish*, 3 Pen. & W. (Pa.) 30; *Fretton v. Karcher*, 77 Pa. 423; *O'Farrell v. Nance*, 2 Hill (S. C.) 484; *Bailey v. Wright*, 3 McCord (S. C.) 484; *Weir v. Brooks*, 17 Tex. 638; *Olinger v. McChesney*, 7 Leigh (Va.) 660.

⁴⁶⁵ See ante, § 172 h, at note 196.

⁴⁶⁶ Co. Litt. 47 b, Lord Hale's note, citing *Y. B. 21 Hen. 6*, 40; 2 Wms. Saund. 284, note (2) to *Poole v. Longueville*; *Dibble v. Bowater*, 2 El. & Bl. 564, 568; *Johnson v. Owens*, 2 Cranch C. C. 160, Fed. Cas. No. 7,402; *Fry v. Breckinridge*, 46 Ky. (7 B.

in advance, the landlord may distrain for it at the commencement of the rent period.⁴⁶⁷

A provision of the lease, giving a right to distrain for rent after a default in payment continued for a time named, has been decided not to affect the landlord's right, existing independently of any stipulation of the lease, to distrain immediately upon default,⁴⁶⁸ nor is such right of immediate distress affected by a condition for re-entry a certain period after default.⁴⁶⁹

b. Statutory distress for rent not due. By statute, occasionally, the landlord is entitled to distrain in case the tenant removes his goods from the premises,⁴⁷⁰ or is about to do so,⁴⁷¹ although the rent is, by the terms of the lease, not yet due, the effect being to make the rent, to the extent named in the statute, due and in arrear for the purpose of distress. In one state a statute authorizing distress when the tenant is about to remove his crops is apparently regarded as applicable when he is removing them.⁴⁷²

When the statute authorizes a distress on crops for rent not due in case of their removal from the premises, it is immaterial, it has been decided, that the tenant informs the landlord before-

Mon.) 31; *Gano v. Hart*, Hardin (Ky.) 304; *Weiss v. Jahn*, 37 N. J. Law, 93.

⁴⁶⁷ *Gilbert*, Rents, 25; *Buckley v. Taylor*, 2 Term R. 600; *Harrison v. Barry*, 7 Price, 690; *Lee v. Smith*, 9 Exch. 661; *Atkin v. Byrnes*, 71 Ill. 326; *Weiss v. Jahn*, 37 N. J. Law, 93; *Russell v. Doty*, 4 Cow. (N. Y.) 576; *Conway v. Starkweather*, 1 Denio (N. Y.) 113; *Anderson's Appeal*, 3 Pa. 218; *Collins' Appeal*, 35 Pa. 83; *Williams v. Howard*, 3 Munf. (Va.) 277.

⁴⁶⁸ *Hill v. Stocking*, 6 Hill (N. Y.) 277; *Van Rensselaer v. Jewett*, 2 N. Y. (2 Comst.) 141, 51 Am. Dec. 275.

⁴⁶⁹ *Smith v. Meanor*, 16 Serg. & R. (Pa.) 375, and see cases cited in next preceding note.

⁴⁷⁰ *Illinois*, Hurd's Rev. St. 1905, c. 80, §§ 33, 34 (on abandonment of premises or on removal of crops sub-

ject to lien); *Mississippi* Code 1906, § 2849 (on removal of effects, other than agricultural products, on which there is a lien). In *South Carolina* (Civ. Code 1902, § 2432) the landlord may distrain for the rent due up to the end of the month in case the tenant should "remove from the demised premises."

⁴⁷¹ *Georgia* Code 1895, § 3124 (see *Rosenstein v. Forester*, 57 Ga. 94; *Daniel v. Harris*, 84 Ga. 479, 10 S. E. 1013); *Illinois*, Hurd's Rev. St. 1905, c. 80, § 34 (threatened removal of crops); *Mississippi* Code 1906, § 2848; *Texas* Rev. St. 1895, § 3240.

⁴⁷² See *Tucker v. Hasson*, 32 Tex. 536; *Holt v. Miller* (Tex. Civ. App.) 32 S. W. 823; *Riggs v. Gray*, 31 Tex. Civ. App. 268, 72 S. W. 101. And compare the *Georgia* cases above referred to.

hand of his intention to remove,⁴⁷³ or that he has no intention to defraud the latter.⁴⁷⁴

A statute giving a right to distrain on crops for rent not due in case the tenant removes a portion of the crops, so as to endanger the claim for rent, has been construed to make the remedy available when a portion is fed to stock.⁴⁷⁵ But the feeding of produce to the stock employed in producing the crop, to a reasonable amount, has been regarded as not within the statute.⁴⁷⁶

A statute giving a right of distress on a sale or removal of the crops to such an extent as to endanger the landlord's lien has been held not to apply in the case of a mortgage of the crops, unaccompanied by removal.⁴⁷⁷

Apart from any statutory provision, it may be expressly stipulated that the landlord may distrain upon the removal or attempted removal of the tenant's goods.⁴⁷⁸

c. **Statutory limitation period.** In some jurisdictions there are express provisions as to the period previous to the distress for which arrears of rent may be claimed, that is, a period of limitation, running from the accrual of any installment, is named, within which distress for that installment must be made.⁴⁷⁹ The general statutes of limitation are not applicable to this proceeding.⁴⁸⁰

§ 334. Persons entitled to distrain.

a. **Persons having or not having the reversion.** At common

⁴⁷³ *Hare v. Stegall*, 60 Ill. 380.

⁴⁷⁴ *Morgan v. Tims*, 44 Tex. Civ. App. 308, 17 Tex. Ct. Rep. 111, 97 S. W. 832.

⁴⁷⁵ *Hopkins v. Wood*, 79 Ill. App. 484.

⁴⁷⁶ *Riggs v. Gray*, 31 Tex. Civ. App. 268, 72 S. W. 101.

⁴⁷⁷ *Hill v. Coats*, 109 Ill. App. 266.

⁴⁷⁸ See *Klein v. McFarland*, 5 Pa. Super. Ct. 110; *Dinner v. McAndrews*, 10 Pa. Dist. R. 221. In the case first cited it was held that a mere intention to remove was not an "attempted removal" within the meaning of the stipulation.

⁴⁷⁹ *Delaware Rev. Code* 1893, p.

872, §§ 44, 45 (two years, unless by executor or administrator or other person having no estate, and then six months); *Kentucky St.* 1903, § 3206 (six months); *New Jersey*, 1 Gen. St. p. 1209, § 8 (six months); *Virginia Code* 1904, § 2790 (five years); *West Virginia Code* 1906, § 3403 (one year). In England six years' arrears are recoverable. *St.* 3 & 4 Wm. 4, c. 27, § 1.

⁴⁸⁰ *Braithwaite v. Cooksey*, 1 H. Bl. 465; *Longwell v. Ridinger*, 1 Gill (Md.) 57; *Vechte v. Brownell*, 8 Paige (N. Y.) 212; *Blake v. De Lieseline*, 4 McCord (S. C.) 496.

law, as we have seen,⁴⁸¹ only the person or persons having the reversion can distrain, and the result of this rule in precluding a distress by one having the rent, when the reversion and rent have become separated, has been before discussed.⁴⁸² In some states the statute authorizes distress by the person entitled to the rent,⁴⁸³ the effect of which would seem to be to enable one who has a rent without any reversion to distrain.

The transferee of the reversion,⁴⁸⁴ including the heir⁴⁸⁵ or devisee,⁴⁸⁶ may distrain, as may an execution purchaser,⁴⁸⁷ or one to whom a "concurrent" lease is granted.⁴⁸⁸ In one state, however, it has been held that there is no right of distress in the transferee of the reversion until the tenant has attorned to him, although no attornment would be necessary for the purpose of an action for the rent.⁴⁸⁹

b. **Executors and administrators.** At common law, the executors or administrators of a deceased landlord had ordinarily no right to distrain for arrears of rent which had accrued during the life of their decedent, since the reversion was not in them but in the heir,⁴⁹⁰ the only exception being that of a tenant for years, who underlet and then died, the subreversion then passing to his personal representative.⁴⁹¹ By St. 32 Hen. 8, c. 37, § 1, the executors and administrators of tenants in fee, fee tail, or for term of life, of rent services, rent charges, rents seek and fee farm rents, were empowered to distrain, but this statute, applying in terms merely to rents in which the decedent had a freehold interest, has been held not to authorize a distress by the executor or administrator of a tenant in fee of land who demised the land for years reserving a rent,⁴⁹² and on this construction it would have but little practical efficacy in this country, even in

⁴⁸¹ See ante, § 326 a.

⁴⁸² See ante, § 326 d.

⁴⁸³ See ante, note 50.

⁴⁸⁴ Litt. §§ 228, 229; *Haskins v. Houston*, 2 Clark (Pa.) 277.

⁴⁸⁵ *McGillick v. McAllister*, 10 Ill. App. (10 Bradw.) 40.

⁴⁸⁶ *Lewis' Appeal*, 66 Pa. 312.

⁴⁸⁷ *Baker v. Burton*, 3 Houst. (Del.) 10.

⁴⁸⁸ See ante, at note 55.

⁴⁸⁹ *Stewart v. Gregg*, 42 S. C. 392, 20 S. E. 193.

⁴⁹⁰ Co. Litt. 62 a.

⁴⁹¹ *Williams' Executors* (9th Ed.) 796, citing *Wade v. Marshe*, 1 Rolle Abr., 672, s. c. *Latch*, 211.

⁴⁹² *Prescott v. Boucher*, 3 Barn. & Adol. 849; *Jones v. Jones*, 3 Barn. & Adol. 967. But the decision in *Longwell v. Ridinger*, 1 Gill (Md.) 57, seems to involve a different view.

jurisdictions where it might be recognized as in force.⁴⁹³ There are in some states statutes expressly giving the right of distress to the executors or administrators of a deceased landlord, or giving them the same remedies for the collection of rents as their decedent had.⁴⁹⁴

In most jurisdictions the executor or administrator of one having a reversion in fee has no right to distrain for rent falling due after the death of his decedent, since such rent belongs to the heir or devisee as incident to the reversion,⁴⁹⁵ and he is the one to distrain. And even an executor to whom a power to sell or to lease is given by the will of the deceased landlord is not, it seems, apart from statute, entitled to distrain for rent accruing in his own time, if he is not given the legal title.⁴⁹⁶ In some jurisdictions the executor or administrator is by statute given the possession and control of the real property for purposes of administrator,⁴⁹⁷ and there, presumably, he would have the right of distress for rent accruing after the death of his decedent.⁴⁹⁸

c. **Tenants pur autre vie.** By St. 32 Hen. 8, c. 37, § 4, a person having a rent for another's life is enabled to distrain for arrears of rent which became due during the life of the *cestui que*

⁴⁹³ It is in force in *Maryland* (Alexander's British Statutes, 356), and is re-enacted in *New Jersey* (1 Gen. St. p. 1212, § 20). In *South Carolina* it was decided not to be in force. *Bagwell v. Jamison*, 1 Cheves (S. C.) 249.

⁴⁹⁴ *Delaware* Rev. Code 1893, p. 867, § 9, p. 868 § 20; *Florida* Gen. St. 1906, § 2240; *Mississippi* Code 1906, §§ 2838, 2852, 2879; *Virginia* Code 1904, § 2788; *West Virginia* Code 1906, § 3401. In *England* St. 3 & 4 Wm. 4, c. 42, §§ 37, 38, authorize the executor of a deceased landlord, in the case of a demise for years or at will, to distrain for arrears of rent due the landlord in his lifetime.

⁴⁹⁵ See *Wright v. Williams*, 5 Cow. (N. Y.) 338; *Sherman v. Dutch*, 16 Ill. 283; *Lewis' Appeal*, 66 Pa. 312.

⁴⁹⁶ It is so decided in *Nicholl v. Cotter*, 5 U. C. Q. B. 564. But in *Reid v. Stoney*, 1 Strob. Law (S. C.) 182, it is asserted that an executor, although without legal title, if given power to manage the property, make leases and receive rents, may distrain. The fact that he has no reversionary interest is not referred to.

⁴⁹⁷ See 2 *Woerner, Administration*, § 337.

⁴⁹⁸ In *Carter v. Walters*, 63 Ga. 164, it is stated in the official syllabus that one of two executors may sue out a distress warrant, especially if the "contract of renting" was with him alone. In *Dean v. Donaldson*, 2 Ga. App. 462, 58 S. E. 679, a case of a distress by an executor, the rent was due under a lease made by the latter.

vie, and were unpaid at the latter's death. At common law there was no right of distress in such case, the tenant *pur autre vie* having no reversion after the death of the *cestui que vie*. This statute is in force in at least one state,⁴⁹⁹ and has been substantially re-enacted in two others.⁵⁰⁰ It does not seem that one having an estate *pur autre vie*, who makes a lease for years reserving rent, can be regarded as having a rent for another's life within the statute.

d. **Joint tenants and tenants in common.** One of two or more joint tenants may distrain for the whole rent, without any express authority from the other or others, in the absence at least of an express dissent by the latter. But he must justify the distress in his own right and as the bailiff of the others.⁵⁰¹ A surviving joint tenant may distrain for rent which fell due before the death of his cotenant.⁵⁰²

Tenants in common are entitled to distrain separately for their respective shares of the rent reserved upon a lease granted by all of them,⁵⁰³ or they may, it seems, join in one distress, though they must avow separately.⁵⁰⁴

If one tenant in common leases to his cotenant, he may distrain for the rent on any part of the land.⁵⁰⁵

e. **Mortgagors and mortgagees.** As before stated,⁵⁰⁶ upon the

⁴⁹⁹ See Alexander's British Statutes in force in Maryland.

⁵⁰⁰ *Delaware* Rev. Code 1893, p. 867, § 11, and *New Jersey* (1 Gen. St. p. 1212, § 20).

⁵⁰¹ *Pullen v. Palmer*, 3 Salk. 207; *Leigh v. Shepherd*, 2 Brod. & B. 465; *Robinson v. Hoffman*, 4 Bing. 562.

⁵⁰² 2 Rolle, Abr., 86; *Bradby, Distresses*, 39.

⁵⁰³ *Bradby, Distresses*, 41; *Harrison v. Barnby*, 5 Term R. 24; *Whitley v. Roberts*, McClell. & Y. 107.

⁵⁰⁴ *Bullen, Distress* (2d Ed.) 50; *Oldham & Foster, Distress* (2d Ed.) 50; *Pullen v. Palmer*, 3 Salk. 207; *Waring v. Slingluff*, 63 Md. 53. In *Dutcher v. Culver*, 24 Minn. 584, it is said that tenants in common must distrain severally, but that an error

in this respect is cured by the statute of 11 Geo. 2, c. 19, § 19, which was, however, intended for an entirely different class of illegal acts, those involved in the proceedings preliminary to sale. See post, § 346 d (8).

In *Reid v. Stoney*, 1 Strob. Law (S. C.) 182, it is said that one who is given by will an undivided interest in the land, the property not to be divided until a certain time, and the executor to manage it in the meanwhile, cannot distrain, this power being exclusively in the executor. See ante, note 396.

⁵⁰⁵ *Snelgar v. Henston*, Cro. Jac. 611; *Brennan v. Flood*, 4 Ir. C. L. 322.

⁵⁰⁶ See ante, § 146 e, at note 29.

making of a mortgage by a reversioner, transferring the legal title, the reversion is vested in the mortgagee, and he has the right to distrain for rent due by the tenant under the lease.⁵⁰⁷ It has been held, however, that the mortgagor, in such case, if allowed by the mortgagee to continue in receipt of the rent, may distrain, on the theory, apparently, that he is to be regarded as receiving the rent and making the distress as the bailiff of the mortgagee.⁵⁰⁸

In the case of a lease by a mortgagor, made after the mortgage, even though the legal title is in the mortgagee, the mortgagor has a right to distrain, it has been decided, on the theory that the tenant is estopped to deny his title.⁵⁰⁹ The mortgagee has no right to distrain for rent accruing under such a lease, since he has not the reversion thereon,⁵¹⁰ but if the tenant consents to hold under him, paying him rent, a new tenancy is created, it seems, under which he may distrain.

f. Receivers. It has in England been decided that a receiver may distrain for rent without first obtaining an order of court for the purpose.⁵¹¹ But if there is a doubt as to the person entitled to the rent, the receiver should apply for an order, since he must distrain in the name of the person so entitled,⁵¹² unless the tenant has attorned to the receiver and so created a tenancy as between them,⁵¹³ in which case the receiver should distrain in his own name.⁵¹⁴

g. Agents. At common law the distress could be made by the landlord by the hands of his authorized agent or bailiff, and this may still be done in some jurisdictions. The question of the right to employ such an agent to seize and sell the property, and

⁵⁰⁷ *Moss v. Gallimore*, 1 Doug. 279; *Johns*. (N. Y.) 289; *Souders v. Van Rogers v. Humphreys*, 4 Adol. & E. Sickie, 8 N. J. Law (3 Halst.) 313. 299; *Souders v. Van Sickie*, 8 N. J. See ante, § 73 a (1).
Law (3 Halst.) 313.

⁵⁰⁸ *Trent v. Hunt*, 9 Exch. 14; *Dancer v. Hastings*, 4 Bing. 2; *Bennett v. Robins*, 5 Car. & P. 379.
⁵⁰⁹ *Ryce v. Strousberg*, 54 Law T. (N. S.) 133; *Snell v. Finch*, 13 C. B. (N. S.) 651.
⁵¹⁰ *Hughes v. Hughes*, 3 Bro. C. C. 87, 1 Ves. Jr. 161.

⁵⁰⁹ *Alchorne v. Gomme*, 2 Bing. 54. See ante, § 78.
⁵¹³ *Evans v. Mathias*, 7 El. & Bl. 590; *White v. Smale*, 22 Beav. 72.

⁵¹⁰ *Evans v. Elliot*, 9 Adol. & E. 342; *Rogers v. Humphreys*, 4 Adol. & E. 299; *McKircher v. Hawley*, 16
⁵¹⁴ *Jolly v. Arbuthnot*, 4 De Gex & J. 224.

the proper mode of conferring authority on him for this purpose, as well as the various statutory requirements in regard to the persons who may make the seizure in behalf of the landlord, are elsewhere considered, as pertaining to the mode of proceeding.⁵¹⁵ Apart from those questions, a question might arise as to the power of an agent to make the preliminary affidavit, necessary in some states for the issuance of a warrant, and this is ordinarily settled by an express provision of the statute that such preliminary affidavit or application may be made by either the landlord or his agent.⁵¹⁶ But the affidavit should, in such case, it has been held, aver that the indebtedness is to the principal, and the warrant must issue in the latter's name.⁵¹⁷

The question whether at common law an agent of the landlord could himself qualify another to make the distress seems not to have been discussed in any English case, presumably because, even though one made a distress on behalf of the landlord without any previous authority, his acts in so doing could be ratified by the latter.⁵¹⁸ It has occasionally been decided in this country that an agent of the landlord may sign a distress warrant in his own name, authorizing another to distrain.⁵¹⁹

§ 335. Preliminaries to levy.

a. **Demand for rent.** A demand for rent is not ordinarily necessary in order to render it due and payable,⁵²⁰ and a distress may usually be made without a previous demand.⁵²¹ Under some

⁵¹⁵ See post, § 336.

⁵¹⁶ *Florida* Gen. St. 1906, § 2240; *Georgia* Code 1895, § 4818; *Illinois*, Hurd's Rev. St. 1905, p. 80, § 16; *Kentucky* St. 1903, § 2301; *Mississippi* Code 1906, § 2839; *Texas* Rev. St. 1895, art. 3241; *Virginia* Code 1904, § 2790; *West Virginia* Code 1906, § 3403.

⁵¹⁷ *Maxwell v. Collier*, 115 Ga. 304, 41 S. E. 620; *Stephens v. Hooks*, 122 Ga. 423, 50 S. E. 119. See *Parker v. Stovall*, 31 Miss. 446, applying a statute to that effect.

⁵¹⁸ See post, at note 479.

⁵¹⁹ *Jean v. Spurrier*, 35 Md. 110;

Giles v. Ebsworth, 10 Md. 333; *Bigelow v. Judson*, 19 Wend. (N. Y.) 229.

⁵²⁰ See ante, § 296.

⁵²¹ *Bac. Abr.*, Rent (I); *Horn v. Lewin*, 2 Salk. 583; *Gillingham v. Gwyer*, 16 Law T. (N. S.) 640; *Buffington v. Hilley*, 55 Ga. 655; *McCray v. Samuel*, 65 Ga. 739; *Henley v. Brockman*, 124 Ga. 1059, 53 S. E. 672; *Offutt v. Trail*, 4 Har. & J. (Md.) 20; *Royer v. Ake*, 3 Pen. & W. (Pa.) 461; *Weber v. Vernon*, 2 Pen. (Del.) 359, 45 Atl. 537; *Keeley Brew. Co. v. Mason*, 102 Ill. App. 381. Compare *Lathrop & Co. v. Clewis*, 63 Ga. 282.

circumstances, however, a demand is necessary, and such, it is said, is the case when the rent is payable at a place off the premises, and the lease expressly gives a right of distress after a previous demand at such place,⁵²² or when the particular form of a rent reserved in kind is made dependent upon the expressed desires of the landlord.⁵²³ So a demand is necessary when the landlord is by the lease given a right to demand an increased rent in a certain contingency,⁵²⁴ or the rent is payable quarterly, "or half quarterly if required."⁵²⁵ If the rent is expressly made payable in advance "if required," the landlord can distrain only for such rent as he may have demanded.⁵²⁶ Such a clause has been construed as making the rent due and payable in advance, but as precluding a resort to a distress or other remedy for its collection until after a demand, and as consequently allowing a demand for the purpose of distress either upon the first day of the rent period or on a subsequent day,⁵²⁷ and as allowing a distraint immediately on demand, if the landlord's rights are in peril.⁵²⁸

b. **Affidavit.** There are in several states provisions for the filing of an affidavit by the landlord, or on his behalf,⁵²⁹ as a prerequisite to the issuance by a justice of the statutory warrant authorizing the distress.⁵³⁰ In one state such an affidavit is re-

⁵²² Bac. Abr., Rent (I). See *Remsen v. Conklin*, 18 Johns. (N. Y.) 447. payable in money, cotton or other agricultural product or thing); *Georgia Code* 1895, § 4818 (may obtain distress warrant from justice

⁵²³ *Helser v. Pott*, 3 Pa. 179.

⁵²⁴ *Mallam v. Arden*, 10 Bing. at p. 300, per Alderson, J.

⁵²⁵ *Mallam v. Arden*, 10 Bing. 299.

⁵²⁶ *Clarke v. Holford*, 2 Car. & K. 540.

⁵²⁷ *Witty v. Williams*, 12 Wkly. Rep. 755; 10 Law T. (N. S.) 457; *London & Westminster Loan & Discount Co. v. London & N. W. R. Co.* [1893] 2 Q. B. 49.

⁵²⁸ *London & Westminster Loan & Discount Co. v. London & N. W. R. Co.* [1893] 2 Q. B. 49.

⁵²⁹ See ante, note 416.

⁵³⁰ *Florida Gen. St.* 1906, § 2240 (affidavit stating amount of rent or advances due, and whether they are

on oath in writing); *Kentucky St.* 1903, § 2301 (affidavit showing the amount of rent due and in arrear); *Mississippi Code* 1906, § 2839 (complaint on oath before justice, averring facts entitling to remedy, and bond); *Virginia Code* 1904, § 2790 (affidavit that amount specified is, he verily believes, due to claimant for rent reserved upon contract); *West Virginia Code* 1906, § 3403 (ditto).

quired as a prerequisite to a levy by the landlord's bailiff.⁵³¹

The affidavit must ordinarily show that rent is due, or that other circumstances exist which, under the statute, justify a distress.⁵³² It has been held, however, that a statute requiring it to be shown by affidavit that the demand is for rent does not absolutely require that the justification for the distress appear in the affidavit.⁵³³ A statement that the tenant is "indebted" for rent is equivalent, it has been held, to a statement that rent is due.⁵³⁴ If the affidavit shows that the claim is due, it need not state the time at which it became due, unless the statute so requires.⁵³⁵ If the affidavit is sufficient to support a distress as for rent due, allegations as to the removal of property, necessary to support a distress before rent is due, may be regarded as surplusage.⁵³⁶

A requirement that the affidavit shall state that it is not for the purpose of "vexing or harassing" has been held to be satisfied by a statement that it is not for the purpose of injuring or harassing.⁵³⁷

Occasionally the statute contains a specific requirement that the amount of the indebtedness be stated,⁵³⁸ and the same effect

⁵³¹ Maryland Code Pub. Gen. Laws 1904, art 53, § 8 (oath before justice that tenant is justly and bona fide indebted in sum named, if rent is payable in money, or that he is justly and bona fide entitled to quantity or proportion of produce claimed).

The New York statute formerly in force required that the "time for which" the rent accrued be stated, and this involved the necessity of a showing as to the commencement as well as the end of the rent period. *Smith v. Fyler*, 2 Hill (N. Y.) 648; *Marquissee v. Ormston*, 15 Wend. (N. Y.) 368; *Jenkins v. Pell*, 17 Wend. (N. Y.) 417, 20 Wend. (N. Y.) 450.

⁵³² See *Scott v. Russell*, 72 Ga. 35.

⁵³³ *Weir v. Brooks*, 17 Tex. 638. But if the affidavit does state the grounds for the distress, it cannot be assumed that another ground was relied on. *Jackson v. Corley*, 30 Tex. Civ. App. 417, 70 S. W. 570.

⁵³⁶ *Wright v. Hawkins*, 68 Ga. 828; *Hollingsworth v. Willis*, 64 Miss. 152, 8 So. 170; *Murray v. Blanchard*, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 479.

⁵³⁴ *Wright v. Hawkins*, 68 Ga. 828; *Hollingsworth v. Willis*, 64 Miss. 152, 8 So. 170 (statement that tenant "indebted for rent in arrear" shows that rent is "due and in arrear"); *Fulcher v. West* (Tex. Civ. App.) 51 S. W. 342.

⁵³⁷ *Biesenbach v. Key*, 63 Tex. 79.

⁵³⁸ *Florida Gen. St.* 1906, § 2240; *Maryland, Code Pub. Gen. Laws* 1904, art. 53, § 8; *Virginia Code* 1904, § 2790; *West Virginia Code* 1906, § 3403.

⁵³⁵ *Driver v. Maxwell*, 56 Ga. 11.

has been given to a requirement that the affidavit state that the amount claimed is for rent and advances,⁵³⁹ as well as to a provision that a warrant shall issue for the amount claimed by the affidavit to be due.⁵⁴⁰ Under the latter statute it has been decided that if the rent is payable in specific articles of fluctuating value, it is sufficient to aver the supposed value of such articles.⁵⁴¹

The affidavit, it has been held, need not describe the premises in reference to which the tenancy exists.⁵⁴²

If the affidavit is required to be made before a justice of the peace of the county in which the premises are located, the name of such county must be correctly stated.⁵⁴³ When the statute authorizes the grant, upon affidavit, of a distress warrant, by a justice within the county where the debtor resides or his property may be found, either the affidavit or the warrant must show such jurisdictional fact, and a description of the premises as being in that county is not sufficient.⁵⁴⁴

When the statute provides for an affidavit by the landlord or person to whom rent is due, an agent cannot make it.⁵⁴⁵ Ordinarily, however, the statute provides that the affidavit may be made by an agent or attorney.⁵⁴⁶ The affidavit should, it seems, show that the person making it is the agent or attorney of the landlord or person entitled to distrain,⁵⁴⁷ and should not be made on information or belief merely.⁵⁴⁸ One of two administrators may, it has been held, make the affidavit on behalf of both.⁵⁴⁹ If the affidavit is made by an assignee of the lien for rent, by rea-

⁵³⁹ *Jones v. Walker*, 44 Tex. 200.

⁵⁴³ *Pate v. Shannon*, 69 Miss. 372,

⁵⁴⁰ *Cornwell v. Leverette*, 127 Ga. 163, 56 S. E. 300; *Fountain v. Whitehead*, 119 Ga. 241, 46 S. E. 104. An affidavit of indebtedness in a certain sum for rent is supported by evidence that cotton worth that sum is due as rent. *Renew v. Redding*, 56 Ga. 311.

13 So. 729.

⁵⁴⁴ *Cohen v. Candler*, 88 Ga. 207, 14 S. E. 193.

⁵⁴⁵ *Howard v. Dill & Co.*, 7 Ga. 52; *Mitchell v. Franklin*, 26 Ky. (3 J. J. Marsh.) 477.

⁵⁴⁶ See ante, note 416.

⁵⁴⁷ *Bryan v. Teal*, 115 Ga. 740, 42 S. E. 34.

⁵⁴¹ *Dawson v. Pennaman*, 65 Ga. 698.

⁵⁴⁸ *Drake v. Dawson*, 66 Ga. 174. See *Bussing v. Bushnell*, 6 Hill (N. Y.) 382.

⁵⁴² *Scruggs v. Gibson*, 40 Ga. 511. It is there suggested that perhaps this should be done if the affidavit is based on the removal of the tenant's goods.

⁵⁴⁹ *Scruggs v. Gibson*, 40 Ga. 511.

son of a statute giving such assignee a right to distrain, it must, it has been held, set forth the lease and the assignment.⁵⁵⁰

In one state at least the statute as to amendments authorizes amendments of the affidavit to the same extent as in the case of a complaint in a civil action,⁵⁵¹ and in one a change in the Christian name of the tenant was allowed apparently without reference to any statute.⁵⁵² Elsewhere, however, it was decided that, since a distress was not a judicial proceeding, it not being returnable to any court in a pending suit, and since the making of the affidavit was a condition precedent to a valid levy, the court could not, upon a subsequent issue as to the validity of the levy, allow an amendment of the affidavit.⁵⁵³

c. **Bond.** There are in two states statutory provisions requiring the landlord, before distraining, to enter into a bond conditioned to pay such damages as may be sustained by the tenant by reason of the wrongful "suing out" of the distress.⁵⁵⁴ A statute requiring a bond to pay damages sustained in case the warrant is "illegally and unjustly sued out" has been held not to be satisfied by a bond conditioned to pay damages, in case the warrant is "illegally sued out."⁵⁵⁵ Such a statute was construed to cover a case in which the distress was for an amount in excess of that actually due.⁵⁵⁶

It has been decided that the claim on the bond may be asserted by "reconvention."⁵⁵⁷

d. **Warrant.** At common law a distress warrant is merely an authority given by the landlord to another to act as his bailiff in making the distress, and the purpose thereof is merely to protect the bailiff, the absence of authority in writing not affecting

⁵⁵⁰ *Lathrop & Co. v. Clewis*, 63 Ga. 282.

⁵⁵¹ Georgia Code 1895, § 5122. See *Bryant v. Mercier*, 82 Ga. 409, 9 S. E. 166; *Reese v. Walker*, 89 Ga. 72, 14 S. E. 888; *Freeny v. Hall*, 93 Ga. 706, 21 S. E. 163; *Westbrook v. Harrison*, 99 Ga. 660, 26 S. E. 68; *Collins v. Taylor*, 128 Ga. 789, 53 S. E. 446.

⁵⁵² *Jackson v. Corley*, 30 Tex. Civ. App. 417, 70 S. W. 570.

⁵⁵³ *Pate v. Shannon*, 69 Miss. 372, 13 So. 729.

⁵⁵⁴ Mississippi Code 1906, § 2839; *Texas Rev. St.* 1895, art. 3241. The former statute requires the bond to cover costs, while the latter does not (see *Kelley v. King*, 18 Tex. Civ. App. 360, 44 S. W. 915).

⁵⁵⁵ *Riggins v. Ford*, 1 Willson, Civ. Cas. Ct. App. (Tex.) § 1286.

⁵⁵⁶ *McKee v. Sims*, 92 Tex. 51, 45 S. W. 564.

⁵⁵⁷ *Slay v. Milton*, 64 Tex. 421.

the validity of the distress. In several of the states, however, a warrant to distrain is, by force of statute, an integral part of the distress proceeding. In two of these states a warrant by the landlord to a bailiff seems to be required as a prerequisite to a valid distress, the effect being to preclude a levy by the landlord himself;⁵⁵⁸ while in the others the levy can be made only under a warrant issued by a justice upon the affidavit of the landlord or his agent.⁵⁵⁹

The distress, it has been held, cannot be sustained unless the warrant, or the affidavit on which it was issued, shows that the tenant resides, or has property, in the county of the justice who issued it, the justice having, under the statute, jurisdiction to issue the warrant in such case only.⁵⁶⁰ The warrant need not set out the ground of its issue, it has been decided in the same state, if this appears from the affidavit.⁵⁶¹

Where the property on the premises is alone subject to distress, a warrant issued by a justice should, it would seem, show the location of the premises, though perhaps the same particularity of description as in the case of a conveyance is unnecessary.⁵⁶² If all the property of the tenant, although not on the premises, is subject under the statute, there is, apparently, no necessity of naming the premises in the warrant.⁵⁶³ That the warrant directs a levy on the property of the subtenant found in the county, although the statute authorizes a levy only on such of his property as may be on the premises, has been held to be immaterial, if the levy is made only on the latter.⁵⁶⁴

The warrant should state the amount of the landlord's claim, since otherwise the bailiff or officer making the levy will not

⁵⁵⁸ In Illinois this seems to be a result of the requirement (*Huras* Ky (1 B. Mon.) 300, seems to be to the effect that his jurisdiction will be presumed, the contrary not appearing. But *Asbell v. Tipton*, 40

of "the distress warrant" be filed with a justice of the peace. In Maryland the statute was so construed in *Giles v. Ebsworth*, 10 Md. 333.

⁵⁵⁹ *Florida* Gen. St. 1906, § 2241; *Georgia* Code 1895, § 4818, *Mississippi*

Code 1906, § 2841; *Texas* Rev. St. 1895, art. 3242; *Virginia* Code 1904, § 2790; *West Virginia* Code 1906, § 2403.

⁵⁶⁰ *Cohen v. Candler*, 88 Ga. 207, 14

S. E. 193. But *Asbell v. Tipton*, 40 Ky (1 B. Mon.) 300, seems to be to the effect that his jurisdiction will be presumed, the contrary not appearing.

⁵⁶¹ *Callaway v. Phillips*, 95 Ga. 801, 22 S. E. 704.

⁵⁶² See *Central Land Co. v. Calhoun*, 16 W. Va. 361.

⁵⁶³ *Alwood v. Mansfield*, 33 Ill. 452.

⁵⁶⁴ *Hutsell v. Deposit Bank of Paris*, 102 Ky. 410, 43 S. W. 469, 39

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know the amount of property to be distrained.⁵⁶⁵ It need not state the rent period for which the claim is made.⁵⁶⁶ In one state the statute provides that an account showing the amount of rent accrued, with any credits thereon, shall be annexed to the warrant.⁵⁶⁷

There is a decision to the effect that where rent is payable in an article of produce of fluctuating value, it is sufficient to state in the warrant the amount of such article due, and that it is supposed to be of a particular value.⁵⁶⁸

When the statute allows the amendment of the affidavit by leave of court, in order to uphold the distress, the warrant may, it has been held, be amended so as to conform thereto.⁵⁶⁹ In one state, where the statute provides that the warrant, after levy, being filed in court, shall stand as a declaration, it is also provided that it shall be amendable as other declarations provided that no such amendment shall in any way affect any liabilities accrued in the execution of the warrant.⁵⁷⁰

It has in one state been decided that a distress warrant is a writ within a constitutional provision requiring writs to run in the name of the state;⁵⁷¹ while in another it is said that such a warrant "should run in the name of" the landlord.⁵⁷²

⁵⁶⁵ In *Craig v. Merime*, 16 Ill. App. (16 Bradw.) 214, it was decided that a warrant which in terms authorized distraint for the "amount of \$150 damages due me for the nonperformance of the conditions of the lease" was sufficient, it appearing that there was that sum due for arrears of rent.

⁵⁶⁶ *Mitchell v. Franklin*, 26 Ky. (3 J. J. Marsh.) 477.

⁵⁶⁷ Maryland, Code Pub. Gen. Laws 1904, art. 53, § 9. See *Cross v. Tome*, 14 Md. 247. The account must name a debtor. *Joynes v. Wartman*, 5 Md. 195. Compare *Burnett v. Bealmear*, 79 Md. 36, 28 Atl. 898.

⁵⁶⁸ *Tucker v. Cox*, 65 Ga. 700. In Illinois it was decided that though the warrant was irregular in directing the sheriff to take the agreed share of the grain, yet, if the ten-

ant acquiesced in the taking of such share, the landlord could not thereafter change the warrant and claim the value of the rent in money. *Agney v. Strohecker*, 21 Ill. App. 625. Florida Gen. St. 1906, § 2241, provides that the warrant shall command the officer to collect the amount claimed in the affidavit, "or the value thereof."

⁵⁶⁹ *Westbrook v. Harrison*, 99 Ga. 660, 26 S. E. 68; *Jones v. Eubanks*, 86 Ga. 616, 12 S. E. 1065.

⁵⁷⁰ Illinois, *Hurd's Rev. St.* 1905, c. 80, § 20.

⁵⁷¹ *Beach v. O'Riley*, 14 W. Va. 55.

⁵⁷² *Maxwell v. Collier*, 115 Ga. 304, 41 S. E. 620. Here the question was whether the warrant could "run in the name of" the agent of the landlord who applied for the warrant.

The issuance of the warrant by a justice of the peace is presumably, in all the states in which it is required, a merely ministerial duty on his part. He has no power to determine whether any rent is due,⁵⁷³ and has no discretion as to issuing the warrant. It has been decided that this duty is so purely ministerial that his near relationship to the landlord does not preclude his performance thereof.⁵⁷⁴

In some states the statute requires the warrant to be made returnable to the justice or to a court.⁵⁷⁵ In the absence of such a statutory requirement, a distress warrant is not to be regarded as judicial process to be made returnable to some court or judicial officer.⁵⁷⁶

§ 336. Person to make levy.

At common law, the levy of the distress may be made by the landlord himself, or by his bailiff.

One employed as bailiff for this purpose should be authorized to act by a "warrant" signed by the landlord, or, it seems, the landlord's agent,⁵⁷⁷ but written authority is not essential to the validity of the distress.⁵⁷⁸ The landlord may ratify a distress made in his name without any precedent authority.⁵⁷⁹ And a distress made after the death of the landlord, but by his direction, may, it has been held, be adopted by the executor, the latter having by statute the right to distrain.⁵⁸⁰

⁵⁷³ *Commonwealth v. Colgan*, 44 (Del.) 28; *Bigelow v. Judson*, 19 Ky. (5 B. Mon.) 485. That he cannot give judgment for the rent, see *Reigart*, 4 Watts (Pa.) 98; *Jones v. Richardson v. Vice*, 4 Blackf. (Ind.) 13.

⁵⁷⁴ *Thornton v. Wilson*, 55 Ga. 607.

⁵⁷⁵ *Florida Rev. Laws* 1906, §§ 2241, 2243 (semble); *Georgia Code* 1895, § 4819; *Texas Rev. St.* 1895, §§ 3240, 3242; *Virginia Code* 1904, § 2794 a.

⁵⁷⁶ *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998.

⁵⁷⁷ See ante, at note 419.

⁵⁷⁸ *Bro. Abr.*, Bailie pl. 2; 1 Bac. Abr., Bailiff (C); Anonymous, 1 Salk. 191; *Manby v. Long*, 3 Lev. 107; *Lambson v. Matthew*, 5 Har.

Ct. 308; *Furbush v. Chappell*, 105 Pa. 187.

⁵⁷⁹ *Vin. Abr.*, Bailiff (B); *Trevillian v. Pine*, 11 Mod. 112; Anonymous, Godb. 109; *Whitehead v. Taylor*, 10 Adol. & E. 210; *Jean v. Spurrier*, 35 Md. 110. But aliter if the distress was not made in the landlord's name. Anonymous, Godb. 109; *Wilson v. Tumman*, 6 Man. & G. 236; *Jean v. Spurrier*, 35 Md. 110.

⁵⁸⁰ *Whitehead v. Taylor*, 10 Adol. & E. 210. But not, it has been de-

A statutory requirement of a warrant to distrain has been regarded as precluding a distress by the landlord himself.⁵⁸¹

In a number of jurisdictions the statute requires the levy to be made by a sheriff, a constable, or other officer.⁵⁸² Though the statute names the officer who is to levy the distress under the warrant, in making the levy he acts, it has been decided, merely as the landlord's bailiff and not as an officer of the law,⁵⁸³ and this is *a fortiori* the case when an officer is named as bailiff without any statutory requirement to that effect.⁵⁸⁴ But it has been decided that a warrant directed by the landlord to the sheriff may be executed by his deputy.⁵⁸⁵

It has been decided that, though one levies a distress in his own name, and not in that of the landlord to whom the rent is due, he may justify as the bailiff of the latter.⁵⁸⁶

The landlord, in authorizing another to distrain on his behalf, impliedly agrees to indemnify him against any liability on account of acts properly done by the latter in the exercise of his authority.⁵⁸⁷ There is ordinarily no right of indemnity in favor of the bailiff on account of acts wrongfully committed by him in the course of the distress.⁵⁸⁸

If the bailiff commits some act which renders his employer liable to the tenant, the employer, on paying the tenant, is entitled to recover over against the bailiff.⁵⁸⁹ So a bailiff may be liable to his

cided, in a jurisdiction where an executor has no authority to distrain. *Bagwell v. Jamison*, Cheves (S. C.) 249; *Salvo v. Schmidt*, 2 Speers Law (S. C.) 512.

⁵⁸¹ *Giles v. Ebsworth*, 10 Md. 333.

⁵⁸² *Florida* Gen. St. 1906, § 2241; *Georgia* Code 1895, § 4818; *Kentucky* St. 1903, § 2301; *Mississippi* Code 1906, § 2845; *Texas* Rev. St. 1895, arts. 3242, 3243; *Virginia* Code 1904, § 2790; *West Virginia* Code 1906, § 3403.

⁵⁸³ *Webber v. Shearman*, 6 Hill (N. Y.) 29; *Moulton v. Norton*, 5 Barb. (N. Y.) 286.

⁵⁸⁴ *Murphy v. Chase*, 103 Pa. 260.

⁵⁸⁵ *Giles v. Ebsworth*, 10 Md. 333; *Myers v. Smith*, 27 Md. 91.

⁵⁸⁶ *Trent v. Hunt*, 9 Exch. 14; *Wootley v. Gregory*, 2 Younge & J. 536. But see *Swearingen v. Ma-gruder*, 4 Har. & McH. (Md.) 347.

⁵⁸⁷ *Lord v. Brown*, 5 Denio (N. Y.) 345 (want of right to distrain). See *Fawcett, Landl. & Ten.* (3rd Ed.) 232; *Draper v. Thompson*, 4 Car. & P. 84, per Tindal, C. J.; *Cox v. Bailey*, 6 Man. & G. 193.

⁵⁸⁸ See *Ibbet v. De La Salle*, 6 Hurl. & N. 233; *Toplis v. Grane*, 5 Bing. N. C. 636.

⁵⁸⁹ *Megson v. Mapleton*, 49 Law T. (N. S.) 744.

employer for the value of goods distrained and lost by him through his failure to exercise ordinary care.⁵⁹⁰

§ 337. Mode of levy.

a. **Entry.** In order that one may enter on the leased premises for the purpose of levying a distress, he may open an outer door in the way in which other persons ordinarily open it when it is left so as to be accessible to all having occasion to go on the premises, as, for instance, by turning a key in the lock, lifting a latch, or drawing back a bolt,⁵⁹¹ and he may enter by a door already open.⁵⁹² But an outer door cannot be broken open,⁵⁹³ whether it be the door of a residence or of a stable or other building.⁵⁹⁴ By the outer door in this connection is to be understood the door of a building, and it is immaterial that the landlord or his representative has, without exerting force, obtained access to the yard enclosing the building.⁵⁹⁵ It has been held to be likewise immaterial that the tenant is no longer in possession of the premises.⁵⁹⁶ The landlord or his representative may, however, enter by a door forcibly broken open by another without the former's connivance.⁵⁹⁷ If the outer door is open, the person seeking to distrain may break open an inner door.⁵⁹⁸

It has been held that if the landlord forcibly breaks open the outer door, and thereafter sells the goods distrained, he will be

⁵⁹⁰ White v. Heywood, 5 Times Dent v. Hancock, 5 Gill (Md.) 120; Law R. 115. Cate v. Schaum, 51 Md. 299. This

⁵⁹¹ Ryan v. Shilcock, 7 Exch. 72; Crabtree v. Robinson, 15 Q. B. Div. 314; Dent v. Hancock, 5 Gill (Md.) 120; Cate v. Schaum, 51 Md. 299. has been changed by statute in *Virginia* (Code 1904, § 2793) and *West Virginia* (Code 1906, § 3406), as regards an entry in the daytime.

But he cannot, it has been decided, pick a lock, or unlock it with a key brought by him for the purpose. ⁵⁹⁴ Brown v. Glenn, 16 Q. B. 254. ⁵⁹⁵ American Must Co. v. Hendry, 62 L. J. Q. B. 388.

Murray v. Vaughn, 4 Pa. Dist. R. 631. ⁵⁹⁶ Dent v. Hancock, 5 Gill (Md.) 120.

⁵⁹² 1 Rolle's Abr., 671 (m), pl. 1, 26 Semayne's Case, 5 Coke, 91; Long v. Clark [1894] 1 Q. B. 119. ⁵⁹⁷ Dent v. Hancock, 5 Gill (Md.) 120.

⁵⁹³ Semayne's Case, 5 Coke, 91; 1 Smith's Leading Cases; Hancock v. Austin, 14 C. B. (N. S.) 634; Crabtree v. Robinson, 15 Q. B. Div. 312; ⁵⁹⁸ Browning v. Dann, Bulles' N. P. 81; 2 Wms. Saund. 284, note 2, Poole v. Longevill; Anonymous, Comb. 17.

liable as a trespasser for the full value of the goods, though the proceeds are applied in satisfaction of the rent.⁵⁹⁹

The landlord or his representative cannot break open a gate, or break down a wall or fence,⁶⁰⁰ but he may climb over a wall or a fence.⁶⁰¹

The landlord or his representative may enter, it has been said, by an open window,⁶⁰² or he may open further a window already open.⁶⁰³ But it is illegal to open a window, whether the window is fastened⁶⁰⁴ or merely closed without being fastened.⁶⁰⁵ An entry by an open skylight has been held to be lawful.⁶⁰⁶

If one who has made a lawful entry is forcibly turned out of possession,⁶⁰⁷ or if, having temporarily left the premises, he is kept out of possession,⁶⁰⁸ he may break open an outer door in order to re-enter. It has been decided that a delay of six days will deprive the landlord of this right of forcible re-entry.⁶⁰⁹ One who has merely gotten his foot and arm, or some article, between the door and the door post, so as to prevent it from being closed, has not such possession that he may break open a door in order to gain admission.⁶¹⁰

One who has lawfully entered may, it seems, break open the outer door in order to remove the goods distrained.⁶¹¹

The statute 11 Geo. 2, c. 19, § 1, authorizing the landlord to follow goods removed from the premises for the purpose of dis-

⁵⁹⁹ *Attack v. Bramwell*, 3 Best & S. 520.

⁶⁰⁰ *Co. Litt.* 161 a; *Rich v. Woolley*, 7 Bing. 651; *Cate v. Schaum*, 51 Md. 299. But he may, it seems, if he is a tenant in common of the wall. See *Gould v. Bradstock*, 4 Taunt. 562.

⁶⁰¹ *Long v. Clarke* [1894] 1 Q. B. 119, approving *Eldridge v. Stacey*, 15 C. B. (N. S.) 458, and questioning *Scott v. Buckley*, 16 Law T. (N. S.) 573.

⁶⁰² *Nixon v. Freeman*, 5 Hurl. & N. 653; *Long v. Clark* [1894] 1 Q. B. 119.

⁶⁰³ *Crabtree v. Robinson*, 15 Q. B. Div. 312; *Miller v. Tebb*, 9 Times Law R. 515.

⁶⁰⁴ *Hancock v. Austin*, 14 C. B. (N. S.) 634.

⁶⁰⁵ *Nash v. Lucas*, L. R. 2 Q. B. 590; *Cate v. Schaum*, 51 Md. 299.

⁶⁰⁶ *Miller v. Tebb*, 9 Times Law R. 515.

⁶⁰⁷ *Eagleton v. Gutteridge*, 11 Mees. & W. 465; *Eldridge v. Stacey*, 15 C. B. (N. S.) 458.

⁶⁰⁸ *Bannister v. Hyde*, 2 El. & El. 627.

⁶⁰⁹ *Russell v. Rider*, 6 Car. & P. 416.

⁶¹⁰ *Boyd v. Profaze*, 16 Law T. (N. S.) 431. And see *United States v. Scott*, 2 Cranch C. C. 572, Fed. Cas. No. 16,408.

⁶¹¹ *Pugh v. Griffith*, 7 Adol. & E. 827.

training thereon,⁶¹² provides that if they are placed in a house or other building, or in a locked yard or closed or other place, the landlord may, with the assistance of a constable,⁶¹³ and in the case of a dwelling house, after making oath of a reasonable ground to suspect their presence therein, break into such house, yard, or place. There are in at least three states somewhat similar provisions, allowing a house or building to be broken into in order to levy on goods removed from the leased premises.⁶¹⁴ In two of these states the officer having a distress warrant is authorized by the statute to break in the daytime into any house or close in which there may be goods liable to the distress, although they have not been removed.⁶¹⁵

b. **Seizure.** The landlord, having entered, must then seize the goods. No particular form of language or character of act is necessary to constitute a seizure, it being sufficient that there is a distinct expression of an intention to distrain particular goods, and acts in accordance therewith. There is a valid seizure if the landlord or his agent takes effectual means to prevent the removal of the goods from the premises,⁶¹⁶ and a declaration by the landlord that the goods shall not be removed till the rent is paid has been recognized as sufficient,⁶¹⁷ as has a notification by him to the tenant that he has distrained certain goods.⁶¹⁸ Likewise, there is a sufficient seizure if the landlord claims the goods and tries to detain them.⁶¹⁹ But the mere commencement of the taking of an inventory of the goods, without completing it, not accompanied or followed by the removal of any goods, is not a seizure.⁶²⁰

A seizure of some goods in the name of all is a good seizure of

⁶¹² See ante, § 328 m (3).

⁶¹³ See *Rich v. Wooley*, 7 Bing. 651.

⁶¹⁴ *New Jersey*, 1 Gen. St. p. 1211, § 16; *Virginia* Code 1904, § 2793; *West Virginia* Code 1906, § 3406.

⁶¹⁵ See the above cited provisions of the Codes of Virginia and West Virginia.

⁶¹⁶ *Cramer v. Mott*, L. R. 5 Q. B. 359.

⁶¹⁷ *Cramer v. Mott*, L. R. 5 Q. B. 359; *Wood v. Nunn*, 5 Bing. 10;

Furbush v. Chappell, 105 Pa. 187;

Furbush v. Fisher, 16 Phila. (Pa.) 170.

⁶¹⁸ *Swann v. Falmouth*, 2 Mann. & R. 534, 8 Barn. & C. 456; *Finn v. Morrison*, 13 U. C. Q. B. 568; *Black v. Coleman*, 29 U. C. C. P. 507; *Newell v. Clark*, 46 N. J. Law, 363.

⁶¹⁹ *Dod v. Monger*, 6 Mod. 215; *Werth v. London & Westminster Loan Co.*, 5 Times Law R. 320.

⁶²⁰ *Spice v. Webb*, 2 Jur. 943.

all,⁶²¹ and it is not necessary that the landlord go into all the rooms of the house, if he makes an inventory of the goods seized and puts a man in possession.⁶²² It is unnecessary to leave a man in possession, if the articles seized are clearly indicated, and notice of the seizure given to the tenant.⁶²³

c. **Hours for levy.** A levy of distress must be made in the daytime, that is, between sunrise and sunset, and if one distrains in the night he is liable as a trespasser.⁶²⁴ But where a landlord took measures, after sunset, forcibly to prevent the removal of the goods, in order that he might distrain them the next day, the tenant, it was held, not resisting, could not claim as for a wrongful conversion, the goods remaining in his possession and control.⁶²⁵ It has been said that if the tenant, or the owner of the goods on the premises, by keeping the premises locked, prevents a levy in the daytime, he cannot assert that a distress made in the night time upon the goods while being removed from the premises is illegal.⁶²⁶

§ 338. Effect of levy.

The landlord has not infrequently been said to have a lien on the goods distrained by him.⁶²⁷ By this is meant apparently merely that he has a right to the possession of the goods, and to have a sale thereof, unless the rent is paid, and this is presumably also what is meant by the statement that he has a "special property" in the goods distrained.⁶²⁸ The actual ownership of the goods, however, is not changed by the distress.⁶²⁹

⁶²¹ *Dod. v. Monger*, 6 Mod. 215.

⁶²⁶ *Pickering v. Brien*, 31 Pa. Super. Ct. 280.

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⁶²³ *Swann v. Falmouth*, 8 Barn. & C. 456; *Eames v. Mayo*, 6 Ill. App. (6 Bradw.) 334.

⁶²⁴ *Co. Litt.* 142 a; *Tutton v. Darke*, 5 Hurl. & N. 647; *Sherman v. Dutch*, 16 Ill. 283; *Fry v. Breckinridge*, 46 Ky. (7 B. Mon.) 31. But a distress damage feasant may be made in the night. *Co. Litt.* 142 a.

⁶²⁵ *England v. Cowley*, L. R. 8 Exch. 126.

⁶²⁷ *Leonard v. Neale*, 1 Cranch C. C. 493, Fed. Cas. No. 8,259; *Calvert v. Stewart*, 4 Cranch C. C. 728, Fed. Cas. No. 2,327; *Speer v. Skinner*, 35 Ill. 282; *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483, 28 N. E. 955; *Woglam v. Cowperthwaite*, 2 Dall. (Pa.) 68.

⁶²⁸ *Delaware Rev. Code* 1893, p. 870, § 30; *Lambson v. Matthew*, 5 Har. (Del.) 28.

⁶²⁹ *Moore v. Pyrke*, 11 East, 52; *King v. England*, 4 Best. & S. 782.

The seizure of goods under a distress does not preclude a subsequent action by the landlord against the tenant for the rent.⁶³⁰ So long, however, as the goods remain unsold, the landlord cannot bring an action for the rent.⁶³¹

There is, it has been decided, no presumption that the amount of the landlord's claim was satisfied by the levy.⁶³²

§ 339. Impounding.

At common law the landlord, having seized the goods, was required to remove them off the demised premises and to put them in a "pound," that is, a place suitable for their safekeeping, in a pound covert, that is, one protected from the weather, if the articles were of a perishable nature, and, if the things distrained were cattle, in an open pound, into which the owner could enter for the purpose of feeding them unless the landlord assumed the responsibility of doing this.⁶³³ Originally there was no restriction as to the location of the pound, and consequently the landlord could cause much hardship to the tenant by impounding the tenant's cattle in several and distant places, where it was practically impossible for the tenant to feed them. It was consequently provided by the statute of Marlbridge (52 Hen. 3, c. 4) that no one should cause any distress taken by him to be driven out of the county where it was taken, and, by a later statute,⁶³⁴ that no distress of cattle should be removed more than three miles, and that all things distrained at one time must be impounded together. By a still later statute, that of 11 Geo. 2, c. 19, § 10, the landlord or his representative is enabled to impound the goods on the leased premises. There is a Canadian decision that the tenant cannot maintain an action against the landlord for removing furniture to a city six miles distant, unless it was

⁶³⁰ *Philpott v. Lehain*, 35 Law T. App. 417, 23 S. W. 480, 24 S. W. 313. (N. S.) 855; *Manley v. Dupuy*, 2 Whart. (Pa.) 162; *Robinson v. White*, 39 Pa. 255. Compare *Fulcher v. West* (Tex. Civ. App.) 51 S. W. 342.

⁶³¹ *Lehain v. Philpott*, L. R. 10 Exch. 242.

⁶³² *Taylor v. Felder*, 5 Tex. Civ.

⁶³³ See *Gilbert*, Distress, 62; Co. Litt. 37 b; 2 Co. Inst. 106; Bac. Abr., Distress (D); *Griffin v. Scott*, 2 Ld. Raym. 1426; *Wilder v. Speer*, 8 Adol. & E. 547; *Bignell v. Clarke*, 5 Hurl. & N. 485.

⁶³⁴ 1 & 2 Phil. & Mary, c. 12, § 1.

unnecessary to do so, and unless it is averred that the act was unreasonably or maliciously done to prejudice the tenant.⁶³⁵

To constitute an impounding, the whole of the goods distrained need not be put together, its being sufficient if the person distraining makes an inventory of the goods distrained, serves it, with notice of the distress, on the tenant, and leaves a man in possession,⁶³⁶ and the person distraining may, with the assent of the tenant, leave the goods as they stand upon the premises.⁶³⁷

If the tenant does not assent to the leaving of the goods in the same position on the premises as before, the distrainer cannot ordinarily take the whole house for the custody of the goods, but must select one room for the purpose, or remove the goods from the premises.⁶³⁸ If, however, it is necessary to occupy the whole of the premises leased, in order to safely keep the goods, the landlord or his representative may, it seems, do so to the entire exclusion of the tenant.⁶³⁹

In Maryland the English statutes, above referred to, on the subject of impounding, are in force;⁶⁴⁰ while in Delaware and New Jersey they have been substantially re-enacted.⁶⁴¹ In Pennsylvania, though there is no statute in force expressly authorizing an impounding on the premises, the validity of such impounding, for the period allowed the tenant for replevying, has been recognized.⁶⁴² In three states it is provided that the officer making the distress shall not remove the property out of the county.⁶⁴³

§ 340. Pound breach.

In case the goods distrained are taken from the control of the

⁶³⁵ *MacGregor v. Defoe*, 14 Ont. 87.

⁶³⁶ *Johnson v. Upham*, 2 El. & El. 250; *Tennant v. Field*, 8 El. & Bl. 336.

⁶³⁷ *Washburn v. Black*, 11 East, 405; *Tennant v. Field*, 8 El. & Bl. 336; *Thomas v. Harries*, 1 Man. & G. 695; *Cox v. Painter*, 7 Car. & P. 767.

⁶³⁸ *Woods v. Durrant*, 16 Mees. & W. 149.

⁶³⁹ See *Woods v. Durrant*, 16 Mees. & W. 149; *Cox v. Painter*, 7 Car. & P. 767; *Holland v. Townsend*, 136 Pa. 392, 20 Atl. 794.

⁶⁴⁰ See Alexander's British Statutes in force in Maryland.

⁶⁴¹ *Delaware Rev. Code* 1893, p. 870, § 29; *New Jersey*, 1 Gen. St. pp. 1207, 1299, §§ 2, 4, 5, 9. See *Newell v. Clark*, 46 N. J. Law, 363.

⁶⁴² See *Holland v. Townsend*, 136 Pa. 392, 20 Atl. 794; *Waitt v. Ewing*, 7 Phila. (Pa.) 195; *Woglam v. Cowperthwaite*, 2 Dall. (Pa.) 68; *McKinney v. Reader*, 6 Watts (Pa.) 34, 36 Am. Dec. 202.

⁶⁴³ *Mississippi Code* 1906, § 2353; *Virginia Code* 1904, § 905; *West Virginia Code* 1906, § 1315.

landlord or his representative against his will, the person taking the goods is guilty of a "pound breach" or "rescue." For this he is liable, under the statutes of some jurisdictions, in treble damages,⁶⁴⁴ and he is also criminally liable.⁶⁴⁵ If the goods were impounded on the premises one is, it has been decided, liable in treble damages only if he had notice of the impounding at the time of the pound breach.⁶⁴⁶

The landlord has the right to again seize the goods wrongfully taken from him, wherever he may find them, provided he can do so without a breach of the peace⁶⁴⁷ and on "fresh pursuit."⁶⁴⁸ If the distress is wrongful, the tenant can, without incurring any liability, rescue the goods at any time before they are impounded.⁶⁴⁹

§ 341. Care of things taken.

The person taking goods under a distress, whether the landlord or another, is bound to exercise reasonable care that no injury to them shall occur,⁶⁵⁰ though he is not liable for injuries occurring without his fault.⁶⁵¹ He is liable for injuries caused by the unsuitable condition of the pound in which they may be placed.⁶⁵²

Formerly the owner of the cattle distrained was required to water and feed them at his own peril if they were placed in an open pound.⁶⁵³ Now, in England, the distrainer is, by statute, required to feed them.⁶⁵⁴ There is a *dictum* in one state that,

⁶⁴⁴ *England*, 2 Wm. & M. sess. 1, c. 5, § 3; *Delaware* Rev. Code 1893, p. 870, § 31 (double damages); *Kentucky* St. 1903, § 2313; *New Jersey*, 1 Gen. St. p. 1209, § 10; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landl. & Ten." § 12.

⁶⁴⁵ 2 McClain, Crim. Law, § 932; 1 Russell, Crimes (6th Ed.) 882.

⁶⁴⁶ *Cadmus v. Barney*, 42 N. J. Law, 346.

⁶⁴⁷ 1 Rolle's Abr., 674; Co. Litt. 47 b.

⁶⁴⁸ *Rich v. Woolley*, 7 Bing. 651.

⁶⁴⁹ Co. Litt. 47 b, 160 b; *Bevil's Case*, 4 Coke, 11 b; *Cotsworth v. Betison*, 1 Ld. Raym. 104. See post, § 346 a.

⁶⁵⁰ See *Taylor v. Felder*, 5 Tex. Civ. App. 417, 23 S. W. 480, 24 S. W. 313.

⁶⁵¹ *Wilder v. Speer*, 8 Adol. & E. 547; *Weber v. Vernon*, 2 Pen. (Del.) 359, 45 Atl. 537.

⁶⁵² *Wilder v. Speer*, 8 Adol. & E. 547.

It has been decided that the burden is on the landlord of showing that injuries to the things distrained, received while in his custody or in that of his bailiff or agent, was not the result of his or the custodian's neglect. *Weber v. Vernon*, 2 Pen. (Del.) 359, 45 Atl. 537.

⁶⁵³ Co. Litt. 47 b.

⁶⁵⁴ 12 & 13 Vict. c. 92, § 5.

apart from any statute, one distraining is liable for injuries caused by failure to feed and water cattle distrained, as well as for injuries caused to milch cattle by failure to milk them.⁶⁵⁵

One distraining cannot ordinarily make any use of the goods or work the cattle distrained.⁶⁵⁶ He may, however, as above intimated, milk the milch cows distrained,⁶⁵⁷ though he must, it has been decided, account for the value of the milk, less the expense of milking and caring for the cows.⁶⁵⁸

§ 342. Sale and preliminaries thereto.

a. **Power to sell.** At common law goods distrained could not be sold, but could only be detained by the landlord as a pledge, until the rent was paid. This was changed by St. 2 W. & M. sess. 1, c. 5, which provided that if the owner of goods or chattels distrained for rent "shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises," replevy the same, the person distraining shall and may cause the goods and chattels to be appraised by two sworn appraisers, and shall and may sell the goods and chattels so distrained for the best price that can be gotten, towards satisfaction of the rent and the charges of such distress, appraisement, and sale. It has been decided that this statute does not render a sale compulsory, and that no action lies for not selling.⁶⁵⁹

In one state the English statute above recited is in force,⁶⁶⁰ and in others it has been re-enacted with some changes, of greater or less extent.⁶⁶¹ The statute of Pennsylvania, though using the same words "shall and may sell" as those which occur in the English statute, has received a different construction from

⁶⁵⁵ *Weber v. Vernon*, 2 Pen. (Del.) 359, 45 Atl. 537.

⁶⁵⁶ *Dod v. Monger*, 6 Mod. 215; *Smith v. Wright*, 6 Hurl. & N. 821.

⁶⁵⁷ See *Bagshawe v. Goward*, Cro. Jac. 147.

⁶⁵⁸ *Weber v. Vernon*, 2 Pen. (Del.) 359, 45 Atl. 537.

⁶⁵⁹ *Hudd v. Ravenor*, 2 Brod. & B. 662; *Lear v. Edmonds*, 1 Barn. & Ald. 157.

⁶⁶⁰ Maryland. See Alexander's *British Statutes in force in Maryland* 567.

⁶⁶¹ *Delaware* Rev. Code 1893, p. 869, §§ 25, 26, p. 871, § 32; *Kentucky* St. 1903, § 2309; *Mississippi* Code 1906, § 2845; *New Jersey*, 1 Gen. St. p. 1208, § 6; *Pennsylvania*, Pepper & Lewis Dig. Laws, "Landl. & Ten." § 11; *South Carolina* Civ. Code 1902, § 2435.

that placed on the latter, and has been regarded as imposing an obligation to sell.⁶⁶²

b. **Notice to tenant.** The first thing to be done, under the English statute and those adopting its requirements, with a view to the sale of the goods distrained, is the giving of a notice to the tenant. This notice should state the amount of the rent for which the distress is made,⁶⁶³ and contain, or be accompanied by, an inventory or list of the goods distrained.⁶⁶⁴ The notice must be in writing, this requirement being inferable from the provision that it shall be "left" on the premises.⁶⁶⁵ Although the statute in terms requires the notice to be left on the premises, it may, it has been decided, be served personally,⁶⁶⁶ and if the goods distrained belong to a third person, the notice may, in the landlord's discretion, be given either to such person or to the tenant.⁶⁶⁷

An officer, in giving the notice, has been held to act as the agent of the landlord, and not as a public officer.⁶⁶⁸

The statutes do not ordinarily name any time at which the notice must be given, and it may be given on the day on which the distress is made.⁶⁶⁹

The notice of distress is required merely as a prerequisite to sale, and, if there is no sale, the lack of the statutory notice is immaterial.⁶⁷⁰

⁶⁶² *Quinn v. Wallace*, 6 Whart. (Pa.) 452. "the inventory should be so full and complete as to inform the tenant of the goods distrained, and for which he may have a writ in replevin."

⁶⁶³ *Kerby v. Harding*, 6 Exch. 234; *Snyder v. Boring*, 4 Pa. Super. Ct. 196, 40 Wkly. Notes Cas. 275. And see *Snyder v. Boring*, 4 Pa. Super. Ct. 196.

⁶⁶⁴ *Kerby v. Harding*, 6 Exch. 234. In *Wakeman v. Lindsey*, 14 Q. B. 625, an inventory specifying certain goods, and concluding "and any other goods and effects that may be found in and about the said premises, to pay the said rent and expenses of this distress," was regarded as sufficiently specific. This case is distinguished in *Kerby v. Harding*, 6 Exch. 234, *supra*, where the inventory included "and all other goods and chattels on the premises which may be required to satisfy the rent." In *Richards v. McGrath*, 100 Pa. 389, it is said that

⁶⁶⁵ *Wilson v. Nightingale*, 8 Q. B. 1034; *Shultz v. Reddick*, 43 U. C. Q. B. 155; *Snyder v. Boring*, 4 Pa. Super. Ct. 196.

⁶⁶⁶ *Walter v. Rumbal*, 1 Ld. Raym. 53, 4 Mod. 390. See *Wilson v. Nightingale*, 8 Q. B. 1034.

⁶⁶⁷ *Walter v. Rumbal*, 4 Mod. 390, 1 Ld. Raym. 53; *Caldcleugh v. Hollingsworth*, 8 Watts & S. (Pa.) 302.

⁶⁶⁸ *Murphy v. Chase*, 103 Pa. 260.

⁶⁶⁹ *Whitton v. Milligan*, 153 Pa. 376, 26 Atl. 22.

⁶⁷⁰ *Trent v. Hunt*, 9 Exch. 14; *Mc-*

The owner of the goods distrained has alone, it seems, the power to waive the notice.⁶⁷¹ Such waiver is not shown, it has been decided, by the fact that the owner of the goods informs the person making the levy that he does not care for an inventory, he knowing what was seized.⁶⁷²

c. **Appraisement.** The English statute gives the tenant or owner of the goods distrained "five days next after such distress taken, and notice thereof," within which to replevy them, after which the appraisement and sale may be made, and substantially similar provisions are to be found in several state statutes.⁶⁷³ The days named in the statute are to be computed from the day on which the notice is given, and five clear days of twenty-four hours each must intervene between that day and the day of appraisement.⁶⁷⁴ The person making the distress has a reasonable time after the expiration of the five days in which to have the goods appraised and to make the sale, and further time may be taken for this purpose with the consent of the tenant.⁶⁷⁵

The person making the distress cannot act as an appraiser.⁶⁷⁶ The appraisers must be reasonably competent, but need not be professional appraisers.⁶⁷⁷ In two states the statute requires them to be freeholders.⁶⁷⁸

The appraisers should be sworn by the sheriff or constable,⁶⁷⁹

Kinney v. Reader, 6 Watts (Pa.) (N. Y.) 164; Robinson v. Waddington, 13 Q. B. 753; Lynch v. Bickle, 17 U. C. C. P. 549.

⁶⁷¹ Briggs v. Large, 30 Pa. 287.

⁶⁷² Shultz v. Reddick, 43 U. C. Q. B. 155. See, as to waiver by appearance, Wright v. Craig (Miss.) 45 So. 835.

⁶⁷³ Delaware Rev. Code 1893, p. 869, § 26; Kentucky St. 1902, § 2309 (ten days); New Jersey, 1 Gen. St. p. 1208, § 6 (ten days); Pennsylvania, Penner & Lewis' Dig. Laws, "Landl. & Ten." § 11; South Carolina Civ. Code 1902, § 2425.

⁶⁷⁴ See Westwood v. Cowne, 1 Starkie. 172, and opinion of B. St. C. J., in Lyon v. Weldon, 2 Bing. 334.

⁶⁷⁵ Roden v. Eyton, 6 C. B. 427; Cahill v. Lee, 55 Md. 319.

⁶⁷⁶ Pennsylvania, Pepper & Lewis' Dig. Laws, "Landl. & Ten." § 11. See Snyder v. Boring, 4 Pa. Super. Ct. 196.

⁶⁷⁷ Kenney v. May, 1 Moody & R. 56; Curtis v. Bradley, 75 Ill. 180.

⁶⁷⁸ Davis v. Davis, 128 Pa. 100, 18 Atl. 514; Butts v. Edwards, 2 Denio

and this should be done before the appraisement.⁶⁸⁰ In one state the statute requires the appraisement to be made only after two days' notice to the tenant.⁶⁸¹

The tenant may waive an appraisement of his own goods,⁶⁸² but he cannot waive either the notice or the appraisement as regards the goods of another,⁶⁸³ and a waiver in the latter case is nugatory even though the landlord is ignorant that the goods do not belong to the tenant, it being his duty to determine that the tenant owns them before accepting the latter's waiver.⁶⁸⁴ That the tenant was present at the sale and requested that the property be all sold together was held not to involve a waiver of the appraisement, he being at the time ignorant that none had been made.⁶⁸⁵

d. **Mode of sale.** The English statute, by which the right to sell the goods distrained was first conferred, does not contain any specification as to the method of sale, and so the local state statutes, while they ordinarily in terms authorize a sale, do not specify the mode of conducting it. In some states the person levying the distress is expressly required to advertise and sell as in case of execution,⁶⁸⁶ and in another it has been held that, in view of the fact that a sale is compulsory, it is to be treated as an execution sale.⁶⁸⁷

In a few states the statute expressly provides for public notice, that is, an advertisement of the time and place of sale,⁶⁸⁸ and in

⁶⁸⁰ *Kenney v. May*, 1 Moody & R. *Mississippi Code* 1906, § 2845; *South Carolina Civ. Code* 1902, § 2435; *Vir-*

⁶⁸¹ *New Jersey*, 1 Gen. St. p. 1208, *ginia Code* 1904, § 906; *West Vir-*

§ 6. See *Brown v. Howell*, 66 N. J.

Law, 25, 48 Atl. 1020.

⁶⁸² *Bishop v. Bryant*, 6 Car. & P. (Pa.) 452; *Richards v. McGrath*, 100 484; *Henkels v. Brown*, 4 Phila. Pa. 389.

(Pa.) 299.

⁶⁸³ *Chestnut St. Nat. Bank v. Crompton Loom Works*, 19 C. C. A. 609, 73 Fed. 614; *Briggs v. Large*, 30 Pa. 287.

⁶⁸⁴ *Chestnut St. Nat. Bank v. Crompton Loom Works*, 19 C. C. A. 609, 73 Fed. 614; *Harris v. Shaw*, 17 Pa. Super. Ct. 1.

⁶⁸⁵ *Curtis v. Bradley*, 75 Ill. 180.

⁶⁸⁶ *Georgia Code* 1835, § 4818; *highest bidder.*

⁶⁸⁷ *Quinn v. Wallace*, 6 Whart.

⁶⁸⁸ *Delaware Rev. Code* 1893, p.

871. § 32; *Georgia Code* 1895, § 4818;

Kentucky St. 1903, § 2309; *New Jer-*

sey, 1 Gen. St. p. 1208, § 6; *Penn-*

sylvania, *Pepper & Lewis Dig.*

Laws, "Landl. & Ten." § 11; *Virginia*

Code 1904, § 906; *West Virginia*

Code 1906, § 1316. In *Mis-*

issippi (Code 1906, § 2845) the

officer must sell "at public sale to the

most jurisdictions, presumably, a public notice, as in case of execution and judicial sales, would be required. No such requirement appears to be recognized in England.

In most of the states in which the remedy of distress is still recognized the sale must, under the local statute, be made by a sheriff or constable.⁶⁸⁹ The goods must be sold in such a way as to obtain the best available price⁶⁹⁰ and consequently must, upon occasion, be sold separately or in lots, rather than *en masse*.⁶⁹¹ A sale at the appraised price is, it has been said, presumably at the best price.⁶⁹² The landlord cannot, nor can, it would seem, an officer or bailiff, impose conditions upon the sale such as to prevent a sale at the best price.⁶⁹³ Whether the sale has been so conducted as to obtain the best price depends, it has been said, upon the circumstances of each case and the character of the property seized and sold.⁶⁹⁴ For a failure to obtain the best price the landlord is liable in damages.⁶⁹⁵

No greater amount of the goods should be sold than is reasonably necessary to satisfy the landlord's claim and the cost of the proceedings.⁶⁹⁶ But the distrainor is under no obligation, upon demand, to sell goods belonging to the tenant before those of a third person.⁶⁹⁷

In England it appears to be an occasional practice for the appraisers to take the goods, if of small value, at their own valuation.⁶⁹⁸ But this would presumably not be allowed in this country. It has in England been decided that the landlord cannot himself purchase at the appraised valuation,⁶⁹⁹ but, presumably,

⁶⁸⁹ See *Delaware* Rev. Code 1893, p. 871, § 32; *Florida* Gen. St. §§ 2241, 2245; *Georgia* Code 1895, § 4818; *Kentucky* St. 1903, § 2309; *Mississippi* Code 1906, § 2845; *Virginia* Code 1904, § 906; *West Virginia* Code 1906, § 1316.

⁶⁹⁰ *Poynter v. Buckley*, 5 Car. & P. 512; *Cahill v. Lee*, 55 Md. 319; *Richards v. McGrath*, 100 Pa. 389.

⁶⁹¹ *Poynter v. Buckley*, 5 Car. & P. 512; *Cahill v. Lee*, 55 Md. 319; *Richards v. McGrath*, 100 Pa. 389.

⁶⁹² *Walter v. Rumbal*, 1 Ld. Raym. 53.

⁶⁹³ *Hawkins v. Walrond*, 1 C. P. Div. 280; *Ridgway v. Stafford*, 6 Exch. 404.

⁶⁹⁴ *Cahill v. Lee*, 55 Md. 319.

⁶⁹⁵ *Ridgway v. Stafford*, 6 Exch. 404; *Poynter v. Buckley*, 5 Car. & P. 512; *Cahill v. Lee*, 55 Md. 319.

⁶⁹⁶ *Richards v. McGrath*, 100 Pa. 389; *Wilkinson v. Ibbet*, 2 Fost & F. 300.

⁶⁹⁷ *Pegg v. Starr*, 23 Ont. 83.

⁶⁹⁸ See *Bullen, Distress* (2d Ed.) 193; *Oldham & Foster, Distress*, 228.

⁶⁹⁹ *King v. England*, 4 Best & S. 782; *Moore v. Singer Mfg. Co.* [1904]

where the sale is made by an officer, at public auction, a sale to the landlord as being the highest bidder would be valid.⁷⁰⁰

The sale must be made after the five days or other period named in the statute,⁷⁰¹ and a failure to comply with the statute in this respect will render the landlord liable for any damage actually resulting,⁷⁰² unless where it is the fault of the officer conducting the sale, and such officer can be regarded as acting in his official capacity.⁷⁰³ The sale should be made within a reasonable time after the expiration of the statutory period.⁷⁰⁴ It may be postponed for a reasonable time after the date first announced.⁷⁰⁵ And with the consent of the tenant, or other owner of the goods, the sale may, it seems, be indefinitely postponed,⁷⁰⁶ provided an innocent third party is not thereby misled.⁷⁰⁷

It has in one state been decided that the officer, in making the sale, as provided by the statute, does so in his official capacity, and that he consequently is the person entitled to sue the purchaser for the price and not the landlord.⁷⁰⁸ But in another state it was held that the officer so selling, though he is required by the statute to make the sale, acts merely as the landlord's agent, and not in his official capacity.⁷⁰⁹

If the distress for rent is illegal, as when no relation of tenancy exists, no rent is in arrear, or the goods seized are not subject to distress,⁷¹⁰ no title can pass to a purchaser at the sale.⁷¹¹ If, on the other hand, there are merely irregularities in conducting the proceedings or in making the sale,⁷¹² the purchaser obtains

1 K. B. 820; *Williams v. Grey*, 23 U. C. P. 561. See *Howell v. Listowell*, 392, 20 Atl. 794; *Brown v. Harris*, 67 N. J. Law, 207, 50 Atl. 689.
 he may do so with the consent of the owner of the goods, whether the tenant or another. *Woods v. Rankin*, 18 U. C. C. P. 44. Compare *Burnham v. Waddell*, 3 Ont. App. 288.
⁷⁰⁵ *Holland v. Townsend*, 136 Pa. 392, 20 Atl. 794; *Brown v. Harris*, 67 N. J. Law, 207, 50 Atl. 689.
⁷⁰⁶ *Fisher v. Algar*, 2 Car. & P. 374; *Bigelow v. Judson*, 19 Wend. (N. Y.) 229.
⁷⁰⁷ *Lamotte v. Wisner*, 51 Md. 543.
⁷⁰⁸ *Lambson v. Matthew*, 5 Har. (Del.) 28.

⁷⁰⁰ By analogy to a sale to an execution plaintiff. See 2 Freeman, Executions (3rd Ed.) § 292.
⁷⁰¹ See ante, § 342 a.
⁷⁰² See post, § 346 d (8).
⁷⁰³ See post, at note 608.
⁷⁰⁴ See ante, at note 575.
⁷⁰⁹ *Murphy v. Chase*, 103 Pa. 260.
⁷¹⁰ See post, § 346 d.
⁷¹¹ *Prescott v. DeForest*, 16 Johns. (N. Y.) 159; *Smith v. Sheriff of Charleston Dist.*, 1 Bay (S. C.) 443.

⁷¹² See post, § 348 (d) 8.

a good title,⁷¹³ except in jurisdictions where the rule still exists that such irregularities make the landlord a trespasser *ab initio*.⁷¹⁴

§ 343. Surplus proceeds and unsold goods.

The statute 2 W. & M. sess. 1, c. 5, provided that the chattels should be appraised and sold "towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale, leaving the overplus (if any) in the hands of the sheriff, under sheriff or constable, for the owner's use."⁷¹⁵ It has been held that if the overplus be not left with an officer as prescribed by the statute, and the tenant or owner of the goods consequently suffers actual damage, an action on the case is maintainable,⁷¹⁶ though not an action for money had and received to recover the amount of such overplus.⁷¹⁷ In such an action for damages the amount of the charges may be questioned.⁷¹⁸ It has furthermore been decided that the fact that the tenant has received the overplus without objection does not disentitle him to recover in such action, it being a question of fact whether he received it in full satisfaction of the balance due, and whether it was sufficient to satisfy such balance.⁷¹⁹

If more goods were seized than are necessary to satisfy the sum claimed and the costs, it is proper for the person distraining to return them to the premises from which they were taken, even though he has notice of a claim to them made by a third party.⁷²⁰

§ 344. Statutory distress as commencement of action.

The remedy of distress, as recognized at common law, is not an action, it being exercisable without any judicial process what-

⁷¹³ Lyon v. Weldon, 2 Bing. 334.

⁷¹⁴ Brisben v. Wilson, 60 Pa. 452.

⁷¹⁵ The statute of Delaware (Rev. Code 1893, p. 871, § 33) provides that any overplus of the proceeds of sale, after satisfying the rent and costs, shall, without delay, be refunded to the owner of the property, or otherwise applied according to law.

⁷¹⁶ Lyon v. Tomkies, 1 Mees. & W. 603.

⁷¹⁷ Yates v. Eastwood, 6 Exch. 805; Evans v. Wright, 2 Hurl. & N. 527.

⁷¹⁸ Lyon v. Tomkies, 1 Mees. & W. 603.

⁷¹⁹ Lyon v. Tomkies, 1 Mees. & W. 603.

⁷²⁰ Evans v. Wright, 2 Hurl. & N. 527.

ever,⁷²¹ and it cannot be regarded as such even by reason of statutes requiring as a preliminary the issue of a warrant by a justice upon affidavit by the landlord, and requiring the seizure and sale to be made by a sheriff or constable, these provisions not involving any judicial hearing or determination.⁷²² In some states, however, the character of the remedy has been entirely changed, it being made in effect the commencement of a proceeding in court to obtain a sale of property belonging to the tenant to satisfy the landlord's claim, and also a personal judgment therefor.

In Florida the statute⁷²³ provides that, upon affidavit by the person entitled to the rent, a distress warrant shall be issued by the clerk of court commanding the sheriff to levy on property liable to distraint and collect the sum claimed, and to summon "the defendant" to appear before the court, and that, if the defendant does not appear, a judgment against him by default shall be entered, while, if the defendant appears and makes affidavit that the sum claimed, or a part thereof, is not due, this issue shall be tried by the court or a jury and a judgment shall be rendered against "the defendant" for the amount found to be due, and that the property distrained shall be sold and the proceeds applied on the judgment. Under this statute, it has been said, the affidavit stands in lieu of and performs the functions of an ordinary declaration.⁷²⁴

In Georgia the statute⁷²⁵ provides that, on affidavit, a justice of the peace shall issue a distress warrant, which shall be levied

⁷²¹ See 3 Blackst. Comm. 7; Keller v. Weber, 27 Md. 660. set off against the claim for rent, see Fowler v. Eddy, 110 Pa. 117, 1

⁷²² Towns v. Boarman, 23 Miss. Atl. 789.

186; Pate v. Shannon, 69 Miss. 372, ⁷²³ Gen. St. 1906, §§ 2240-2245.

13 So. 729. ⁷²⁴ Smoot v. Strauss, 21 Fla. 611.

That a justice authorized to issue a distress warrant has not therefore any judicial power to determine whether rent is due, see Richardson v. Vice, 4 Blackf. (Ind.) 13; Commonwealth v. Colgan, 44 Ky. (5 B. Mon.) 485. And that he has not such power by reason of a statute giving him authority to determine the amount which the tenant may

rule day. Blanchard v. Raines' Ex'x, 20 Fla. 467. ⁷²⁵ Georgia Code 1895, §§ 4818, 4819.

on property of the debtor by the sheriff or constable, who shall sell such property, but that "the party distrained" may make oath that the sum claimed, or some part thereof, is not due, giving bond if he desires a return of the property, and the levying officer shall then make return to the court. It has been decided that, under this statute, "a distress warrant is a legal process, a mode of claiming a right by a proceeding before a court," to the extent that the court cannot appoint, as special officer, to execute the warrant, one who, as the landlord's agent, made the affidavit on which the warrant was issued.⁷²⁶ In other cases, however, it is said that it is by reason of the making of a "counter affidavit" by "the defendant," that is, the statutory oath that the sum claimed, or a part thereof, is not due, that the proceeding is converted into a suit for rent, the warrant then becoming mesne process,⁷²⁷ and that upon the dismissal of the counter affidavit for any cause the case passes out of the jurisdiction of the court,⁷²⁸ so that it cannot thereafter dismiss the warrant.⁷²⁹ The counter affidavit is sufficient if it alleges that the sum distrained for or some part thereof is not due, in the words of the statute,⁷³⁰ though it may aver special matters showing why such sum is not due.⁷³¹ In either case the defendant may introduce evidence in support of his averments⁷³² and the verdict is for the amount

⁷²⁶ *Flury v. Grimes*, 52 Ga. 341. 199; *Anders v. Blount*, 67 Ga. 41;

⁷²⁷ *Elam v. Hamilton*, 69 Ga. 736; *Haines v. Chappell*, 1 Ga. App. 480,

Brooke v. Augusta Warehouse & Banking Co., 119 Ga. 946, 47 S. E. 58 S. E. 220. ⁷²⁹ *Habersham v. Eppinger*, 61 Ga. 341; *Swain v. Nasworthy*, 2 Ga. 199.

App. 253, 58 S. E. 492; *Hardy v. Poss*, 120 Ga. 385, 47 S. E. 947. "A ⁷³⁰ *Feagin v. McCowen*, 115 Ga. 325, 41 S. E. 575; *Drake v. Dawson*, 66 Ga. 174; *Anders v. Blount*, 67 Ga. 41; *Girtman v. Stanford*, 68 Ga. 178; *Hawkins v. Collier*, 101 Ga. 145, 28 S. E. 632. ⁷³¹ *Johnston v. Patterson*, 86 Ga. 725, 13 S. E. 17; *Hawkins v. Collier*, 101 Ga. 145, 28 S. E. 632.

After the filing of a counter affidavit, no other action will lie for the rent, unless the warrant is fatally defective. *Chisholm v. Lewis & Co.*, 66 Ga. 729; *Elam v. Hamilton*, 69 Ga. 736. ⁷³² See *McMahon v. Tyson*, 23 Ga. 43; *Cranston v. Rogers*, 83 Ga. 750, 10 S. E. 364; *Johnston v. Patterson*, 86 Ga. 725, 13 S. E. 17; *Hawkins v. Collier*, 101 Ga. 145, 28 S. E.

⁷²⁸ *Habersham v. Eppinger*, 61 Ga. 341.

found to be due.⁷³³ By the filing of the counter affidavit, the burden is cast upon the plaintiff of proving the existence of the relation of landlord and tenant,⁷³⁴ and that the sum alleged is due.⁷³⁵

In Illinois the statute ⁷³⁶ provides that the person making the distress shall file a copy of the distress warrant under which he acted, together with an inventory of the property levied on, with a justice of the peace or a clerk of court, upon which the justice or clerk shall issue a summons against the party against whom the warrant was issued, that "the suit" shall thereafter proceed as in case of attachment, except that the warrant shall stand for a declaration, that if the plaintiff succeeds in his suit judgment shall be given in his favor for the amount which shall appear to be due, and that if the defendant appears or is personally summoned, execution may issue under such judgment against any property belonging to the defendant, while if he is served by publication merely and does not appear, a special execution shall issue against the property distrained only. Under these provisions, a proceeding by distress warrant is regarded as a suit for the collection of rent,⁷³⁷ and the defendant may consequently be required to file an affidavit of merits as in ordinary cases.⁷³⁸ Since the warrant stands as a declaration, evidence is not admissible unless it corresponds with the averments of the warrant,⁷³⁹ and the landlord's recovery is limited to the amount named in the warrant.⁷⁴⁰ The judgment rendered in such a proceeding is final and conclusive as to all matters which should have been determined therein.⁷⁴¹

632; *Feagin v. McCowen*, 115 Ga. 325, 41 S. E. 575; *Hunnicut v. Cranston v. Rogers*, 83 Ga. 750, 10 S. E. 364.

Chambers, 111 Ga. 566, 36 S. E. 853. ⁷³⁶ *Hurd's Rev. St.* 1905, c. 80, §§ 16-25.

The plaintiff cannot give evidence that the defendant has removed crops or other things from the premises, if the distress warrant was not ⁷³⁷ *Bartlett v. Sullivan*, 87 Ill. 219. ⁷³⁸ *Bartlett v. Sullivan*, 87 Ill. 219.

sued out on such ground. *Holt v. Licette*, 111 Ga. 810, 35 S. E. 703. ⁷³⁹ *Vierling v. Owens*, 64 Ill. App. 609; *Bainter v. Lawson*, 24 Ill. App. 634; *Hill v. Coats*, 109 Ill. App. 266.

⁷³³ *Hardy v. Poss*, 120 Ga. 385, 47 S. E. 947. ⁷⁴⁰ *Kuhl v. Mowell*, 72 Ill. App. 461.

⁷³⁴ *Hancock v. Boggus*, 111 Ga. 461. ⁷⁴¹ *Clevenger v. Dunaway*, 84 Ill. 884, 36 S. E. 970.

⁷³⁵ *Reid v. Brinson*, 37 Ga. 63; 367.

In Texas the statute⁷⁴² provides that, on the making of an affidavit and the giving of a bond, a justice of the peace shall issue a warrant for the seizure of defendant's property, such warrant to be returnable to the justice or to a court, according to the amount claimed, that the justice shall also issue a citation "to the defendant," requiring him to answer before the justice or before the court to which the warrant is made returnable, and that the case shall then be tried as in ordinary cases. It is further provided that if the warrant is made returnable to a court, the plaintiff may file his petition either before suing out the warrant, or on or before the appearance day of the term of court to which the warrant is returnable.⁷⁴³ If no petition is filed as provided by the statute, the proceeding will, it has been held, be dismissed.⁷⁴⁴ On the other hand, the right of the landlord to a judgment for rent is independent of the legality of the distress warrant and of the truth of the averment thereof.⁷⁴⁵ No judgment can be rendered for rent not due, although a valid distress warrant could be and was issued therefor.⁷⁴⁶

§ 345. Abandonment of distress.

The question whether the landlord has abandoned a distress made by him is said to be a question for the jury.⁷⁴⁷ The mere quitting of possession of the goods distrained is not necessarily an abandonment,⁷⁴⁸ nor is a delay, not unreasonable, in regaining possession of the goods after loss of possession by forcible expulsion or exclusion from the premises.⁷⁴⁹ And the fact that the person distraining permitted the goods of a stranger, who had no notice of the distress, to be removed from the premises for a mere-

⁷⁴² Rev. St. 1895, §§ 3240-3248.

⁷⁴³ As to the effect of delay in filing the petition, see *Bateman v. Maddox*, 86 Tex. 546, 26 S. W. 51.

⁷⁴⁴ *Jones v. Walker*, 44 Tex. 203.

⁷⁴⁵ *Pruitt v. Kelley* (Tex.) 15 S. W. 119.

⁷⁴⁶ *Miller v. Lancaster* (Tex. Civ. App.) 41 S. W. 198.

⁷⁴⁷ *Eldridge v. Stacey*, 15 C. B. (N. S.) 458. See *Bagshawes, Limited v. Deacon* [1898] 2 Q. B. 173; 2 *Freeman, Executions*, § 271. Dela-

ware Code 1893, p. 872, § 42, provides that no distress shall remain in force more than sixty days from the time of making it, and that the property shall be discharged if not sold within such time.

⁷⁴⁸ *Bannister v. Hyde*, 2 El. & El. 627; *Swann v. Falmouth*, 8 Barn. & C. 456.

⁷⁴⁹ *Bannister v. Hyde*, 2 El. & El. 631; *Eldridge v. Stacey*, 15 C. B. (N. S.) 458.

ly temporary purpose, they being involuntarily returned, was held not to involve an abandonment.⁷⁵⁰

The landlord may, it seems, in effect abandon the distress as to particular goods in favor of a particular person, by conduct calculated to mislead such person, as when he permits the goods distrained to remain on the demised premises an unreasonable time, and they are purchased *bona fide* by another, without knowledge of the landlord's claim.⁷⁵¹

§ 346. Wrongful and irregular distresses—Remedies.

a. **Rescue.** At common law, if a distress is illegal, and not merely excessive or irregular, the owner of the chattels wrongfully seized may rescue them at any time before the impounding,⁷⁵² but he cannot do this after the impounding, since they are then in the custody of the law.⁷⁵³ If, however, the distrainer himself takes the chattels out of the pound for the unlawful purpose of using them, the owner may retake possession without incurring any liability.⁷⁵⁴

b. **Replevin**—(1) **Proceedings at common law.** Replevin is a process by which the owner of goods taken by another obtains their redelivery to him upon giving security to try, in an action subsequently to be brought by him, the right to the goods, and to restore them if the right be adjudged against him. The remedy is not confined to cases of taking by way of distress, but it has been most frequently utilized in that connection.

By the statute of Marlebridge (52 Hen. 3, c. 21), the sheriff was given jurisdiction to grant replevin, without resort to chancery for a writ, and by that of Westminster the second (13 Edw. 1, c. 2) it was provided that "sheriffs shall not only receive of the plaintiff's pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded." By St. 11 Geo. 2, c. 19, § 23, the sheriff was required to take in his own name, from the plaintiff and two responsible persons as sureties, "a bond in double the value of the

⁷⁵⁰ Kerby v. Harding, 6 Exch. 234.

⁷⁵³ Co. Litt. 47 b; Cotsworth v.

⁷⁵¹ Lamotte v. Wisner, 51 Md. 543.

Betison, 1 Ld. Raym. 104; Cadmus

⁷⁵² Co. Litt. 47 b, 161 a; Bevil's

v. Barney, 42 N. J. Law, 346.

Case, 4 Coke, 11 b; Com. Dig. Distress (D 5).

⁷⁵⁴ Smith v. Wright, 6 Hurl. & N. 821.

goods distrained, and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained in case a return of the goods shall be awarded," and it was further provided that, if the bond was forfeited, the sheriff should assign it to the distrainer, at his request, that the latter might sue thereon in his own name.

The remedy of replevin is, at common law, available when the distress or taking is absolutely illegal as regards all of the goods or part of them. If the distress is illegal as to part of the goods only, they alone are a proper subject for the replevin. In accordance with the above statement, it lies when there is no relation of landlord and tenant,⁷⁵⁵ or no certain rent was reserved,⁷⁵⁶ or no rent is due,⁷⁵⁷ or none due to the person distraining,⁷⁵⁸ or the rent was tendered before the impounding,⁷⁵⁹ or the entry was illegal,⁷⁶⁰ or things not subject to distress were seized.⁷⁶¹ An excessive distress is not absolutely illegal,⁷⁶² and it is consequently not ground for replevin,⁷⁶³ nor does a distress become so illegal by reason of irregular acts in the course of the proceedings, except in the few jurisdictions where such irregularities render it a trespass *ab initio*.⁷⁶⁴

The proceeding is available to the owner of the goods seized, without reference to whether he is the tenant.⁷⁶⁵

The effect of the giving of the replevy bond is to relieve the things distrained from the lien created by their seizure, to enable their owner to sell or incumber them, and to leave them free to be subjected to the satisfaction of creditors generally.⁷⁶⁶

⁷⁵⁵ Walker v. Giles, 6 C. B. 662.

⁷⁵⁶ Hegan v. Johnson, 2 Taunt. 148; Dunk v. Hunter, 5 Barn. & Ald. 322; Regnart v. Porter, 7 Bing. 451.

⁷⁵⁷ Davis v. Gyde, 2 Adol. & E. 623; Cooper v. Robinson, 10 Mees. & W. 694.

⁷⁵⁸ Downs v. Cooper, 2 Q. B. 256.

⁷⁵⁹ Evans v. Elliott, 5 Adol. & E. 142; Hilson v. Blain, 2 Bailey Law (S. C.) 168. See ante, § 329 b.

⁷⁶⁰ Tunnicliffe v. Wilmot, 2 Car. & K. 626.

⁷⁶¹ Eaton v. Southby, Willes, 131.

⁷⁶² See post, at note 748.

⁷⁶³ Oldham & Foster, Distress (2d Ed.) 346; Woodfall, Landl. & Ten. (16th Ed.) 539; Whitcomb v. Brant (N. J. Law) 68 Atl. 1102; Whitney v. Carle, 47 Ky. (8 B. Mon.) 171.

⁷⁶⁴ See Jimison v. Reifsneider, 97 Pa. 136.

⁷⁶⁵ Co. Litt. 145 b; Oldham v. Foster, Distress (2d Ed.) 348; Peacock v. Purvis, 2 Brod. & B. 362.

⁷⁶⁶ Bradyll v. Ball, 1 Brown's C. C. 427; Speer v. Skinner, 35 Ill. 282; Woglam v. Cowparthwaite, 2 Dall. (Pa.) 68; Jimison v. Reifsneider, 97 Pa. 136. But in Harris v. Clayton,

At common law, the goods having been delivered to the tenant or other person claiming them, upon his execution of the replevy bond, it remains for him to bring an action of replevin to try the legality of the distress. The defendant in this action, the distrainer, then makes "avowry" or "cognizance," the former being a justification by the distrainer in his right, as landlord, of the seizure of the goods, the latter term applying to a justification by the defendant as bailiff or another. The avowry or cognizance is in the nature of a declaration, to which the plaintiff in replevin must plead as if he were in the position of a defendant.⁷⁶⁷ In some of the states, no doubt, the introduction of new methods of pleading has rendered the common-law rules in reference to avoweries obsolete, as they are by reason of modern legislation in England.

(2) **Local statutory changes.** The common-law right of the tenant, or other owner of the things distrained, to "replevy" them, that is, to obtain their redelivery to him by giving a bond to try, in an action subsequently to be brought by him, the right of distress, and to restore them if such right be adjudged against him, is recognized by statute in several of the states in which the right of distress still exists,⁷⁶⁸ in some, however, subject to restrictions which did not exist at common law. In three states the right to replevy is apparently confined to the tenant himself, a third person claiming the goods being remitted to proceedings of another character;⁷⁶⁹ and in one state the right exists only in case the tenant makes oath that the sum claimed, or a part there-

1 McMUL. (S. C.) 194, it was held that the lien of the distress on the goods replevied is prior to the general lien of an execution issued but not levied.

The statutory lien for rent was held not to be released by the giving of the statutory bond to pay the judgment for rent which might be recovered in a proceeding begun by distress. *McEvoy v. Niece*, 20 Tex. Civ. App. 686, 50 S. W. 424.

⁷⁶⁷ 3 Blackst. Comm. 149; *Woodfall*, Landl. & Ten. (10th Ed.) c. 21.

⁷⁶⁸ See *Illinois*, Hurd's Rev. St. 1905, c. 80, § 21; *Kentucky* St. 1903,

§ 2310; *New Jersey*, 1 Gen. St. p. 1208, § 6; *Pennsylvania*, Pepper & Lewis' Dig. Laws, "Landl. & Ten." §§ 11, 24; *South Carolina* Civ. Code 1902, § 2435. In several states the statutes contain more or less elaborate provisions as to the practice in replevin. See *Delaware* Rev. Code 1893, p. 872, §§ 46-51; *Illinois*, Hurd's Rev. St. 1905, c. 119; *Mississippi* Code 1906, §§ 2845-2847, 2856-2861; *New Jersey*, 3 Gen. St. pp. 2770-2778.

⁷⁶⁹ *Florida* Gen. St. 1906, § 2246;

Georgia Code 1895, §§ 4819, 4820;

1905, c. 80, § 21; *Texas* Rev. St. 1895, § 3244.

of, is not due.⁷⁷⁰ The replevy proceeding in this latter state is ordinarily referred to in the cases as one by "counter affidavit."⁷⁷¹ The counter affidavit is sufficient if it alleges, as provided by the statute, that the sum distrained for, or some part thereof, is not due.⁷⁷² If more specific allegations are made, as to the existence of particular counterclaims, evidence as to other counterclaims has been held to be inadmissible.⁷⁷³

In two states the statute provides, in lieu of the common-law right, that the officer levying a distress may release the goods on obtaining a "forthcoming bond" from the debtor;⁷⁷⁴ and in others the statute, without undertaking to abolish the remedy of replevin as it existed at common law, provides for the giving of a bond conditioned, not to try the right to the property distrained, but to pay the value of such property, or to pay the sum ascertained to be due by the tenant.⁷⁷⁵

At common law a third person has, to the same extent as a tenant, a right to assert by replevin that goods belonging to him have been illegally seized under distress.⁷⁷⁶ In several states the statute provides in addition to or in substitution for the common law remedy in favor of such person a proceeding of "claim and delivery," or some other proceeding framed for the purpose of enabling a third person to intervene in case of the seizure of his property under execution or other process.⁷⁷⁷

c. **Injunction.** An illegal distress is a trespass, and an injunction to prevent a distress would ordinarily issue, it seems, only under circumstances which might justify such remedy to prevent

⁷⁷⁰ Georgia Code 1905, § 4819. See *Huckaby v. Brooks*, 75 Ga. 678.

⁷⁷¹ See ante, at note 627.

⁷⁷² *Anders v. Blount*, 67 Ga. 41; *White v. Mandeville*, 72 Ga. 705.

⁷⁷³ *Hunnicutt v. Chambers*, 111 Ga. 566, 36 S. E. 853.

⁷⁷⁴ Virginia Code 1904, § 3617; *West Virginia Code*, § 4188.

⁷⁷⁵ Florida Gen. St. 1906, § 2242; Georgia Code 1895, § 4819; Illinois Rev. St. 1905, c. 80, § 26; Kentucky Civ. Code, § 653; Mississippi Code 1906, §§ 2845-2847; Texas Rev. St. 1895, § 3244.

⁷⁷⁶ See ante, at note 665.

⁷⁷⁷ Florida Gen. St. 1906, § 2246; Georgia Code 1895, § 4820; Kentucky Civ. Code, § 645; Texas Rev. St. 1895, arts. 5286-5312 ("trial of right of property"); Virginia Code 1904, §§ 2998-3005; West Virginia Code, §§ 3573-3579. In Georgia a third person cannot claim the goods upon the ground that the distress warrant was sued out on false averments. *Horne v. Powell*, 28 Ga. 637, 15 S. E. 688.

an ordinary trespass. There are a number of cases in which such relief has been refused.⁷⁷⁸ An injunction has issued, however, upon the application of a lessee, to prevent a distress upon his numerous subtenants for rent alleged to have been paid;⁷⁷⁹ and an injunction has likewise issued, apparently, when the lease was accepted by reason of fraudulent representations by the lessor.⁷⁸⁰

d. Action for damages—(1) Distress when no tenancy exists. Since the right of distress exists only when the relation of tenancy exists,⁷⁸¹ a distress made when such is not the case is a naked trespass, giving the person whose rights of property are thus invaded a right to recover damages as in any other case of trespass. The common-law remedy would be an action of trespass,⁷⁸² but trover will also lie, it seems.⁷⁸³

(2) Distress when no rent due. Even though the other prerequisites of a distress exist, the distress is, in the absence of a statutory provision to the contrary, illegal unless the rent distrained for is due,⁷⁸⁴ and the person making a distress for rent when no rent is due is liable at common law in an action of trespass,⁷⁸⁵ or, it seems, in an action of case⁷⁸⁶ or trover.⁷⁸⁷ That

⁷⁷⁸ *Hughs v. Ring*, 1 Jac. & W. 392; *Carter v. Salmon*, 43 Law T. (N. S.) 490; *Crow v. Wood*, 13 Beav. 271; *Homan v. Moore*, 4 Price, 5; *Leopold v. Judson*, 75 Ill. 536; *Banks v. Busey*, 34 Md. 437; *Davis v. Payne's Adm'r*, 4 Rand. (Va.) 332.

⁷⁷⁹ *Coit v. Horn*, 1 Sandf. Ch. (N. Y.) 1. But that an injunction will not issue on the application of a landlord to restrain a distress on his tenant by a third person wrongfully asserting the rights of a landlord as against such tenant, see *Best v. Drake*, 11 Hare, 369; *Aldis v. Fraser*, 15 Beav. 215.

⁷⁸⁰ *Ogden v. Duffy*, 59 Ill. App. 120. In *Fowkes v. Joyce*, 2 Vern. 129, an injunction was issued, on the ground of fraud, to restrain the enforcement of a judgment for the landlord in replevin for cattle distrained, which cattle the landlord

had induced the plaintiff in the replevin suit to pasture on the demised premises for one night on their way to market.

⁷⁸¹ See ante, § 326 a.

⁷⁸² *Yates v. Tearle*, 6 Q. B. 282; *Staneley v. Allecock*, 16 Q. B. 636.

⁷⁸³ *Shipwick v. Blanchard*, 6 Term R. 298.

⁷⁸⁴ See ante, § 333 a.

⁷⁸⁵ *Ireland v. Johnson*, 1 Bing. N. C. 162; *Lockier v. Paterson*, 1 Car. & K. 721; *Rees v. Emerick*, 6 Serg. & R. (Pa.) 286; *Fretton v. Karcher*, 77 Pa. 423; *Olinger v. McChesney*, 7 Leigh (Va.) 660.

In Virginia (Code 1904, § 2898) and West Virginia (Code 1906, § 3486) it is provided that if property be distrained for any rent not due, the owner may, in an action against the party suing out the warrant of distress, recover damages

rent falls due between the time of the distress and the sale is no defense to such action.⁷⁸⁸

A distress to recover sums due other than rent is invalid, in the absence of statutory authority or express stipulations to the contrary.⁷⁸⁹ Consequently, the person making a seizure for such a purpose is liable in damages to the same extent as any other person who wrongfully enters on another's property and seizes goods thereon.

It was provided by the English statute 2 W. & M. sess. 1, c. 5, that in case a distress and sale be made for rent pretended to be in arrear when no rent is in arrear or due, the owner of the chattels distrained may recover double their value, with the costs of suit. This statute has been substantially re-enacted in a few states.⁷⁹⁰ The English statute imposes the liability upon the person distraining, as does that of two of the states,⁷⁹¹ while in one state the statute imposes it upon the person "suing out" the distress,⁷⁹² and in one upon the person "in whose name or right the property is taken."⁷⁹³ It has been held that where the statute imposed the liability on "the person distraining," a constable could not relieve himself from liability thereunder by showing that he acted under warrant from the landlord.⁷⁹⁴

Such a statute obviously does not apply in favor of a stranger merely because his property was levied on though exempt;⁷⁹⁵ and

for the wrongful seizure, and also, damages); *Mississippi* Code 1906, § 2855 (double value of property taken); *New Jersey*, 1 Gen. St. p. 1209, § 11; *Pennsylvania*, *Pepper & Lewis' Dig. Laws*, "Landl. & Ten." § 13.

⁷⁸⁶ *Olinger v. McChesney*, 7 Leigh (Va.) 660; *Smith v. Goodwin*, 4 Barn. & Adol. 413; *Lear v. Caldecott*, 4 Q. B. 123. See *Skidmore v. Ensign*, 29 Ky. (6 J. J. Marsh.) 577.

⁷⁸⁷ *Hugill v. Reed*, 49 N. J. Law, 300, 8 Atl. 287. See *Lear v. Caldecott*, 4 Q. B. 123.

⁷⁸⁸ *Evans v. Herring*, 27 N. J. Law, 243. Aliter when the action is under the statute. See post, at notes 697-698.

⁷⁸⁹ See ante, § 327.

⁷⁹⁰ *Delaware* Rev. Code 1893, p. 871, § 37; *Kentucky* St. 1903, § 2312 (or if property not sold, double

⁷⁹¹ See the statutes of New Jersey and Pennsylvania.

⁷⁹² See the Kentucky statute.

⁷⁹³ See the Mississippi statute. The Delaware statute imposes the liability upon the person "upon whose demand the distress is made."

⁷⁹⁴ *Wells v. Hornish*, 3 Pen. & W. (Pa.) 30; *Fretton v. Karcher*, 77 Pa. 423. But see *Mitchell v. Franklin*, 26 Ky. (3 J. J. Marsh.) 477.

⁷⁹⁵ *Ward v. Beatty*, 41 Ky. (2 B. Mon.) 260; *Hartshorne v. Kierman*, 7 N. J. Law (7 Halst.) 29.

so far as it may in terms apply only when the rent is "pretended" to be in arrear, it is not applicable when the distress is based on allegations that the tenant is removing his property in order to avoid payment of rent subsequently to become due.⁷⁹⁶ That a proper affidavit was made for a distress warrant did not render the statute applicable, it has been held, when the justice issued an ordinary attachment thereon and the parties so treated the proceeding.⁷⁹⁷

By the ordinary language of these statutes, double value is recoverable only if the sale as well as the seizure is made when no rent is due.

Such a statute has been held not to apply if any rent is due, although there is no right to distrain for such rent,⁷⁹⁸ or when there is no rent due because none was reserved.⁷⁹⁹ And it has been decided, by reason of the specific reference in the statute to the sale of the goods, not to apply when rent fell due between the time of the distress and that of the sale.⁸⁰⁰

In order to support a recovery under the statute, the declaration or complaint must declare thereunder⁸⁰¹ The tenant is not confined to a proceeding under this statute but may bring an action at common law,⁸⁰² and by so doing he may possibly recover more than he could under the statute.⁸⁰³ He cannot, it has been decided, recover in one action double the value of the chattels distrained, and also damages for injury to his business.⁸⁰⁴

In case a distress proceeding is instituted for rent not due, on false allegations that the tenant is removing or about to remove

⁷⁹⁶ *Kyzer v. Middleton*, 61 Miss. 360. *cher*, 77 Pa. 423; *Royse v. May*, 93 Pa. 454.

⁷⁹⁷ *Hawkins v. James*, 69 Miss. 361, 11 So. 654. ⁸⁰² *Hugill v. Reed*, 49 N. J. Law, 300, 8 Atl. 287; *Rees v. Emerick*, 6

⁷⁹⁸ *Peters v. Newkirk*, 6 Cow. (N. Y.) 103. *Serg. & R. (Pa.)* 286; *Thomas v. Gibbons*, 21 Pa. Super. Ct. 635. In the first

⁷⁹⁹ *McCaskill v. Rodd*, 14 Ont. 282. *Contra*, *Mitchell v. McDuffy*, 31 U. C. C. P. 266, 649. cited case it was held that the claim for double damages was not waived because a count at common law was

⁸⁰⁰ *Fry v. Breckinridge*, 46 Ky. (7 B. Mon.) 31; *Weber v. Loper*, 16 Mont. 300, 8 Atl. 287. added, though there could not be a recovery under both.

Montgomery Co. Rep. (Pa.) 70. ⁸⁰³ See *Rees v. Emerick*, 6 *Serg. & R. (Pa.)* 286.

⁸⁰¹ *Bell v. Norris*, 79 Ky. 48; *Garnett v. Jennings*, 19 Ky. Law Rep. 1712, 44 S. W. 382; *Fretton v. Kar-* ⁸⁰⁴ *Hugill v. Reed*, 49 N. J. Law, 300, 8 Atl. 287.

his goods, the tenant would have, in some jurisdictions, it seems, a right to recover actual damages without reference to whether the averments in this regard were made maliciously and without probable cause,⁸⁰⁵ while in some there would be no right of recovery except on a showing of malice and want of probable cause.⁸⁰⁶

(3) **Seizure or sale after tender.** As before stated,⁸⁰⁷ the levy of a distress after tender of the rent due is illegal, as is the detention or removal of the goods after tender of the rent and costs of distress, when the tender is made after the levy or seizure. The tenant is entitled to recover damages for such illegal acts⁸⁰⁸ in an action of trespass or trespass on the case.⁸⁰⁹ That the amount of the rent and costs were tendered after levy, while it renders the subsequent detention or removal of the goods illegal, does not affect the validity of the original levy.⁸¹⁰ If a tender of the rent and costs be made after the impounding, the landlord is not, at common law, under any obligation to accept it,⁸¹¹ but he is, it has been decided, by reason of St. 2 W. & M. sess. 1, c. 5, liable in damages if after such tender he proceeds to sell the goods distrained.⁸¹² That the landlord accepts a tender after the impounding, but refuses to return the goods, does not make him liable as a trespasser, though he may be liable in trover.⁸¹³

(4) **Distress on property not subject.** If a distress is made on chattels which are not subject to distress, the person distraining is liable as a trespasser, as regards such chattels,⁸¹⁴ or he may

⁸⁰⁵ See post, § 351, as to the analogous case of a wrongful attachment, and also 4 *Cyclopedia Law & Proc.* 832, with reference to the same subject.

⁸⁰⁶ Such is the rule in Georgia. *Sturgis v. Frost*, 56 Ga. 188; *Wilcox v. McKenzie*, 75 Ga. 73.

⁸⁰⁷ See ante, § 329 b.

⁸⁰⁸ *Six Carpenters' Case*, 8 Coke, 146 a.; *Branscomb v. Bridges*, 1 Barn. & C. 145; *Holland v. Bird*, 10 Bing. 15; *Evans v. Elliott*, 5 Adol. & E. 142; *Loring v. Warburton*, El. Bl. & El. 507; *Vertue v. Beasley*, 1 Moody & R. 21; *Newell v. Clark*, 46 N. J. Law, 363, 377; *Davis v. Henry*, 63 Miss. 110.

⁸⁰⁹ *Branscomb v. Bridges*, 1 Barn. & C. 145; *Holland v. Bird*, 10 Bing. 15; *Richards v. McGrath*, 100 Pa. 389.

⁸¹⁰ *Six Carpenters' Case*, 8 Coke, 146 a.; *Holland v. Bird*, 10 Bing. 15.

⁸¹¹ *Six Carpenters' Case*, 8 Coke, 146 a.; *Ladd v. Thomas*, 12 Adol. & E. 117.

⁸¹² *Johnson v. Upham*, 2 El. & El. 250, overruling *Ellis v. Taylor*, 8 Mees. & W. 415; *Richards v. McGrath*, 100 Pa. 389.

⁸¹³ *West v. Nibbs*, 4 C. R. 172.

⁸¹⁴ *Pitt v. Shew*, 4 Barn. & Ald. 206; *Nargett v. Nias*, 1 El. & El. 439;

be made liable in an action of trover,⁸¹⁵ or of case.⁸¹⁶ That he thus distrains chattels which are not liable obviously does not make the distress illegal as to chattels distrained which are liable.⁸¹⁷

So far as concerns goods which are exempt from distress because not belonging to the tenant, it has been decided in the state of Mississippi, on a construction of the local statute, that the owner must assert his claim before sale by the giving of a replevy bond, and that if he fails so to do he has thereafter no right of action for damages;⁸¹⁸ and in Pennsylvania also it has been held that if the landlord levies upon goods which are exempt as having been merely consigned to or stored with the tenant, the owner of the goods should interpose his claim by replevin before sale, if he has notice of the seizure and this was made by the landlord in ignorance of the true ownership of the goods,⁸¹⁹ though the landlord is there liable in trespass if he knows who owns the goods and proceeds with the sale without giving the owner an opportunity to replevy.⁸²⁰

(5) Irregularities in entry or seizure. Although circumstances exist which justify a distress, if an entry or seizure is made at an illegal hour,⁸²¹ or off the premises, when this is not allowable,⁸²² or if the entry or seizure is improperly made by reason of the breaking of doors or other employment of force,⁸²³ the person

Harvey v. Pocock, 11 Mees. & W. 740. Paine v. Hall Safe & Lock Co., 64 Miss. 175, 1 So. 56.

⁸¹⁵ Dalton v. Whittem, 3 Q. B. 961; Gishbourn v. Hurst, 1 Salk. 249; Simpson v. Hartopp, Willes, 512; Swire v. Leach, 18 C. B. (N. S.) 479; Huskinson v. Lawrence, 26 U. C. Q. B. 570; Hall v. Amos, 21 Ky. (5 T. B. Mon.) 89, 17 Am. Dec. 42; Connah v. Hale, 23 Wend. (N. Y.) 462.

⁸¹⁶ Nargett v. Nias, 1 El. & El. 439; Connah v. Hale, 23 Wend. (N. Y.) 462; Parkerson v. Wightman, 4 Strob Law (S. C.) 363.

⁸¹⁷ Nargett v. Nias, 1 El. & El. 439; Harvey v. Pocock, 11 Mees. & W. 740.

⁸¹⁸ Gibson v. Lock, 58 Miss. 298; S. 520.

⁸¹⁹ Coldcleugh v. Hollingsworth, 8 Watts & S. (Pa.) 302; Esterly Mach. Co. v. Spencer, 147 Pa. 466, 23 Atl. 774; Lengert Co. v. Bellevue Bldg. & Loan Ass'n, 15 Pa. Super. Ct. 380.

⁸²⁰ Brown v. Stackhouse, 155 Pa. 582, 26 Atl. 669, 35 Am. St. Rep. 908; Toledo Tinware Mfg. Co. v. Duff, 15 Pa. Super. Ct. 383.

⁸²¹ Tutton v. Darke, 5 Hurl. & N. 647; Sherman v. Dutch, 16 Ill. 283.

⁸²² Tharpe v. Stallwood, 5 Man. & G. 760.

⁸²³ Brown v. Glenn, 16 Q. B. 254; Moore v. Drinkwater, 1 Fost. & F. 134; Attack v. Bramwell, 3 Best &

taking the distress is liable as a trespasser *ab initio*. And so if he seizes goods exempt from distress he is a trespasser as regards those goods, though not as regards goods seized therewith which are not exempt.⁸²⁴

(6) **Second distress.** The levy of a second distress for the same rent, when enough might have been taken on the first distress to satisfy the landlord's demand, is ordinarily wrongful⁸²⁵ and constitutes a trespass.⁸²⁶ Instead of suing in trespass the tenant may, if he choose, bring trover,⁸²⁷ or case.⁸²⁸

(7) **Excessive distress.** It was provided by the statute of Marlebridge⁸²⁹ that distresses shall be reasonable and not too great, and that "he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distress." This statute is in force in some states,⁸³⁰ and there are in others statutes of a somewhat similar nature, imposing liability upon person making an excessive distress for all damage caused by its excessive character.⁸³¹

It is only necessary, in order to avoid any liability as for an excessive distress, that the person distraining exercise a reasonable and honest discretion,⁸³² and it has been said that no liability exists if the excessive character of the distress results from a mere mistake of judgment or a lack of knowledge of the amount of rent due.⁸³³

⁸²⁴ *Harvey v. Pocock*, 11 Mees. & W. 740; *Nargett v. Nias*, 1 El. & El. 439.

⁸²⁵ See ante, § 330.

⁸²⁶ *Smith v. Goodwin*, 4 Barn. & Adol. 413.

⁸²⁷ *Smith v. Goodwin*, 4 Barn. & Adol. 413.

⁸²⁸ *Lear v. Caldecott*, 4 Q. B. 123; *Dawson v. Cropp*, 1 C. B. 961.

⁸²⁹ 52 Hen. 3, c. 4 (anno 1267).

⁸³⁰ *Maryland* (see Alexander's British Statutes in force in Maryland); *Pennsylvania* (see McKinney v. Reader, 6 Watts [Pa.] 34); and *semlé* in *Illinois* (see Hare v. Stegall, 60 Ill. 380; *Lindley v. Miller*, 67 Ill. 244).

⁸³¹ *Delaware Rev. Code* 1893, p. 869, § 24 (liable in action on the case); *Mississippi Code* 1906, § 2853 (officer liable in double damages); *New Jersey*, 1 Gen. St. p. 1207, § 1; *South Carolina Civ. Code*, § 2434. In *Virginia* (Code 1904, § 1315) and *West Virginia* (Code 1906, § 905) it is merely provided that the officer shall in no case make an unreasonable distress or levy.

⁸³² *Roden v. Eyton*, 6 C. B. 427; *Weber v. Vernon*, 2 Pen. (Del.) 359, 45 Atl. 537. See *Willoughby v. Backhouse*, 2 Barn. & C. 823.

⁸³³ *Harms v. Solem*, 79 Ill. 460.

In determining whether a distress is excessive, the value of the goods seized, it is said, is *prima facie* what they would realize at auction,⁸³⁴ and not their value to the tenant or the amount which an incoming tenant would pay for them.⁸³⁵ But it has been held that the price actually obtained for them at the sale under the distress is not conclusive as to their value, and consequently the tenant may sue for an excessive distress though the sale of the goods distrained (less the expense) did not realize the amount due.⁸³⁶ If only a single chattel subject to distress is found, the person distraining it will not be liable as for an excessive distress, though its value considerably exceeds the amount due.⁸³⁷

The fact that no sale takes place, either because the tenant pays the amount due,⁸³⁸ or because the parties so arrange,⁸³⁹ does not affect the right of action, even though the goods have not been withdrawn from the tenant's control.⁸⁴⁰ A recovery in an action of replevin has, however, been regarded as a bar to the action, this involving an election by the tenant to treat the distress as illegal.⁸⁴¹

An action for an excessive distress may be brought not only by the tenant, but as well by a third person whose goods have been seized.⁸⁴² A person who has the mere enjoyment of the use of the chattels, without any property in them either legal or equitable, may, it has been held, sue on this ground.⁸⁴³

In one state it has been held that a landlord may, in distraining, seize sufficient goods to satisfy not only the rent but also a lien on the goods of a character which by statute takes precedence

⁸³⁴ *Rapley v. Taylor*, Cab. & E. Willoughby v. Backhouse, 2 Barn. 150; *Wells v. Moody*, 7 Car. & P. 59; & C. 821.

Weber v. Vernon, 2 Pen. (Del.) 359, ⁸⁴⁰ *Baylis v. Usher*, 4 Moore & P. 45 Atl. 537. 790.

⁸³⁵ *Wells v. Moody*, 7 Car. & P. 59.

⁸³⁶ *Smith v. Ashforth*, 29 L. J. ⁸⁴¹ *Phillips v. Berryman*, 3 Doug. 286. See *Grace v. Morgan*, 2 Bing. N. C. 534.

⁸³⁷ *Field v. Mitchell*, 6 Esp. 71; ⁸⁴² *Fisher v. Algar*, 2 Car. & P. 374; *Wilkinson v. Ibbett*, 2 Fost. & Avenell v. Croker, Moody & M. 172. F. 300.

⁸³⁸ *Chandler v. Doulton*, 3 Hurl. & ⁸⁴³ *Fell v. Whitaker*, L. R. 7 Q. C. 553. B. 120.

⁸³⁹ *Sells v. Hoare*, 1 Bing. 401;

of rent;⁸⁴⁴ and in another the statute provides that if the goods are subject to a mortgage made before the lease, the landlord may pay it, and distrain for the amount thereof as well as for the rent.⁸⁴⁵

In any jurisdiction in which there is a statutory lien for the rent, and distress is named as a proper mode of asserting the lien, that all the property subject to the lien is distrained, though much greater in value than the amount due, is not, it seems, a ground of liability.⁸⁴⁶

The proper form of action for an excessive distress is an action on the case.⁸⁴⁷

While an action ordinarily lies for the taking of an excessive distress, the distress is not on that account void, and the goods seized may be detained for the amount actually due.⁸⁴⁸

In some states there is a right of action against a landlord if he undertakes to distrain for an amount in excess of the rent actually due, without reference to the amount or value of the property which may be seized under the distress.⁸⁴⁹

(8) **Irregularities after seizure.** At common law any irregularity committed in the course of a distress rendered the person distraining a trespasser *ab initio*.⁸⁵⁰ But by St. 11 Geo. 2, c. 19, § 19, it was provided that when any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent, the distress itself shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party or parties aggrieved may recover the special damage sustained, in an action of trespass or on the

⁸⁴⁴ Smith v. Hoopes, 1 Pen. (Del.) 177, 39 Atl. 990. Watts (Pa.) 34 (and not trespass); Jimison v. Reifsneider, 97 Pa. 136

⁸⁴⁵ South Carolina Civ. Code, § 2430. (and not replevin).

⁸⁴⁶ It is so decided in McKee v. 1244; Harms v. Solem, 79 Ill. 460; Sims, 92 Tex. 51, 45 S. W. 564. McKinney v. Reader, 6 Watts (Pa.)

⁸⁴⁷ Hutchins v. Chambers, 1 Bur- 34; Richards v. McGrath, 100 Pa. row, 586; Lynne v. Moody, 2 389, and cases cited in next preced- Strange, 851; Kendrick v. Lee, 6 U. ing note.

C. Q. B. (O. S.) 27; Hare v. Stegal, 849 See ante, § 331.

60 Ill. 380; Lindley v. Miller, 67 850 Six Carpenters' Case, 8 Coke, Ill. 244; McKinney v. Reader, 6 146 a.

case at his election. An approximately similar statute is in force in several of the states.⁸⁵¹

Such a statute applies only to irregularities subsequent to the seizure, as where a sale is made without giving the proper notice,⁸⁵² or without appraisement,⁸⁵³ or before the proper time,⁸⁵⁴ or without obtaining the best price;⁸⁵⁵ and any irregularity in the entry or seizure still renders the person distraining a trespasser *ab initio*.⁸⁵⁶ By force of the statute the tenant can recover for any irregularity subsequent to the seizure only if he shows special damage by reason thereof.⁸⁵⁷

Whether an action on account of a wrong committed subsequently to the seizure shall be in trespass or in case depends on the character of the wrong. For a mere omission to have an appraisement made, or the like, an action of case is proper,⁸⁵⁸ while for an active wrong, such as turning the tenant's family out of possession,⁸⁵⁹ or for continuing in possession an unreasonable time,⁸⁶⁰ he may sue in trespass. Since by the English statute the distrainer is not a trespasser *ab initio*, and an action on the case is expressly given him, he cannot, it has been held, bring trover on account of an irregularity within the statute.⁸⁶¹

In Pennsylvania St. 11 Geo. 2, c. 19, § 19, is not in force, and

⁸⁵¹ *Delaware* Rev. Code 1893, p. N. 116; *Brown v. Howell*, 68 N. J. 871, § 38; *Kentucky* St. 1903, § 2398; *Law*, 292, 53 Atl. 459.

Mississippi Code 1906, § 2854; *New Jersey*, 1 Gen. St. p. 1210, § 12; *West Virginia* Code 1906, § 3407; *Virginia* Code 1904, § 2794. ⁸⁵⁸ *Messing v. Kemble*, 2 Camp. 115; *Knight v. Egerton*, 7 Exch. 407; *Robinson v. Waddington*, 13 Q. B. 753; *Biggins v. Goode*, 2 Crompt. & J. 364; *Lucas v. Tarleton*, 3 Hurl. & N. 116.

⁸⁵² *Kerby v. Harding*, 6 Exch. 234. See ante, § 342 b.

⁸⁵³ *Biggins v. Goode*, 2 Crompt. & J. 364; *Knotts v. Curtis*, 5 Car. & P. 322; *Knight v. Egerton*, 7 Exch. 407.

⁸⁵⁴ *Lucas v. Tarleton*, 3 Hurl. & N. 116; *Rodgers v. Parker*, 18 C. B. 112; *Wallace v. King*, 1 H. Bl. 13.

⁸⁵⁵ *Poynter v. Buckley*, 5 Car. & P. 512; *Ridgway v. Stafford*, 6 Exch. 404; *Cahill v. Lee*, 55 Md. 319.

⁸⁵⁶ *Attack v. Bramwell*, 3 Best & S. 520.

⁸⁵⁷ *Rodgers v. Parker*, 18 C. B. 112; *Lucas v. Tarleton*, 3 Hurl. &

⁸⁵⁹ *Etherton v. Popplewell*, 1 East, 139.

⁸⁶⁰ *Winterbourne v. Morgan*, 11 East, 395; *Thompson v. Marsh*, 2 U. C. Q. B. (O. S.) 389; *Lynch v. Bickle*, 17 U. C. C. P. 549.

⁸⁶¹ *Wallace v. King*, 1 H. Bl. 13. In Illinois it was assumed that the English statute was not in force there, and that consequently trover would lie in the case of a sale without appraisement. *Tripp v. Ground*, 60 Ill. 474.

accordingly a landlord has there been held liable as a trespasser *ab initio* when he sold without first having an appraisalment,⁸⁶² and when he sold after an appraisalment which was made less than the statutory time after the seizure.⁸⁶³ An omission by the landlord of a prerequisite of the sale, such as notice to the tenant,⁸⁶⁴ or presumably an appraisalment, does not even there render him liable as a trespasser *ab initio* if no sale is made. In that jurisdiction, in the case of a sale made without a proper appraisalment, or other required preliminary, the landlord may, as being a trespasser *ab initio*, be sued in trover instead of in trespass,⁸⁶⁵ and likewise the purchaser at the invalid sale may be sued in trover, as no title can grow out of a trespass.⁸⁶⁶

(9) **Measure of damages.** In case a distress is absolutely illegal and so constitutes a trespass *ab initio*, by reason of the fact that there is no right of distress, or that the entry or seizure is wrongful, or, in some jurisdictions, by reason of irregularities subsequent to the seizure,⁸⁶⁷ the person whose goods are taken, whether the tenant or another, may, if the goods are subsequently sold under the distress, ordinarily recover as damages the value of the goods wrongfully taken, without deducting the amount of rent due,⁸⁶⁸ and also, according to some cases, interest on such amount until the time of trial.⁸⁶⁹ It has been held, however, that if, before the goods are removed from the premises, the distress is withdrawn by reason of the payment of the rent, only the amount of the actual damage sustained by the wrongful levy can be recovered.⁸⁷⁰

⁸⁶² Kerr v. Sharp, 14 Serg. & R. S. 520; Howell v. Listowell Rink & (Pa.) 399; Briggs v. Large, 30 Pa. Park Co., 13 Ont. 476; Huskinson v. 287; Wyke v. Wilson, 173 Pa. 12, 33 Lawrence, 26 U. C. Q. B. 570; Cate v. Atl. 701; Hazlett v. Mangel, 9 Pa. Schaum, 51 Md. 299; Briscoe v. Mc- Super. Ct. 139. Elween, 43 Miss. 556 Perrin v. Wells,

⁸⁶³ Brisben v. Wilson, 60 Pa. 452; 155 Pa. 299, 26 Atl. 543; Majors v. Davis v. Davis, 128 Pa. 100, 18 Atl. Goodrich (Tex. Civ. App.) 54 S. W. 514. 919.

⁸⁶⁴ McKinney v. Reader, 6 Watts 869 Cate v. Schaum, 51 Md. 299; (Pa.) 34. Briscoe v. McElween, 43 Miss. 556;

⁸⁶⁵ Briggs v. Large, 30 Pa. 287. Bohm v. Dunphy, 1 Mont. 333; Fern-
⁸⁶⁶ Brisben v. Wilson, 60 Pa. 452. wood Masonic Hall Ass'n v. Jones, 102 Pa. 307.

⁸⁶⁷ See ante, § 346 d (8).

⁸⁶⁸ Keen v. Priest, 4 Hurl. & N. 870 Harvey v. Pocock, 11 Mees. & 236; Attack v. Bramwell, 3 Best & W. 740; Hogarth v. Jennings [1892]

In a number of cases the person injured has been allowed to recover consequential damages resulting from the seizure,⁸⁷¹ such as injury to his business⁸⁷² or reputation for solvency,⁸⁷³ loss of time,⁸⁷⁴ and even for injury to his feelings.⁸⁷⁵ He can obviously not recover for loss and injury for which he is himself responsible.⁸⁷⁶ Exemplary damages may also be recovered when the illegal seizure is made under such circumstances of malice, willfulness, or oppression, as would justify recovery of such damages in the case of any other illegal taking.⁸⁷⁷

As before stated,⁸⁷⁸ by statute, in several jurisdictions, there may be a recovery of double the value of the goods taken if no rent is due.

In the case of an excessive distress, the measure of recovery is, it has been said, the inconvenience and expense which the tenant sustains in being deprived of the use and control of the excess of goods taken, or, in case he has replevied the goods, the additional expense and inconvenience of replevying to a larger amount,⁸⁷⁹ and he may, in any case of excessive distress, recover nominal damages at least.⁸⁸⁰ In case the goods are sold the

1 Q. B. 907; *Lamb v. Wall*, 1 Fost. & F. 503. In *Scott v. McEwen*, 2 Phila. (Pa.) 176, the court refused to allow any damages, the wrongful seizure of exempt goods being by mistake, they having been replevied, and no actual damage being proven.

⁸⁷¹ See *Fernwood Masonic Hall Ass'n v. Jones*, 102 Pa. 30; *Mickle's Adm'r v. Miles*, 1 Grant's Cas. (Pa.) 320.

⁸⁷² See *Sturgis v. Frost*, 56 Ga. 188; *Dailey v. Grimes*, 27 Md. 440; *Sherman v. Dutch*, 16 Ill. 283; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354. Compare *Hugill v. Reed*, 49 N. J. Law, 300, 8 Atl. 287; *Burger v. Rhiney* (Tex. Civ. App.) 42 S. W. 590.

⁸⁷³ *Marquissee v. Ormston*, 15 Wend. (N. Y.) 368.

⁸⁷⁴ See *Watson v. Boswell*, 25 Tex. Civ. App. 379, 61 S. W. 407; *Smith*

v. Jones, 11 Tex. Civ. App. 18, 31 S. W. 306.

⁸⁷⁵ *Morris v. Duncan*, 126 Ga. 467, 54 S. E. 1045, 115 Am. St. Rep. 105.

⁸⁷⁶ See *Andrews v. Jones*, 36 Tex. 149; *Thomas v. Judy* (Tex. Civ. App.) 44 S. W. 890.

⁸⁷⁷ *Dye v. Denham*, 54 Ga. 224; *Sherman v. Dutch*, 16 Ill. 283; *Clevenger v. Dunaway*, 84 Ill. 367; *Bohm v. Dunphy*, 1 Mont. 333; *Rees v. Emerick*, 6 Serg. & R. (Pa.) 286; *Hatchell v. Chandler*, 62 S. C. 380, 40 S. E. 777. Compare *Mackin v. Blythe*, 35 Ill. App. 216; *Burger v. Phiney* (Tex. Civ. App.) 42 S. W. 590; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

⁸⁷⁸ See ante, § 346 d (2).

⁸⁷⁹ *Piggott v. Birtles*, 1 Mees. & W. 441.

⁸⁸⁰ *Chandler v. Doulton*, 3 Hurl. & C. 553; *Piggott v. Birtles*, 1 Mees.

tenant may, it seems, allege such sale as special damage.⁸⁸¹

In the case of an irregularity subsequent to the seizure, which irregularity does not, by statute,⁸⁸² render the distrainor a trespasser *ab initio*, the recovery is ordinarily, by the language of the statute, limited to the "special damage" sustained by reason of such irregularity. Consequently, in the absence of proof of actual damage, there is no right to a verdict for nominal damages.⁸⁸³ The ordinary measure of damages in such a case is the value to the owner⁸⁸⁴ of the goods distrained less the amount of the rent due.⁸⁸⁵ In a jurisdiction where such an irregularity does make the distrainor a trespasser *ab initio*, the value of the goods seized and sold, without any reduction for rent, may be recovered.⁸⁸⁶

(10) **Persons liable.** When, as is ordinarily the case, the seizure and sale are not made by the person asserting the claim for rent, usually the landlord, but another makes the distress for him as bailiff or constable, a question may arise as to the liability of the employee. If a distress is made under circumstances not warranting a resort to such a remedy, as when no relation of tenancy exists, or when no rent is due, the person who directed the distress to be made is obviously liable as a joint trespasser.⁸⁸⁷ It has even been decided that the landlord is liable for the act of the bailiff in distraining after a tender made to the latter on the land, although the landlord did not know of the tender.⁸⁸⁸

As to whether, when the circumstances justify a distress, the

& W. 441; *Black v. Coleman*, 29 U. C. C. P. 507.

⁸⁸¹ *Thompson v. Wood*, 4 Q. B. 493. As to damages for distraining for more rent than is due (ante, § 346 d [7]), see *Watson v. Boswell*, 25 Tex. Civ. App. 379, 69 S. W. 407; *Fernwood Masonic Hall Ass'n v. Jones*, 102 Pa. 307.

⁸⁸² See ante, § 346 d (8).

⁸⁸³ *Rodgers v. Parker*, 18 C. B. 112; *Lucas v. Tarleton*, 3 Hurl. & N. 116. Contra, *Maguire v. Post*, 5 U. C. Q. B. (O. S.) 1.

⁸⁸⁴ See *Knotts v. Curtis*, 5 Car. & P. 322; *Rocke v. Hills*, 3 Times Law R. 298.

⁸⁸⁵ *Biggins v. Goode*, 2 Crompt. & J. 364; *Knight v. Egerton*, 7 Exch.

407; *Whitworth v. Maden*, 2 Car. & K. 517; *Shultz v. Reddick*, 43 U. C. Q. B. 155; *Tripp v. Grouner*, 60 Ill. 474; *Cahill v. Lee*, 55 Md. 319.

⁸⁸⁶ *Davis v. Davis*, 128 Pa. 100, 18 Atl. 514. But see *Tripp v. Grouner*, 60 Ill. 474.

⁸⁸⁷ *Richardson v. Vice*, 4 Blackf. (Ind.) 13; *Ashbell v. Tipton*, 40 Ky. (1 B. Mon.) 300.

⁸⁸⁸ *Hatch v. Hale*, 15 Q. B. 10; *Howell v. Listowell Rink & Park Co.*, 13 Ont. 476; *Hilson v. Blain*, 2 Bailey Law (S. C.) 168.

landlord is liable for the wrongful acts of his representative committed in making the distress and sale, as being within the scope of the authority given, the cases are by no means in accord.⁸⁸⁹ It has been decided that the landlord is liable on account of the act of his bailiff in making an excessive distress,⁸⁹⁰ and also for other irregularities committed by the bailiff in conducting the distress, such as a failure to give notice or have an appraisement made previous to sale.⁸⁹¹ The landlord is obviously liable for all acts specifically authorized⁸⁹² or ratified by him.⁸⁹³

There are two decisions that the landlord is liable for the act of his bailiff in entering in an illegal manner in order to distrain,⁸⁹⁴ and there is also a decision to the contrary.⁸⁹⁵ And while in England and in one state it has been decided that the landlord is not liable for the act of the bailiff, not specifically authorized or ratified by him, in seizing articles which are not a proper subject of seizure,⁸⁹⁶ a different view has been adopted in

⁸⁸⁹ *In Manchester Home Bldg. & Loan Ass'n v. Porter*, 106 Va. 528, 56 S. E. 337, it was said that since the evidence did not tend to prove that the landlords directed or approved of the manner in which the constable executed the warrant, or that they knew how it had been executed, the question of their liability for the officer's acts ought not to have been submitted to the jury. The character of the officer's misconduct does not appear.

⁸⁹⁰ *Megson v. Mapleton*, 49 Law T. (N. S.) 744; *Riggin v. Becker*, 9 Pa. Dist. R. 439. See *Webber v. Vernon*, 2 Pen. (Del.) 359, 45 Atl. 537.

⁸⁹¹ *Haseler v. Lemoyne*, 5 C. B. (N. S.) 530. But in *Butts v. Edwards*, 2 Denio (N. Y.) 164, it was held that the landlord was not liable for a premature appraisement, he not knowing thereof.

⁸⁹² *Hall v. Amos*, 21 Ky. (5 T. B. Mon.) 89, 17 Am. Dec. 42; *Riggin v. Becker*, 9 Pa. Dist. R. 439.

⁸⁹³ *Moore v. Drinkwater*, 1 Fost. & F. 134; *Becker v. Dupree*, 75 Ill. 167;

Connah v. Hale, 23 Wend. (N. Y.) 462. Compare *Grund v. VanVleck*, 69 Ill. 478. That the landlord received the proceeds of a distress has been held not of itself sufficient to make him liable for the seizure of goods not subject. *Lewis v. Read*, 13 Mees. & W. 834; *Freeman v. Rosher*, 13 Q. B. 780. Contra, where he retains possession of things which he must know to have been wrongfully distrained. *Gauntlett v. King*, 3 C. B. (N. S.) 59.

⁸⁹⁴ *Anglehart v. Rathier*, 27 U. C. C. P. 97; *Cate v. Schaum*, 51 Md. 299. This later case is to a considerable extent based on *Attack v. Bramwell*, 3 Best & S. 520, in which case, however, the question whether the landlord was liable for his bailiff's act is not referred to by court or counsel and it would seem that the landlord either authorized or adopted the illegal act.

⁸⁹⁵ *Ellis v. Lamb*, 9 Pa. Dist. R. 491.

⁸⁹⁶ *Lewis v. Read*, 13 Mees. & W. 834; *Freeman v. Rosher*, 13 Q. B.

another state.⁸⁹⁷ An assault by the person employed to make the distress, though made while engaged in levying the distress, has been regarded as entirely outside of his authority.⁸⁹⁸

The person employed by the landlord to make the distress, even though he is a person having an official character, such as a sheriff or constable, is liable in case there is no legal justification for the distress, as well as on account of his illegal mode of making the levy or sale.⁸⁹⁹ But he is not, it seems, liable for acting under a warrant improperly issued, if the law requires him, as an official, to levy a distress on the issue of a warrant therefor.⁹⁰⁰

(11) **Matters excluding right of action.** It has been decided in one case that a provision of the lease, excluding any right to recover damages by reason of a distress, is invalid.⁹⁰¹

The owner of goods illegally distrained, it has been decided, does not waive his right of action by his failure to claim the goods at the time of the distress.⁹⁰²

In Pennsylvania it has been decided that if a notice of the distress is given to the owner of the goods distrained and an appraisal is made, his only remedy thereafter is by replevin, and he cannot, after the sale, bring trespass or trover.⁹⁰³ This view is based on the ground that the statute names replevin as the remedy in such case. In no other jurisdiction does such a view appear to have obtained.

780; *Haseler v. Le Moyne*, 5 C. B. (6 B. Mon.) 420; *Roberts v. Tennell*, (N. S.) 530; *Becker v. Dupree*, 75 14 Ky. (4 Litt.) 286.

Ill. 167.

⁸⁹⁷ *Parkerson v. Wightman*, 4 App. 379, 61 S. W. 407. In *Watson v. Mirike*, 25 Tex. Civ. App. 527, 61 S. W. 538, such a clause was held to be valid as applied to a distress under circumstances "which authorized a legal distraint."

⁸⁹⁸ *Richards v. West Middlesex Waterworks Co.*, 15 Q. B. Div. 660; *Ellis v. Lamb*, 9 Pa. Dist. R. 491. See *Kinsella v. Hamilton*, 26 L. R. Ir. 671.

⁸⁹⁹ *Lord v. Brown*, 5 Denio (N. Y.) 345; *Moulton v. Norton*, 5 Barb. (N. Y.) 286; *Wells v. Hornish*, 3 Pen. & W. (Pa.) 30; *McElroy v. Dice*, 17 Pa. 163; *Oliver v. Wheeler*, 26 Pa. Super. Ct. 5; *Gauntlett v. King*, 3 C. B. (N. S.) 59.

⁹⁰⁰ See *Powell v. Triplett*, 45 Ky. 908.

⁹⁰¹ *Watson v. Boswell*, 25 Tex. Civ. App. 527, 61 S. W. 538.

⁹⁰² *Evans v. Herring*, 27 N. J. Law, 243.

⁹⁰³ *Caldcleugh v. Hollingsworth*, 8 Watts & S. (Pa.) 303; *Esterly Mach. Co. v. Spencer*, 147 Pa. 466, 23 Atl. 774; *Sassman v. Brisbane*, 7 Phila. (Pa.) 159. See *Briggs v. Large*, 30 Pa. 287; *Brown v. Stackhouse*, 155 Pa. 582, 26 Atl. 669, 35 Am. St. Rep.

The tenant's right of action against one who makes a distress under a warrant which is invalid by reason of the landlord's death after its issuance is not affected, it has been decided, by the fact that he acquiesced in the seizure by reason of the pretended authority.⁹⁰⁴

The right of action for a wrongful distress has been held not to be affected by the fact that the parties enter into an arrangement for the sale of the goods distrained;⁹⁰⁵ and a like view has been adopted in the same jurisdiction as to the effect of the receipt by the tenant of the balance in the sheriff's hands above the rent claimed and costs.⁹⁰⁶ In another jurisdiction such receipt of the balance has been held to prevent recovery of damages.⁹⁰⁷

It has been decided, in jurisdictions where a distress has, or may have, the effect of commencing an action for the rent,⁹⁰⁸ that the fact that such action has not been brought to a final conclusion does not preclude an action for the wrongful distress.⁹⁰⁹

B. ATTACHMENT.

§ 347. When authorized.

The statutes of several states authorize an attachment to secure the payment of rent or of the cost of supplies furnished, or the repayment of advances, when such payment or repayment is endangered by reason of the removal or prospective removal of the crops or of chattels on the premises, against which the landlord has the right of recourse, for the purpose of distress or enforcement of a lien.⁹¹⁰ Ordinarily, the right of attachment under these statutes is expressly made independent of whether the rent or advances have become actually due.⁹¹¹ An attach-

⁹⁰⁴ Bagwell v. Jamison, Cheves (S. C.) 249.

⁹⁰⁵ McElroy v. Dice, 17 Pa. 163.

⁹⁰⁶ Ingram v. Hartz, 48 Pa. 380.

⁹⁰⁷ Manchester Home Bldg. & Loan Ass'n v. Porter, 106 Va. 528, 56 S. E. 337.

⁹⁰⁸ See ante, § 344.

⁹⁰⁹ Sturgis v. Frost, 56 Ga. 188; Kingsley v. Schmicker (Tex. Civ. App.) 60 S. W. 331.

⁹¹⁰ A statute authorizing an attachment to enforce a lien for rent not due on an affidavit that the tenant is about to remove or sell some of his chattels was held not to authorize an attachment as against goods already removed, though they were still subject to the lien. Wallach v. Chesley, 13 D. C. (2 Mackey) 209.

⁹¹¹ In two jurisdictions a statute giving a right of attachment, upon

ment under such a statute is practically equivalent to the distress authorized by some statutes under similar circumstances.⁹¹²

The right to an attachment by reason of an actual removal is ordinarily independent of the question whether the tenant intended thereby to avoid payment of the landlord's claim,⁹¹³ and so it has been held that the fact that the removal was to nearby land belonging to the landlord did not affect the right.⁹¹⁴ The statute sometimes makes the removal of any part of the crop from the premises ground for attachment;⁹¹⁵ but in Missouri the statute has been construed as allowing removal of part of the crops or chattels provided the part left is sufficient to secure the rent,⁹¹⁶ the important question being whether the removal endangered the collection of rent.⁹¹⁷ And in Virginia and West Virginia the statute expressly makes the removal of the tenant's property

the intended removal of the tenant by the same landlord. *Patton v. Garrett*, 37 Ark. 605.

ant's goods, for rent not yet due, has been construed to give such right only as to the installment next falling due. *Redford v. Winston*, 3 Rand. (Va.) 148; *Joyce v. Wilkenning*, 8 D. C. (1 McArthur) 567. That there is no right of attachment previous to the term for rent to become due during the term, see *Johnson v. Garland*, 9 Leigh (Va.) 149.

⁹¹² See ante, § 333 b. The Mississippi statute uses the expressions "distress" and "attachment" interchangeably. See Code, §§ 2838 et seq.

⁹¹³ *Kleun v. Vinyard*, 38 Mo. 447; *Masterson v. Bentley*, 60 Ala. 520; *Randolph v. McCain*, 34 Ark. 696. But see Alabama Code 1907, § 4748, giving a right of attachment upon a "fraudulent disposal of goods."

So the fact that the property was being removed by the tenant in the regular course of business was regarded as immaterial. *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. 246.

⁹¹⁴ *Masterson v. Bentley*, 60 Ala. 520. So when the removal was to other land leased to the same ten-

⁹¹⁵ Alabama Code 1907, § 4739; Arkansas, Kirby's Dig. 1904, § 5040; Kansas Gen. St. 1905, § 4077 (property or crops). See *Randolph v. McCain*, 34 Ark. 696; *Harmon v. Payton*, 68 Kan. 67, 74 Pac. 618.

⁹¹⁶ *Haseltine v. Aushermann*, 87 Mo. 410; *Hubbard v. Quisenberry*, 32 Mo. App. 459; *Kinear v. Shands*, 36 Mo. 379. But when the rent was one-third of the crop, which consisted of corn, oats and and beans, since the landlord is entitled to one-third of each, a disposal of the beans was held to endanger the collection of the rent, though the corn and oats left were worth more than the whole rent. *Ford v. Wycoff*, 73 Mo. App. 144. And the fact that the tenant has property elsewhere out of which the rent could be paid cannot be considered. *Haseltine v. Ausherman*, 87 Mo. 410; *Hubbard v. Quisenberry*, 32 Mo. App. 459; *Dawson v. Quillen*, 43 Mo. App. 118.

⁹¹⁷ *Morris v. Hammerle*, 40 Mo. 489; *Haseltine v. Ausherman*, 87 Mo. 410.

ground for attachment only if sufficient to satisfy a distress does not remain.⁹¹⁸

Some statutes allow an attachment upon the ground not only that the tenant has removed, but also that he intends to remove, his crops⁹¹⁹ or chattels⁹²⁰ from the premises. It has been held that a threat by the tenant to dispose of his crop is not an intention so to do within such a statute.⁹²¹ A statute which in terms authorized an attachment for rent not due in case of a prospective removal endangering the right of distress has been regarded as applicable only when the rent was of a character for which distress could be made.⁹²²

In Kentucky the landlord's right to an attachment is dependent on whether the landlord has reasonable grounds to believe that he will lose his rent unless an attachment is issued.⁹²³

Although the statute refers to a removal or anticipated removal by the tenant or person liable for the rent as the justification for the attachment, a removal by one to whom he has mortgaged chattels on the premises,⁹²⁴ as well as a removal by a subtenant of crops subject to the landlord's lien,⁹²⁵ has been regarded as sufficient for this purpose.

In several states the statute in express terms provides for the enforcement of the lien for rent, or for supplies or advances, by the process of attachment, without reference to any special circumstances of the case, such as removal of the chattels subject or possibility of loss.⁹²⁶

⁹¹⁸ *Virginia* Code 1904, § 2962; ⁹²² *Poer v. Peebles*, 40 Ky. (1 B. West *Virginia* Code 1906, § 3538. Mon.) 1.

⁹¹⁹ *Alabama* Code 1901, § 4739; ⁹²³ See *Kentucky* St. 1903, § 2302: *Arkansas*, Kirby's Dig. 1904, § 5040; Porter v. Sparks, 19 Ky. Law Rep. 1211, 43 S. W. 220; *Tennessee*, Shannon's Code 1896, § 1211, 43 S. W. 220; *Kassel v. Snead*, 21 Ky. Law Rep. 777, 52 S. W. 1058;

⁹²⁰ *Delaware* Rev. Code 1893, p. O'Bryan v. Shipp, 21 Ky. Law Rep. 873, § 52 (intends to remove effects 1068, 53 S. W. 1034; *Ward v. Grigsby*, 21 Ky. Law Rep. 1406, 55 S. W. 436. from county); *District of Columbia* Code 1901, § 1229; *Mississippi* Code 1906, § 2848; *Missouri* Rev. St. 1899,

§ 4123; *Utah* Comp. Laws 1907, § 636, 24 S. E. 246. But see *Abington v. Steinberg*, 86 Mo. App. 639.

1409; *Virginia* Code 1904, § 2962 (so ⁹²⁵ *Garroute v. White*, 92 Mo. 237, that sufficient property liable to dis- 4 S. W. 681. tress will not remain); *West Vir-*

ginia Code 1906, § 3538 (ditto). ⁹²⁶ *Alabama* Code 1907, § 4739; ⁹²¹ *Ford v. Wycoff*, 73 Mo. App. 144. *Arkansas*, Kirby's Dig. 1904, § 5033;

Apart from a statute, such as those we have above referred to, specifically applicable to the case of landlord and tenant or to rent in arrear, the landlord or person entitled to the rent may, it seems, procure an attachment under the general law in order to obtain payment of his claim, as may any other creditor, provided the circumstances are otherwise such as to bring the case within the law.⁹²⁷ Such an attachment cannot be sustained when the circumstances are such as merely to give an attachment under the special law authorizing it for the enforcement of the landlord's lien.⁹²⁸

§ 348. Affidavit for attachment.

The statute almost invariably provides that the attachment shall issue upon the making of an affidavit by the landlord or person entitled, showing the existence of circumstances which, by the terms of the statute, justify its issuance.⁹²⁹ Such a provision quite usually states specifically the averments which the affidavit should contain. When the asserted right of attachment is based on the existence of a lien, the affidavit should ordinarily, no doubt, state the facts by reason of which the lien exists. The affidavit must, it has been said, show the existence of the relation of landlord and tenant,⁹³⁰ and it should show that the claim asserted is due, unless the case is within a provision of the statute allowing an attachment even before the claim is due.⁹³¹ If for advances

District of Columbia Code 1901, § 1229; *Iowa* Code 1897, § 2993; *Kansas* Gen. St. 1905, §§ 4074, 4078; *Kentucky* St. 1903, § 2324; *Mississippi* Code 1906, §§ 2832-2838; *Missouri* Rev. St. 1899, § 4115; *Oklahoma* Rev. St. 1903, § 3343; *Tennessee*, Shannon's Code 1896, § 5301; *Utah* Comp. St. 1907, § 1409.

⁹²⁷ See *Baxley v. Segrest*, 85 Ala. 183, 4 So. 865; *Tignor v. Bradley*, 22 Ark. 781; *Brown v. Cairns*, 107 Iowa, 727, 77 N. W. 478; *Rowell v. Felker*, 54 Vt. 526.

⁹²⁸ *Baxley v. Segrest*, 85 Ala. 183, 4 So. 865; *Tignor v. Bradley*, 32 Ark. 781. See *Greeley v. Greeley*, 12 Okl. 659, 73 Pac. 295.

⁹²⁹ *Alabama* Code 1907, § 4740; *Arkansas*, Kirby's Dig. St. 1904, § 5041; *Delaware* Rev. Code 1893, p. 873; *Kansas* Gen. St. 1905, § 4077; *Kentucky* St. 1903, § 2303; *Mississippi* Code 1906, §§ 2842, 2848; *Missouri* Rev. St. 1899, § 4123; *Oklahoma* Rev. St. 1903, § 3346; *Tennessee*, Shannon's Code 1896, § 5301; *Utah* Comp. St. 1907, § 1410; *Virginia* Code 1904, § 2962; *West Virginia* Code 1906, § 3541.

⁹³⁰ *Fitzsimmons v. Howard*, 69 Ala. 590; *Bell v. Allen*, 76 Ala. 450; *Yarnall v. Haddaway*, 4 Har. (Del.) 437.

⁹³¹ *Fitzsimmons v. Howard*, 69 Ala. 590.

or supplies it must show that they were furnished to enable the tenant to make a crop, when the right to a lien therefor is by the statute conditioned on this fact.⁹³² It has been held, however, that the particular articles supplied, or the values of the separate items, need not be alleged.⁹³³ If it is sought to enforce a lien for rent, and the statute authorizes a lien for the rent of the current year only, the affidavit must show the year during which the rent accrued.⁹³⁴ It is, it has been held, sufficient to state as due a gross sum covering both rent and advances.⁹³⁵ An affidavit has been sustained as regards the rent claimed, though insufficient as regards a claim also asserted therein for advances.⁹³⁶

When the claim of a right of attachment is based on the removal of the crop from the leased premises without the landlord's assent, as stated in the statute, the affidavit must, it has been held, allege that the removal was from such premises,⁹³⁷ and that it was without the landlord's assent.⁹³⁸ When the statute authorized an attachment if the tenant is about to remove his property, is doing so, or has done so, an affidavit alleging all these grounds in the alternative was held insufficient.⁹³⁹

§ 349. Bond.

The statute frequently requires that a bond be given for the payment of damages in case the attachment is wrongfully sued

If the statute gives a right to an attachment to enforce the lien after demand and refusal, demand and refusal after the claim became due must be averred. *Dozier v. Robinson*, 82 Ala. 408, 3 So. 45; *Fitzsimmons v. Howard*, 69 Ala. 590; *Bell v. Allen*, 76 Ala. 450.

⁹³² *Ballard v. Stephens*, 92 Ala. 616, 8 So. 416.

⁹³³ *Cockburn v. Watkins*, 76 Ala. 486; *Ragsdale v. Kinney*, 119 Ala. 454, 24 So. 443. *Contra*, *Dougherty v. Kellum*, 71 Tenn. (3 Lea) 643.

⁹³⁴ That the year in which the advances were made need not be stated, see *Gunter v. Du Bose*, 77 Ala. 326.

⁹³⁵ *De Bardleben v. Crosby*, 53 Ala. 363. It has been held that if the

time of the year at which the rent became due is not averred, it will be presumed to fall due at the end of the year. *Dozier v. Robinson*, 82 Ala. 408, 3 So. 45.

⁹³⁶ *Giddens v. Bolling*, 93 Ala. 92, 9 So. 427; *Ragsdale v. Kinney*, 119 Ala. 454, 24 So. 443.

⁹³⁷ *Ballard v. Stephens*, 92 Ala. 616, 8 So. 416.

⁹³⁸ *Knowles v. Steed*, 79 Ala. 427; *Baxley v. Segrest*, 85 Ala. 183, 4 So. 865. See *Bell v. Allen*, 76 Ala. 450.

⁹³⁹ *Busbin v. Ware*, 69 Ala. 279; *Robinson v. Holt*, 85 Ala. 596, 5 So. 350; *De Bardleben v. Crosby*, 53 Ala. 363.

⁹⁴⁰ *Kleun v. Vinyard*, 38 Mo. 447.

out,⁹⁴⁰ and, in the absence of a specific requirement to this effect in connection with a landlord's attachment, any such requirement in this regard in the general attachment law would presumably be effective. It has been held that a bond conditioned as required by the general attachment law will not sustain an attachment sought for the purpose of enforcing the landlord's lien.⁹⁴¹

§ 350. Writ and levy thereunder.

When, as is ordinarily the case, the right of attachment exists only against the crops grown on the premises, or against the chattels thereon, the writ of attachment should specify these as the subject of the levy.⁹⁴² It has been held, however, that a writ issued in general terms against the tenant's property, will, if not abated, sustain a levy on the crops which are alone subject.⁹⁴³ And a writ directed against the crops of the tenant has been regarded as sustaining a levy on the crops of a subtenant subject to the lien which is sought to be enforced.⁹⁴⁴ Occasionally the statute authorizes an attachment, under particular circumstances, against the tenant's property generally, or against his personal property,⁹⁴⁵ and in such a case the writ would properly direct a levy accordingly.

In several states the statute provides that the procedure shall be as in other proceedings by attachment,⁹⁴⁶ and this presumably is the case even apart from such a provision.

⁹⁴⁰ See *Alabama* Code 1907, § 4740; *Arkansas*, Kirby's Dig. 1904, § 5041; *Kansas* Gen. St. 1905, §§ 4077, 4078; *Mississippi* Code 1906, §§ 2848, 2849; *Missouri* Rev. St. 1899, § 4123; *Okla-* ⁹⁴⁵ *Delaware* Rev. Code 1893, p. 873; *Kansas* Gen. St. 1905, § 4077 (semble); *Kentucky* St. 1903, § 2302; *homa* Rev. St. 1903, § 3346; *Utah* 873; *Kansas* Gen. St. 1905, § 4077 (semble); *Kentucky* St. 1903, § 2302; *Comp. St.* 1907, § 1410. *Mississippi* Code 1906, § 2844; *Missouri* Rev. St. 1899, § 4123; *Virginia* Code 1904, § 2962; *West Virginia* Code 1906, § 3541.

⁹⁴¹ *Edwards v. Cooper*, 28 Ark. 466.

⁹⁴² *Ellis v. Martin*, 60 Ala. 394; *Greeley v. Greeley*, 12 Okla. 659, 73 Pac. 295.

⁹⁴⁶ *Alabama* Code 1907, § 4741; *Iowa* Code 1897, § 2993; *Kansas* Gen. St. 1905, § 4078; *Kentucky* St. 1903, § 2303; *Missouri* Rev. St. § 4124.

⁹⁴³ *Ellis v. Martin*, 60 Ala. 394.

⁹⁴⁴ *Agee v. Mayer Bros.*, 71 Ala. 88. The subtenant, whose crop is, under the statute, only secondarily

Alabama Code 1907, § 4741; *Iowa* Code 1897, § 2993; *Kansas* Gen. St. 1905, § 4078; *Kentucky* St. 1903, § 2303; *Missouri* Rev. St. § 4124.

§ 351. Damages for wrongful attachment.

A landlord who procures the issue of a writ of attachment on the ground that rent is due is liable in damages, it seems, if no rent is due,⁹⁴⁷ as he is if he procures its issue on false allegations that the tenant has removed or is about to remove his property, unless he had probable cause for belief in such allegations.⁹⁴⁸ That the tenant might have obtained a discharge of the attachment by giving a bond is immaterial.⁹⁴⁹ That the landlord acted maliciously in procuring the writ justifies the award of exemplary damages,⁹⁵⁰ and malice may, it has been said, be inferred from lack of probable cause;⁹⁵¹ but not from the fact that the tenant has valid claims against the landlord for more than the amount of the claim for which the attachment was issued,⁹⁵² or that the landlord, being entitled to distrain, by mistake procured a writ of attachment instead of a distress warrant.⁹⁵³

In an action on account of an attachment based on the tenant's intention to remove his crop without paying rent, the tenant may, it has been held, show that he merely contemplated a sale subject to a condition that the purchaser should pay the rent before removing the crop.⁹⁵⁴

⁹⁴⁷ *Patton v. Garrett*, 37 Ark. 605; *Harger v. Spofford*, 46 Iowa, 11; *Sigler v. Murphy*, 107 Iowa 128, 77 N. W. 577. But as to the two latter cases, see *Smeaton v. Cole*, 120 Iowa, 368, 94 N. W. 909.

⁹⁴⁸ *Weber v. Vernon*, 2 Pen. (Del.) 359, 45 Atl. 537; *Briscoe v. McElween*, 43 Miss. 556; *Dillon v. Porier*, 34 La. Ann. 1100.

⁹⁴⁹ *Weber v. Vernon*, 2 Pen. (Del.) 359, 45 Atl. 537.

⁹⁵⁰ *Weber v. Vernon*, 2 Pen. (Del.) 359, 45 Atl. 537.

⁹⁵¹ *Weber v. Vernon*, 2 Pen. (Del.) 359, 45 Atl. 537.

⁹⁵² *Smeaton v. Cole*, 120 Iowa, 368, 94 N. W. 909.

⁹⁵³ *Lawson v. Goodwin* (Tex. Civ. App.) 84 S. W. 279.

⁹⁵⁴ *Masterson v. Phinlzy*, 56 Ala. 336.

CHAPTER XXXIII.

RIGHTS OF ACTION AGAINST THIRD PERSONS.

- § 352. Physical injuries to premises.
 - a. Action by landlord.
 - b. Action by tenant.
- 353. Interference with rights of enjoyment.
 - a. Action by landlord.
 - (1) Rule ordinarily asserted.
 - (2) Theory of recovery.
 - (3) Form of action.
 - (4) Averments of injury.
 - (5) Measure of damages.
 - (6) Loss or reduction of rent.
 - b. Action by tenant.
 - (1) Right of action.
 - (2) Interference existing prior to lease.
 - (3) Form of action.
 - (4) Measure of damages.
 - (5) Effect of contract by landlord.
- 354. Taking for public use.
- 355. Interference with relation of tenancy.
- 356. Action of ejectment.

§ 352. Physical injuries to premises.

a. **Action by landlord.** In case a third person wrongfully causes a direct physical injury to the premises leased, affecting the corporeal substance thereof, so that the premises may or will revert to the landlord in a deteriorated condition, the landlord may recover on account of such injury.¹ Accordingly, the land-

¹ *Bedingfield v. Onslow*, 3 Lev. 209; *New York El. R. Co.*, 128 N. Y. 559, 29 George v. Fisk, 32 N. H. 32; *Gour. N. E.* 65; *Strohlburg v. Jones*, 78 dier v. Cormack, 2 E. D. Smith (N. Cal. 381, 20 Pac. 705; *Tinsman v. Y.*) 200; *McConnel v. Kibbe*, 33 Ill. *Belvidere Delaware R. Co.*, 25 N. J. 175, 85 Am. Dec. 265; *Kernochan v. Law* (1 Dutch.) 255, 64 Am. Dec. 415;

lord has a right of action against one who injures or removes a building or part of a building on the lands leased,² or a fence thereon.³ And likewise, since trees and perennial plants are a part of the land, which belong to the landlord and not to the tenant, the former has a right of action against one by whom they are injured or removed.⁴ And while the landlord cannot recover for an injury to the growing grass, which may be cut or otherwise utilized by the tenant,⁵ he may recover for permanent injury to the sod or growth of the grass.⁶ He may also recover against one removing,⁷ undermining,⁸ or injuring,⁹ the soil.

Bly v. Edison Elec. Illuminating Co., 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500; *Nashville, C. & St. L. R. Co. v. Heikens*, 112 Tenn. 378, 79 S. W. 1038, 65 L. R. A. 298.

² *Hocking v. Phillips*, 3 Exch. 168; *Ott v. Grice*, 15 N. C. (4 Dev. Law) 477; *Lienow v. Ritchie*, 25 Mass. (8 Pick.) 235 (removing part of house); *Cushing v. Kenfield*, 87 Mass. (5 Allen) 307; *Ridge v. Railroad Transfer Co.*, 56 Mo. App. 133 (breaking window); *Green v. Sun Co.*, 32 Pa. Super. Ct. 521 (corrosion of roof by noxious fumes); *Railway v. Ragsdale* (Tex. Civ. App.) 60 S. W. 317.

³ *Brown v. Bridges*, 31 Iowa, 138; *Gulf, C. & S. F. R. Co. v. Smith*, 3 Tex. Civ. App. 483, 23 S. W. 89; *Taylor v. Wright*, 51 App. Div. 97, 64 N. Y. Supp. 344. In *Dills v. Hampton*, 92 N. C. 565, the landlord was regarded as entitled to recover against one who tore down a fence and moved it back on the land, so as to leave unprotected fruit trees excepted from the lease.

⁴ *Beddingfield v. Onslow*, 3 Lev. 209; *Bulkley v. Dolbeare*, 7 Conn. 232; *Fitch v. Gosser*, 54 Mo. 267; *Gulf, C. & S. F. R. Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228; *Aycock v. Raleigh & A. Air-Line R. Co.*, 89 N. C. 321; *Parker v. Shackelford*, 61 Mo. 68 (destruction of hedges).

The landlord may sue a purchaser of timber wrongfully severed by the tenant or another. *Dorsey v. Moore*, 100 N. C. 41, 6 S. E. 270. And see cases cited 28 Am. & Eng. Encyc. Law (2d Ed.) 538.

⁵ See post, notes 14, 128.

⁶ *Noyes v. Stillman*, 24 Conn. 15; *Potts v. Clarke*, 20 N. J. Law (Spencer) 537; *Missouri, K & T. R. Co. v. Fulmore* (Tex. Civ. App.) 26 S. W. 238.

⁷ *Mayfair Property Co. v. Johnston* [1894] 1 Ch. 508; *Lachman v. Deisch*, 71 Ill. 59 (semble); *City of Cartersville v. Lyon*, 69 Ga. 577 (taking of gravel).

⁸ *Alston v. Scales*, 9 Bing. 3. In *Freer v. Stotenbur*, 2 Abb. Dec. (N. Y.) 189, it is decided that a lessor can recover for the taking of stone by a third person, if the lessee had no right thereto by the terms of the lease. It would seem that even if the lessee had a right to take stone, the reversionary interest in the landlord should entitle him to sue a third person taking it, unless the lessee was to be regarded as being given a fee simple estate in the stone in place.

⁹ *Potts v. Clarke*, 20 N. J. Law (Spencer) 537 (overflowing the land and so making it "rotten, boggy and miry").

Upon what may be regarded as an analogous theory, the landlord has been allowed to recover on account of a diminution in the value and utility of the building on the premises as a result of the unauthorized action of the local authorities in taking it for the purpose of a smallpox hospital, with the result that the landlord could not thereafter induce persons to occupy it.¹⁰

If the injury is merely temporary in character, the landlord has no right of action, the tenant being alone entitled to sue, as being the sole sufferer therefrom.¹¹ Accordingly it has been decided that the landlord cannot sue for a mere entry on the land by walking or riding thereon,¹² for injuries to the tenant's crops¹³ or growing grass,¹⁴ or even for the erection on the land of a board, screen or "hoarding," not intended to remain and removable in five minutes.¹⁵ Likewise it has been decided that the landlord has no right of action when the injury is to a structure which is properly to be regarded as the property of the tenant and not of the landlord.¹⁶ The landlord under a building lease has been held to have no right of action, on account of a temporary flooding of the premises, on the theory that the selling value of the reversion and of the "ground rent" incident thereto is thereby diminished.¹⁷

¹⁰ *Hersey v. Chapin*, 162 Mass. 176, 38 N. E. 442; *Kretschmar*, 24 Wis. 283; *Drake v. Chicago, R. I. & P. R. Co.*, 70 Iowa, 59, 29 N. W. 804; *Gulf, C. & S. F. R. Co. v. Smith*, 3 Tex. Civ. App. 483, 23 S. W. 89. But he may sue for injury to such part of the crop as be-

¹¹ *Coney v. Brunswick & F. Steamboat Co.*, 116 Ga. 222, 42 S. E. 498; *Hastings v. Livermore*, 73 Mass. (7 Gray) 194. longs to him, as when it was stipulated that he should have all the cornstalks. *Babley v. Vyse*, 48 Iowa, 481, and see post, at note 119.

¹² *Baxter v. Taylor*, 4 Barn. & Adol. 72; *Peck v. Cain*, 27 Tex. Civ. App. 38, 63 S. W. 177. But if there is a demise of the surface only, the landlord may recover damages against one making holes so as to injure the subsoil. *Cox v. Glue*, 5 C. B. 533.

¹³ *St. Louis, A. & T. R. Co. v. Trigg*, 63 Ark. 536, 40 S. W. 579; *Stoltz v. Co.*, 36 Ch. Div. 113.

That the tenancy has come to an end does not enable the landlord to sue for a trespass on the tenant. *Pilgrim v. Southampton & Dorchester R. Co.*, 18 L. J. C. P. 330.

¹⁴ *St. Louis, A. & T. R. Co. v. Trigg*, 63 Ark. 536, 40 S. W. 579; *Stoltz v. Co.*, 36 Ch. Div. 113.

¹⁴ *Little v. Palister*, 3 Me. (3 Greenl.) 6; *Potts v. Clarke*, 20 N. J. Law (Spencer) 536. Compare post, at note 128.

¹⁵ *Cooper v. Crabtree*, 20 Ch. Div. 589, affg. 19 Ch. Div. 193.

¹⁶ *Little v. Palister*, 3 Me. (3 Greenl.) 6.

¹⁷ *Rust v. Victoria Graving Dock Co.*, 36 Ch. Div. 113.

The fact that the landlord has a right of action against the tenant for permitting an injury to the premises,¹⁸ or in case the latter fails to repair the injury,¹⁹ should not, it is conceived, affect the landlord's right of action against the person who actually commits the injury.²⁰ And that it does not have such an effect appears to be necessarily involved in the decisions above cited, recognizing a right of action in the landlord against a third person, since it is generally conceded that, in the case of direct physical injury to the premises by a third person, the tenant is liable to the landlord as for waste.²¹ That one injured by another has a means of obtaining indemnity from a third person is no reason for excluding an action against the wrongdoer on account of such injury.²² If, however, the landlord's claim against the tenant has actually been satisfied, such satisfaction may properly, it would seem, be asserted in defense to an action by the landlord against the original wrongdoer, or in mitigation of damages, since the latter is presumably liable to the tenant for the amount which the latter has thus been compelled to pay to the landlord.²³

There are decisions to the effect that the landlord has no right of action against a third person erecting a fence on the land and thus debarring the tenant from the possession and use

¹⁸ See ante, § 110.

¹⁹ See ante, §§ 115-118.

²⁰ The view stated in the text is apparently supported by *Bannon v. Mitchell*, 6 Ill. App. (6 Bradw.) 17; *Vance v. San Antonio* (Tex. Civ. App.) 60 S. W. 317. There are suggestions of a contrary view in *Hayden v. Consolidated Mining & Dredging Co.*, 3 Cal. App. 136, 84 Pac. 422; *Taylor v. Wright*, 51 App. Div. 97, 64 N. Y. Supp. 344; *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744, and see post, at notes 32-42.

In *Attersoll v. Stevens*, 1 Taunt. 183, it is said by *Chambre, J.*, "It has been supposed, in the course of the decision in the present case, that where there is an existing tenancy for life or years, so that an action of waste may be brought against

the tenant for any injury done to the inheritance, that action is the only remedy the reversioner has, and he can maintain no action against the stranger, who in fact commits the waste; but I take the law to be clearly settled otherwise; and that the reversioner may in all cases maintain an action on the case against such stranger."

²¹ See ante, § 110.

²² One may, for instance, sue the person injuring him in person or property though he is in a position to obtain indemnity for the injury from an insurer. And so a creditor may recover from the debtor although there is a guaranty by a third person against loss by the creditor on account of the debt.

²³ See post, at notes 32-42.

of part of the property, this being considered a merely temporary injury.²⁴ In other cases, however, a contrary view is adopted.²⁵ As has been remarked, there is in principle but little difference between an injury from taking something off the land and from putting something on it,²⁶ and the question of injury to the reversion in such a case might, it seems, be left to the jury for decision.

In an action by the landlord on account of a direct injury to the premises, the measure of damage was, in an English case,^{27,28} stated to be determinable "by how much less the premises would sell (for) in consequence of the wrongful act of the defendant," by which is meant, it would appear from the context, the diminution in the value of the reversion. This accords with the rule as to the measure of damages for an injury to land. Occasionally, perhaps, the cost of repairing the injury might be adopted

²⁴ Tobias v. Cohn, 36 N. Y. 363; Walden v. Conn, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204. In the latter case, however, the court says: "No loss of rent or injury to the reversion being averred." In Kansas City, Ft. Scott & M. R. Co. v. King, 63 Ark. 251, 38 S. W. 13, it was decided that the landlord had no right of action for the erection of a fence which cut off the tenant from the use of a spring. In Cooper v. Crabtree, 20 Ch. Div. 589, it was decided that the landlord was not entitled to relief against the erection of a small "hoarding" on poles on the leased premises, the structure being not of a "permanent" character, but "removable in five minutes," and not intended to remain over a year. The decision was on a bill for an injunction, but there was a *dictum* to the effect that an action for damages would not lie.

²⁵ Barbee v. Shannon, 1 Ind. T. 199, 40 S. W. 584; Arneson v. Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

²⁶ Arneson v. Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783. In this case the landlord was held to have a right of action on account of defendant's act in erecting a fence on the leased premises, so as to attach part thereof to defendant's farm under a claim of right, principally for the reason that this initiated a possession adverse to the landlord. But generally the statute is not regarded as running against the reversioner or remainderman during the continuance of an outstanding particular estate which existed at the time of the disseisin, that is, it will not run against one who by reason of lack of right to the possession cannot sue for the interference with the possession. See Angell, Limitations, §§ 371, 372; Buswell, Limitations, §§ 271-273. The theory of the above case was apparently approved in Southern R. Co. v. State, 116 Ga. 276, 42 S. E. 508, but was regarded as inapplicable because the lessor was the state.

^{27, 28} Hosking v. Phillips, 3 Exch. 168.

as the measure of damages,²⁹ and if by reason of the injury the tenant has a right to refuse payment of rent, the consequent loss of rent to the landlord might possibly be considered.³⁰ That the tenant has an option to purchase the reversion is obviously no reason for reducing the damages otherwise recoverable by the landlord.³¹

b. **Action by tenant.** Not only has the landlord a right of action for direct injuries to the land leased, or to structures thereon, but the tenant may also have a right of action therefor by reason of the consequent diminution in the value of his estate, such injury, if of a substantial character, being well calculated to affect the value of the rights of present possession and enjoyment. His right of action for such injury to his rights of possession and enjoyment will be considered in the next section.

In several cases a right of action in the tenant is asserted, not only on account of the injury to his rights of possession and enjoyment, but also on account of the injury to the reversion caused by the wrongful act, on the theory that the tenant, being himself liable to the landlord on account of such injury,³² or under an express obligation to repair it,³³ should be allowed to recover from the wrongdoer the amount for which he may thus be made liable.³⁴ The language of these cases is ordinarily suffi-

²⁹ *Austin v. Hudson River R. Co.*, 25 N. Y. 334.

³⁰ *Austin v. Hudson River R. Co.*, 25 N. Y. 334.

³¹ *Hayden v. Consolidated Mining & Dredging Co.*, 3 Cal. App. 136, 84 Pac. 422.

³² See ante, § 110.

³³ See ante, §§ 115-118.

³⁴ *Cook v. Champlain Transp. Co.*, 1 Denio (N. Y.) 91; *Austin v. Hudson River R. Co.*, 25 N. Y. 334; *Ulrich v. McCabe*, 1 Hilt. (N. Y.) 251; *Moeckel v. Cross & Co.*, 190 Mass. 280, 76 N. E. 447 (semble); *Le Salg v. Dougherty*, 60 Misc. 455, 62 N. Y. Supp. 510 (tenant bound by covenant to repair); *Weston v. Gravlin*, 49 Vt. 507 (dictum). The same view is suggested in the opinion of Mansfield,

C. J., in *Attersol v. Stevens*, 1 Taunt. 183, in *Pantam v. Isham*, 1 Salk. 19, and in *West v. Treude*, Cro. Car. 187, Sir Wm. Jones, 224. In *Anthony v. New York, P. & B. R. Co.*, 162 Mass. 60, 37 N. E. 780, it was held that where the lease provided that the lessees should keep the buildings in repair and fully insured, and should rebuild or repair in case of injury or destruction by fire, and that they might alter or remove the buildings provided this did not diminish the value of the premises, the lessees could recover the full value of a building from a railroad company which negligently set fire to it. It was said that the lessees were entitled "to recover full damages for the destruction of the buildings, as

ciently broad to uphold a recovery by the tenant for the injury to the reversion even though he has not actually satisfied his liability to the landlord, and there is one decision³⁵ in which this view is expressly asserted, at very considerable length, chiefly on the ground that otherwise the tenant might be subjected to loss.³⁶ There are on the other hand two decisions which forcibly oppose the view that the tenant may recover for the injury to the reversion when he has not previously satisfied the landlord on account of such injury,³⁷ for the reason that to allow a recovery

if they were the bailees of the buildings, as personal property, and that their obligation to rebuild the buildings, and their right to remove them and erect other buildings, gave to the lessees an interest in the buildings, apart from their interest in the land, sufficient to enable them to recover such damages. It does not appear that the lessors are not content that entire damages should be recovered by and paid to the plaintiffs in this action. If the lessors have any interest in the damages they can, before they are paid, intervene by proper proceedings." In *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227, it was held that a tenant at will could not recover against a railway company for setting fire to a fence, for the reason that such a tenant is not liable to the landlord for permissive waste. As to whether allowing a third person to injure the premises is permissive rather than voluntary waste, see ante, § 110.

³⁵ *Dix v. Jaquay*, 94 App. Div. 554, 88 N. Y. Supp. 228.

³⁶ This case involved an action by a life tenant, and the reasoning of the court was in part based upon the fact that the tenant might, in case the remainder were contingent, be unable with safety to pay over the amount of the injury to the re-

mainderman for the purpose of perfecting his right of action, even were the remainderman ascertainable. The court also reasons that the particular tenant could not safely pay to the remainderman any particular sum, since he could not know the amount of the injury until this was judicially ascertained, and consequently would have to defer his action against the third person until he had been sued by the remainderman or reversioner. Furthermore it is asserted that the tenant should be allowed to recover the entire damages in order that he might repair the injury for the purpose of his own enjoyment.

³⁷ *Wood v. Griffin*, 46 N. H. 230; *California Dry-Deck Co. v. Armstrong*, 8 Sawy. 523, 17 Fed. 216. In apparent accordance with these cases are those deciding that the tenant has no right of action except on account of the injury to his possessory interest, no reference being made to a possible right of recovery by reason of his liability to the landlord. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Ridge v. Railroad Transfer Co.*, 55 Mo. App. 183. The doctrine of the cases above cited is referred to with approval in *Nashville, C. & St. L. R. Co. v. Heikens*, 112 Tenn. 378, 79 S. W. 1038, 65 L. R. A. 298.

by him before he has made such satisfaction might cause a loss to the landlord.³⁸ Since the law, in imposing an absolute liability upon the tenant for injuries to the premises caused by a third person, evidently regards the tenant as a wrongdoer for allowing such injuries, it would seem that, as between the two views asserted, that which enures to the protection of the landlord, who has not been at fault, should be preferred to that which, though protecting the tenant, a wrongdoer, may possibly cause a loss to the landlord. It has been suggested that the tenant should have the right to recover for damage to the reversion, by analogy to the rule that the bailee of chattels may recover the

³⁸ In *Wood v. Griffin*, 46 N. H. 230, it is said by Bellows, J., that "it is clear from the adjudged cases, that the claims of the tenant and reversioner can be separated, that they are in fact distinct, and that each may maintain a suit for the injury done to him, and that both may be pending at the same time. How, then, can the tenant include in his damages the injury to the reversion? If he can in any case, how is the defendant to avail himself of the fact that another action is pending by him in remainder or reversion? Again, there is no necessity for arming the tenant with such power. If he is entitled to recover for the injury to the inheritance, whether he has satisfied the reversion or not, his recovery must be a bar to a suit by the landlord, and still the trespasser might avail himself, by way of defense, of a license, or admission, by the tenant which might in effect defeat the landlord's claim against such trespasser, and besides the landlord might find his claim against the trespasser defeated by the result of a suit prosecuted without his assent, in a manner opposed to his wishes, or by his inability to obtain from the tenant himself the fruits of the suit against such third person." In *California Dry Dock Co. v. Armstrong*, 17 Fed. 216, Sawyer, J., after quoting at length from the case previously cited, says that "the tenant cannot recover before repairing, or satisfying the landlord, for the reason that, till then, his cause of action on this ground has not matured. He has sustained no injury till he has done something by way of repairs, or towards satisfying the landlord for the injury to the inheritance. He may never do either, and he certainly ought not to recover unless he does one or the other. A recovery by an irresponsible tenant may wholly defeat the remedy of the landlord. The tenant ought not to recover any more than he pays in satisfaction, or necessarily expends in repairs; and if he has in fact repaired, or made satisfaction, he cannot recover more. Should he be unnecessarily extravagant in either, he might recover less. He may compromise at one-half or one-fourth the amount claimed. The extent of the liability should, in some mode, be fixed before he is permitted to maintain a suit."

entire amount of the damage to the property as against the person causing the damage.³⁹ And it may be admitted that the argument in opposition to a right of recovery of the whole damage by the tenant would, so far as it is based on the possible loss to the landlord, apply as well to recovery by a bailee, conceding this to be based on the possible loss to the bailor. But the right of recovery in the bailee finds its origin, it seems, in the exclusive importance imputed in early times to the right of possession,⁴⁰ and is independent of any liability on the part of the bailee to the bailor,⁴¹ while the asserted right of recovery in a tenant is in terms based exclusively on the existence of a liability on his part to the landlord.⁴²

A tenant under a lease has obviously no right of action on account of a direct physical injury to land, or to structures or growths thereon, if the injury occurred before the making of the lease.⁴³ The case is similar to that of a sale of property previously injured. The wrong is to the person or persons interested in the land at the time of the doing of the injury, and not to persons who may acquire interests in the land thereafter, nor does the conveyance of an interest in the premises, whether in fee simple, for life, or for years, transfer a right of action for the wrong previously committed. It is only when the circumstances show a continuance or repetition of the previous wrong that the grantee or lessee has any right of action.

³⁹ *Dix v. Jaquay*, 94 App. Div. 554, 88 N. Y. Supp. 228.

⁴⁰ See *Holmes on The Common Law*, c. 5, "Bailments."

⁴¹ *The Winkfield* [1902] Prob. Div. 42; *The Jersey City*, 2 C. C. A. 365, 51 Fed. 527, 1 U. S. App. 244; *Kellogg v. Sweeney*, 1 Lans. (N. Y.) 397, 46 N. Y. 291, 7 Am. Rep. 333. *Contra*, *Buddin v. Fortunato*, 16 Daly, 195, 10 N. Y. Supp. 115.

⁴² In *Wood v. Griffin*, 46 N. H. 230, supra, it is said that "in the case of

lands in the possession of a tenant, his interest and the interest of the

landlord are distinctly marked and easily separated; and for injuries to either there are appropriate and distinct remedies; while in respect to goods there is, in general, no such distinction; and such is the effect given by the law to the fact of possession that either trespass or trover may be maintained against one who wrongfully deprives another of such possession without any injury (*quaere*, inquiry) as to the ultimate title."

⁴³ See *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265.

§ 353. Interference with rights of enjoyment.

a. **Action by landlord**—(1) **Rule ordinarily asserted.** Of cases involving the question of the landlord's right to sue for injuries caused by the act of a third person during the existence of the tenancy, the most difficult are those involving, not a physical injury to the land or structures, but a wrongful interference by such third person with a "natural right" or easement appurtenant to the leased premises,⁴⁴ or a wrongful assertion by him of a nonexistent easement upon the land leased. As regards the right of the landlord to recover in such a case, the great majority of the cases support the view that if the interference with the exercise of the rights appertaining to the leased premises, as being the result of the erection of a structure, or of the placing of some other obstruction in a particular place, will, in the ordinary course of events, continue until the structure or article is removed by an exertion of force, there is such a degree of permanence in the condition as to give a right of action to the reversioner, provided, it seems, the jury find that the continuance of the condition will result in injury to the landlord;^{45,46} while there is, on the other hand, no right of action in the landlord if the injurious interference is the result of repeated acts, so that it will cease upon the mere cessation of a particular course of action. As supporting the distinction above stated, reference may be made to the following cases: It has been decided that the reversioner may have a right of action on account of the construction of a neighboring house in such a way as to pour water on the leased premises from its eaves and spouts;⁴⁷ on account of the

⁴⁴ As to the distinction between natural rights and easements, see Goddard, *Easements* (9th Ed.) 3; 1 Tiffany, *Real Prop.* § 304.

^{45,46} *Metropolitan Ass'n v. Petch*, 5 C. B. (N. S.) 504; *Tucker v. Newman*, 11 Adol. & E. 43; *Kidgill v. Moor*, 9 C. B. 364; *Hastings v. Livermore*, 73 Mass. (7 Gray) 194.

⁴⁷ *Tucker v. Newman*, 11 Adol. & E. 43.

⁴⁸ *Ripka v. Sergeant*, 7 Watts & S.

(Pa.) 9, 42 Am. Dec. 214; *Hastings v. Livermore*, 73 Mass. (7 Gray) 194; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406 (dictum). In *Baker v. Sanderson*, 20 Mass. (3 Pick.) 348, and *Sumner v. Tileston*, 24 Mass. (7 Pick.) 198, such recovery is based on the ground that the landlord reduced the rent in consequence of the obstruction of flow. See post, note 80.

obstruction of the flow of a stream by the erection of a dam, to the injury of the leased premises;⁴⁸ the obstruction of an easement of light by the erection of a wall or other structure;⁴⁹ and the obstruction of the access for boats and rafts to the leased premises by the construction of a railroad embankment.⁵⁰ In each of these cases the condition wrongfully created was such as to continue until it was put an end to by some positive act. On the other hand, a right of action has been denied to the landlord on account of constant noise on adjoining premises caused by the use thereof for a workshop, such use being liable to cease before the end of the tenancy,^{50a} and it has been decided that there is no actionable injury to the reversion as a result of smoke issuing from the defendant's factory chimney, since there is no certainty that the defendant will continue to make fires and to create smoke.⁵¹ The reversioner has also been denied any recovery on account of the action of a neighboring property owner in using a dam and sluiceways in such a manner as to "pen back" the water by day and discharge it by night, thereby interfering with the working of the mill on the leased premises,⁵² as well as on account of the use of a neighboring highway as a stable yard.⁵³ There are, however, one or two cases in this country apparently opposed to the view that the landlord has a right of action when the interference is the result of a structure or other condition of a *quasi* permanent nature;⁵⁴ and conversely in Eng-

⁴⁸ *Jesser v. Gifford*, 4 Burrow, landlord no right of action. Mott 2141; *Shadwell v. Hutchinson*, v. Shoolbred, L. R. 20 Eq. 22.

Moody & M. 350, 3 Car. & P. 615; ⁵² *Beavers v. Trimmer*, 25 N. J. Metropolitan Ass'n v. Petch, 5 C. Law (1 Dutch.) 97.

B. (N. S.) 504.

⁵³ *Mott v. Shoolbred*, L. R. 20 Eq.

⁵⁰ *Tinsman v. Belvidere Delaware* 22.

R. Co., 25 N. J. Law (1 Dutch.) 255, 64 Am. Dec. 415.

^{50a} *Mumford v. Oxford*, W. & W. *R. Co.*, 1 Hurl. & N. 34; *Jones v. Chappell*, L. R. 20 Eq. 539.

⁵¹ *Simpson v. Savage*, 1 C. B. (N. S.) 347. Similarly it was held that the practice of defendants in using the street in front of the premises as a place in which to leave their wagons when not in use gave the

⁵⁴ In *Kaspar v. Dawson*, 71 Conn. 405, 42 Atl. 78, it was decided that a reversioner is entitled to maintain a bill for an injunction to restrain the owners of neighboring property from continuing to pile manure thereon, on the ground that "the fact that the odors rendered living in the plaintiff's dwelling houses uncomfortable and disagreeable to his tenants was itself an injury to

land there is a decision giving a right of action to the landlord, on account of the noise and vibration caused by the operation of a factory on neighboring land,⁵⁵ although, it seems clear, such noise and vibration would cease upon a cessation of the actual operation of the factory. In the latter case the court regarded the nuisance as in effect permanent by reason of the fact that, in view of the costly character of the factory, and that it was capable of use only in this particular way, a cessation of this use was not to be anticipated.

Applying the distinction above indicated, the obstruction of a right of way appurtenant to the leased premises would give a right of action to the landlord if the obstruction were such as, in the ordinary course of events, to remain indefinitely, unless removed by an exertion of force, and only then. In accordance with this view are decisions to the effect that the reversioner may recover on account of the obstruction of a right of way by the digging of a canal across it,⁵⁶ by the erection of a fence across

plaintiff in his property rights." It might perhaps have been considered, had the analogy of the above cited English cases been followed, that the landlord did not suffer any injury of which he could complain, since the neighboring owners might cease to pile the manure on their property before the time for him to resume possession.

Also apparently opposed to the view usually asserted is *Cooper v. Randall*, 59 Ill. 317, where the landlord was regarded as entitled to recover damages for injury caused by the operation of a flour mill on neighboring land, whereby chaff, dust and dirt were thrown upon the leased premises. It does not clearly appear, however, whether the action was for injury to the house on the premises, or merely for injury arising from the interference with its comfortable occupation.

⁵⁵ *Meux's Brewery Co. v. City of London Electric Lighting Co.* [1895] 1 Ch. 287, 317.

⁵⁶ *Richardson v. Bigelow*, 81 Mass. (15 Gray) 154.

In *Van Sielen v. New York*, 64 App. Div. 437, 72 N. Y. Supp. 209, where the action was for damages for the obstruction of a street in front of the leased premises by the digging of a trench and for an injunction against the further maintenance of the obstruction, the court said that "it may be assumed, in view of all the facts, that the nuisance was of a temporary nature," and so decided that the landlord could not recover. But the court also assumed that, since there was no appeal from the grant of an injunction, the nuisance had been abated, and this may have affected its view of the obstruction as being temporary merely.

it,⁵⁷ by the fastening of a gate across it,⁵⁸ and even by the placing thereon of articles of a movable character.⁵⁹

In case of the diversion of water which the occupant of the premises has the right to use, the landlord has, applying the same rule, the right to sue if the diversion is effected by structures or works of a permanent or *quasi* permanent character,⁶⁰ while he would not have such right if the diversion is caused by acts of a repeated character, or by a condition which may cease of itself before the end of the tenancy. Occasionally the landlord has, by the terms of the lease, a direct interest in the amount of water obtainable during the tenancy, and such interest would ordinarily support a right of action in his favor.⁶¹ And in one case

⁵⁷ Taylor v. Wright, 51 App. Div. 97, 64 N. Y. Supp. 344; Okeson v. Patterson, 29 Pa. 22. In neither of these cases is anything said as to the permanent character of the obstruction.

⁵⁸ Kidgill v. Moor, 9 C. B. 364. But in Walker v. Clifford, 128 Ala. 672, 29 So. 588, 86 Am. St. Rep. 74, it was in effect decided that the lessor of a saloon adjoining a hotel could not maintain a bill for an injunction to restrain the hotel keeper from fastening the door leading from the hotel to the saloon, the injury not being of a permanent nature.

⁵⁹ Bell v. Midland R. Co., 10 C. B. (N. S.) 287 (placing coal cars across way with intention of keeping them there); Cushing v. Adams, 35 Mass. (18 Pick.) 110 (depositing building materials).

In McDonnell v. Cambridge R. Co., 151 Mass. 159, 23 N. E. 841, it was decided that an obstruction to a right of way by the placing of snow and ice thereon gave the landlord no right to recover substantial damages, since it caused him no substantial injury. The decision was in part at least based on the averments

of the declaration, which were that the plaintiff, his servants and tenants, were hindered and deprived of the free use and enjoyment of the way by the obstructions, it being said in the opinion that "no injury to property is alleged, and if any was caused, it was to the leasehold and not to the reversion."

⁶⁰ See Halsey v. Lehigh Valley R. Co., 45 N. J. Law, 26; Rogers v. Dickson, 10 U. C. C. P. 481. In Moody v. King, 74 Me. 497, it was decided that the lessor had no right of action on account of the diversion of the water. The mode of diversion does not appear.

In Louisville & N. R. Co. v. Moore, 31 Ky. Law Rep. 141, 101 S. W. 934, it was decided that changing the natural flow of surface water was an injury to the possession only and consequently not cause for action by the landlord. That the diversion was by means of a pipe or culvert is not referred to.

⁶¹ In Cress v. Varney, 17 Pa. 497, the landlord's right to recover for diversion of water was based on the fact that by the terms of the lease he was entitled to part of the water, and, in Woodbury v. Willis, 50 Ma.

the deprivation of water used for purposes of irrigation seems to have been regarded as so permanently affecting the character of the soil and the availability of the land for pasturage purposes as to justify an action by the landlord on account thereof.⁶²

(2) **Theory of recovery.** In regard to the theory upon which a landlord is allowed to recover on account of a wrong of this character, which is primarily, it would seem, a wrong to the actual enjoyment of the property, the right to which enjoyment is in another, the cases are not entirely explicit.

In several decisions in this country it is stated that the landlord has a right of recovery on account of a permanent or *quasi* permanent condition thus interfering with the enjoyment of the premises, by reason of the fact that this reduces the selling value of the reversion.⁶³ The same view is perhaps suggested by the report of an English case decided in the eighteenth century,⁶⁴ where recovery was allowed in favor of a reversioner on account of the obstruction of lights, it being said that he could recover "in respect of his inheritance, for the injury done to the value of it." No other decisions in that jurisdiction specify this as the ground for a recovery by the landlord, but from the fact that the courts there require a finding by the jury of injury to the reversion, in order to support recovery by the landlord,⁶⁵ and since such diminution in selling value is, perhaps, the class of injury which would present itself most prominently to the mind of the average jurymen, it may not unreasonably be inferred that this is regarded as a reason for allowing such recovery. Regarding this as a reason for allowing recovery by the landlord, it might be questioned why such recovery should be restricted, as it ordinarily is,⁶⁶ to cases in which the disturbance of enjoyment is by reason of a condition of things which will continue until it is actually removed. The selling value of the reversion

102. on the fact that the diversion affected the amount of logs sawed in the leased mill and that the amount of rent was based on the amount sawed.

⁶² *Heilbron v. Last Chance Water Ditch Co.*, 75 Cal. 117, 17 Pac. 565.

⁶³ *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Tinsman*

v. Belvidere Delaware R. Co., 25 N. J. Law (1 Dutch.) 255; *Ripka v. Sergeant*, 7 Watts & S. (Pa.) 9, 42 Am. Dec. 214; *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642.

⁶⁴ *Jesser v. Gifford*, 4 Burrow, 2141.

⁶⁵ See ante, at note 45, 46.

⁶⁶ See ante, at notes 50a-53.

might well be affected, it seems, by the fact that a constant noise is caused by the use of adjoining premises as a workshop,⁶⁷ or that smoke constantly issues from a neighboring chimney.⁶⁸ But that such a diminution in the selling value of the reversion cannot be asserted as a ground for recovery by the landlord in a case of an interference with enjoyment of a "temporary" character is not only indicated by the decisions denying any recovery in such case, but is also clearly stated in at least two English cases, in one of which⁶⁹ it is said that to allow damages on account of diminution in selling value in such cases would be to allow them on account not of what has been done, but of the apprehension that something will be done at a future time, while in the other⁷⁰ it is said that this is not a ground of recovery, since a purchaser would have a right to stop the nuisance. The latter reason for refusing a recovery in the case of an interference of a so-called temporary nature would however, it might seem, apply as well in the case of an interference caused by an obstruction or structure of a permanent or *quasi* permanent character. If, for instance, the landlord, whether the original lessor or one who purchases the reversion, has a right to stop a nuisance of smoke caused by kindling fires, he would also, it seems, have a right to stop an overflow caused by the erection of a dam. The former of the reasons stated is, it is conceived, more satisfactory, and it appears to suggest a basis for the distinction made by the courts between an interference or obstruction of a "temporary" and one of a "permanent" nature, they in effect refusing to give damages on the theory that certain acts will be done in the future as they have been done in the past, and on account of the possible future repetition of such acts, although, in giving damages on account of a past act, they consider the possible future consequences thereof, as affecting the value of an interest in land, the possession under which is postponed, without considering the fact that such act may, before the time for possession under such interest, be rendered incapable of producing further interference with the rights of enjoyment incident to the right of possession.

⁶⁷ See ante, at note 50a.

S.) 347.

⁶⁸ See ante, at note 51.

⁷⁰ Jones v. Chappell, L. R. 20 Eq.

⁶⁹ Simpson v. Savage, 1 C. B. (N. 539, per Jessel, M. R.

Occasionally a right of action in the landlord has been in terms upheld on the ground that such a right is necessary in order to prevent the wrongful act or acts becoming the foundation of a claim of right. This view is asserted in at least two English cases in connection with an obstruction of "ancient lights," that is, of a prescriptive right to have light pass to one's window or windows;⁷¹ and it has been asserted in a Pennsylvania case in connection with an interference with a natural right as to the flow of a stream.⁷² It seems clear that in the case of an interference with a prescriptive right, such as was involved in the English decisions referred to, if the reversioner were not allowed to institute proceedings to assert such right, the right might be wholly lost in the course of time, by reason of the death or disappearance of witnesses competent to testify as to the prescriptive user. And so in the case of an interference with an easement not based on prescription or with a natural right, or in the case of the wrongful exercise of an asserted easement on the premises, while no right can become established by prescription by reason of such wrongful interference or exercise, as against a reversioner who has no right of action therefor or other mode of resistance thereto,⁷³ he might, with the lapse of time, if not allowed to assert his rights by action, be unable, owing to the death or disappearance of witnesses, to show that a user for the prescriptive period prior to the making of the lease, though asserted as having been adverse, was in reality permissive.⁷⁴ In one state, moreover, it has been

⁷¹ *Metropolitan Ass'n v. Petch*, 5 C. B. (N. S.) 504; *Shadwell v. Hutchinson*, 3 Car. & P. 615, *Moody & M.* 350, 2 Barn. & Adol. 97, 4 Car. & P. 333. See *Mott v. Shoolbred*, L. R. 20 Eq. 22; *Bower v. Hill*, 1 Scott, 526, 1 Bing. N. C. 555.

⁷² *Ripka v. Sergeant*, 7 Watts & S. (Pa.) 9, 42 Am. Dec. 214.

⁷³ *Barker v. Richardson*, 4 Barn. & Adol. 579; *Baxter v. Taylor*, 4 Barn. & Adol. 72; *Winship v. Hudspeth*, 10 Exch. 5; *Roberts v. James*, 89 Law T. (N. S.) 282; *Reimer v. Stuber*, 20 Pa. 458, 59 Am. Dec. 744; *Cunningham v. Dorsey*, 3 W. Va.

293; *Pentland v. Keep*, 41 Wis. 490. This rule obviously applies in favor of the landlord only so long as there is a lease for years, which he cannot terminate, and does not apply in favor of one who makes successive leases of the property, as he might interrupt the adverse user at the end of any lease. *Bishop v. Springett*, 1 L. J. K. B. 13; *Ward v. Warren*, 82 N. Y. 265. So in the case of a tenancy from year to year. *Reimer v. Stuber*, 20 Pa. 458, 59 Am. Dec. 744.

⁷⁴ So in *Ripka v. Sergeant*, 7 Watts & S. (Pa.) 9, 42 Am. Dec. 214,

held that the rule, recognized in that and some other states,⁷⁵ that a disability arising after the commencement of the adverse use does not suspend the acquisition of the right, or extend the time necessary for its acquisition, applies in case a tenancy is created after the commencement of the adverse use,⁷⁶ and, adopting such a view, a right of action might, in some cases, be necessary to the landlord in order to prevent the continued running of the prescriptive period.

Another theory on which, it has been suggested by an able judge, the landlord may be regarded as suffering damage by reason of an interference with the enjoyment of the premises, is that whatever impairs their productiveness decreases the landlord's security for the rent.⁷⁷ It might, it is submitted, be questioned whether such a possible loss, as distinguished from an actual loss, of sums to be paid, is not too speculative for consideration as a ground for recovery.⁷⁸

ante, note 72, Gibson, C. J., says that "even if an adverse right might not be gained from the reversioner by an undisturbed user for twenty years, it would be unreasonable, after so great a lapse of time, to put him to proof of circumstances in order to show that the user had originated in a parol license, known, it may be, only to witnesses since dead."

⁷⁵ *Currier v. Gale*, 85 Mass. (3 Allen) 328; *Edson v. Munsell*, 92 Mass. (10 Allen) 557; *Wallace v. Fletcher*, 30 N. H. 134; *Mebane v. Patrick*, 46 N. C. (1 Jones Law) 23; *Reimer v. Stuber*, 20 Pa. 458, 59 Am. Dec. 744; *Tracy v. Atherton*, 36 Vt. 503. Contra, *Thorpe v. Corwin*, 20 N. J. Law (Spencer) 311; *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536.

⁷⁶ *Ballard v. Demmon*, 156 Mass. 449, 31 N. E. 635. The case of *Cross v. Lewis*, 2 Barn. & C. 686, is perhaps to the same effect, it being there held that it not appearing that the adverse user had begun

since the commencement of the tenancy, which was for twenty years, and it appearing to have lasted for twenty years, a grant would be presumed as against the reversioner. The Massachusetts case is to some extent based on the fact that in that state the reversioner would have, by statute, the right, by posting a notice, to stop the running of the prescriptive period against him.

⁷⁷ *Ripka v. Sergeant*, 7 Watts & S. (Pa.) 9, 42 Am. Dec. 214, per Gibson, C. J.

⁷⁸ In an early case (*Earl of Suffolk's case*, Y. B. 13 Hen. 4, 11) it was held that the lord had a right of action against one who, by improperly setting up a court, and frequent distresses on the lord's tenants for not attending the court, so improverished them that they were unable to pay their rent.

In *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 40 Colo. 467, 92 Pac. 290, it was decided that one

In one case⁷⁹ the landlord's right to sue on account of the obstruction of a private way was placed on the ground that the tenancy was one at will, and that the landlord might, by reason of such obstruction of the way leading to the premises, be prevented from entering to terminate the lease or to make repairs, and "might thus be induced to continue a disadvantageous lease, or to suffer the tenements to be injured for want of reasonable repairs."

There is one case in which the landlord's right of recovery was based on the fact that, in consequence of the wrongful interference with the enjoyment, the tenant had threatened "to quit" unless the rent was reduced, and that the landlord accordingly did reduce the rent.⁸⁰ It is difficult, however, to see how the fact that a landlord reduces the rent on the threat of the tenant to quit can of itself give the former a right of action against the wrongdoer. A tenant has no right to quit or refuse to pay rent by reason of the wrongful act of a third person.⁸¹

There are in at least four states statutory provisions authorizing one having an estate in reversion to maintain an action for an injury done to the inheritance, notwithstanding an intervening estate for life or years,⁸² and occasionally a right of recovery by the landlord for injury by a person other than the tenant has been based on such provision.⁸³ Such provisions seem more prop-

having a contract for the irrigation of his land, which he leased, might recover as damages for breach of the contract the amount of rent lost by him owing to the tenant's inability, due to the lack of water, to pay the rent.

⁷⁹ *Cushing v. Adams*, 35 Mass. (18 Pick.) 110.

⁸⁰ *Baker v. Sanderson*, 20 Mass. (3 Pick.) 348. See *Summer v. Tilton*, 24 Mass. (7 Pick.) 198.

⁸¹ See ante, § 156 b.

⁸² See *California Civ. Code*, § 826; *New York Code Civ. Proc.* § 1665; *North Dakota Rev. Codes* 1905, § 4807; *South Dakota Civ. Code*, § 287.

⁸³ See *Heilbron v. Water Ditch Co.*, 75 Cal. 117; *Freer v. Stotenbur*, 2 Abb. Dec. (N. Y.) 189; *Taylor v. Wright*, 51 App. Div. 97, 64 N. Y. Supp. 344; *Arneson v. Spawn*, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783. The New York statute (1 Rev. St. p. 750, § 8) formerly provided that the reversioner might maintain an action of waste "or trespass," and this had the effect of changing the common-law rule precluding an action of trespass by a reversioner (See post, at note 85). But the present statute merely provides that he may maintain an action for injury done to the inheritance.

erly adapted for the purpose of removing difficulties in the way of a recovery by the landlord against the tenant for waste.⁸⁴

(3) **Form of action.** Since the possession of the land is in the tenant and not in the landlord, the latter cannot, at common law, maintain an action of trespass *quare clausum frangit* against a person injuring the premises, this action being available only to one in possession, but his remedy is necessarily by an action on the case, and this is the rule in all jurisdictions in which the distinction between these forms of action still exist.⁸⁵ One exception to this rule is, however, recognized, a landlord at will being regarded as entitled to maintain trespass against a wrongdoer, on the theory that, being entitled to resume possession at any time, he is in legal effect in possession.⁸⁶ This view has occasionally been adopted in this country,⁸⁷ but even in a jurisdiction in which this was formerly recognized as the rule, it is declared to be no longer so since the adoption of a statute requiring a

⁸⁴ See ante, § 109 5 (3).

Brooks, 99 Ala. 31, 11 So. 753; *Torrence v. Irwin*, 2 Yeates (Pa.) 210, 1 Am. Dec. 340; *Greber v. Kleckner*, 2 Pa. 289; *Davis v. Clancy*, 3 McCord (S. C.) 422; *Cannon v. Hatcher*, 1 Hill Law (S. C.) 260, 26 Am. Dec. 177; *Reynolds v. Williams*, 1 Tex. 311; *Kretzer v. Wysong*, 5 Grat. (Va.) 9.

⁸⁵ 1 Chitty, Pleading (6th Ed.) 175; *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Uttendorffer v. Saegers*, 50 Cal. 496; *Tilghman v. Cuson*, 4 Har. (Del.) 341; *Halligan v. Chicago & R. I. R. Co.*, 15 Ill. 558; *Gould v. Sternburg*, 4 Ill. App. (4 Bradw.) 439; *Walden v. Conn*, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204; *Bartlett v. Perkins*, 13 Me. (1 Shep.) 87; *Perry v. Bailey*, 94 Me. 50, 46 Atl. 789; *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107; *Lienow v. Ritchie*, 25 Mass. (8 Pick.) 235; *Lindenbower v. Bentley*, 86 Mo. 515, 109 Am. St. Rep. 716; *Tyson v. Shuey*, 5 Md. 540; *New Jersey Midland R. Co. v. Van Syckle*, 37 N. J. Law, 496; *Wentworth v. Portsmouth & Dover R. Co.*, 55 N. H. 540; *Campbell v. Arnold*, 1 Johns. (N. Y.) 511; *Tobey v. Webster*, 3 Johns. (N. Y.) 468; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Smith v. Fortiscue*, 48 N. C. (3 Jones Law) 65; *Rogers v.*

⁸⁶ *Y. B.* 19 Hen. 6, 45, pl. 94; *Bro. Trespass*, pl. 131; *Com. Dig. Trespass*, B 2; *Co. Litt.* 57 a, *Hargrave's note*; 2 *Rolle's Abr.*, *Trespass* (N) 3; *Geary v. Bearcroft*, *Sid.* 347 (dictum). See *Pollock, Torts* (6th Ed.) 357.

⁸⁷ *Starr v. Jackson*, 11 Mass. 519, followed in *Hingham v. Sprague*, 32 Mass. (15 Pick.) 102; *Davis v. Nash*, 32 Me. 411, and see *Curtis v. Hoyt*, 19 Conn. 168. There was, of course, no right of action in trespass, any more than in case, if the landlord was not injured. *Smith v. Fortiscue*, 48 N. C. (3 Jones Law) 65; *Lynchford v. Toothaker*, 39 Me. 28;

notice of a certain period to terminate a tenancy at will.⁸⁸ And in other jurisdictions, likewise, the principle has been regarded as inapplicable in view of the rule requiring such a notice to terminate the tenancy.⁸⁹

Trespass *de bonis asportatis* or trover may be maintained by the landlord against one who removes trees or fixtures, things thus wrongfully severed being the property of the landlord.⁹⁰ If trees or fixtures are excepted from the operation of the lease, the landlord may bring trespass *quare clausum fregit* against one wrongfully removing them.⁹¹

The rights of the landlord, in case of an injury to the reversion, are not necessarily restricted to the recovery of damages, but he may have an injunction against continued or threatened injury, subject to the rules ordinarily applied by courts of equity in granting injunctions.⁹² He has accordingly been granted an injunction against the continuance of an elevated railway in front

French v. Fuller, 40 Mass. (23 Pick.) 104. *lin v. Hayden*, 1 Vt. 375.

In *Perry v. Bailey*, 94 Me. 50, 46 Atl. 789, it is decided that the landlord of a tenant at will cannot bring such action against one who originally entered by permission of the tenant and then injured structures on the land, since "an abuse of authority to enter upon land, given by a party, does not render a man a trespasser." In this case, the words "while a tenant is in possession," in line 7 on page 58, should evidently read, "while a tenant at will is in possession."

⁸⁸ French v. Fuller, 40 Mass. (23 Pick.) 104; *Hastings v. Livermore*, 73 Mass. (7 Gray) 194; *Woodman v. Francis*, 96 Mass. (14 Allen) 198.

⁸⁹ *Clark v. Smith*, 25 Pa. 137; *Gunsolus v. Lormer*, 54 Wis. 630, 12 N. W. 62.

The landlord cannot maintain trespass if the tenancy at will has become one from year to year. *Cat-*

⁹⁰ *Berry v. Heard*, Cro. Car. 242; *Sir Wm. Jones*, 255; *Udal v. Udal*, Aleyn, 82; *Evans v. Evans*, 2 Camp. 491; *Ward v. Andrews*, 2 Chitty, 636; *Higgon v. Mortimer*, 6 Car. & P. 616; *Meyers v. Marsh*, 2 U. C. Q. B. 148; *Gasco v. Marshall*, 7 U. C. Q. B. 193; *Bulkley v. Dolbeare*, 7 Conn. 232; *Westgate v. Wixon*, 128 Mass. 304; *Wadleigh v. Janvrin*, 41 N. H. 593, 77 Am. Dec. 780; *Schermerhorn v. Buell*, 4 Denio (N. Y.) 422.

⁹¹ *Bro. Abr.*, Trespass, pl. 55; 1 Wms. Saund. 322, note (5) to *Pomfret v. Ricroft*; *Phillips v. De Groat*, 2 Lans. (N. Y.) 192; *Schermerhorn v. Buell*, 4 Denio (N. Y.) 422.

⁹² *Wilson v. Townend*, 1 Drew. & S. 324. But in *Ingraham v. Dunnell*, 46 Mass. (5 Mete.) 118, it is decided that the reversioner cannot, without joinder of the tenant, obtain an injunction against a nuisance.

of his premises,⁹³ and against the operation of an electric power house in such a way that the vibrations injure the buildings on the leased premises.⁹⁴

(4) **Averments of injury.** One suing for an injury to his reversion should allege the act to have been done to the injury of his reversion or state an injury of such a permanent nature as necessarily to injure the reversion, and a failure in this respect has been held fatal to the right of recovery.⁹⁵ He should also allege that he had a reversionary interest at the time of the act complained of,⁹⁶ and should, it has been said, describe the extent of his reversionary interest, that the damage may be known and assessed,⁹⁷ though it has also been said to be sufficient if he alleges generally that the land is in possession of a third person "as tenant thereof to the plaintiff," without stating a seisin in fee.⁹⁸ Any defects in these respects would, at the present day, be the subject of amendment.⁹⁹

(5) **Measure of damages.** The damages recoverable by the landlord are ordinarily to be determined by the amount of injury done to his estate in reversion,¹⁰⁰ and this may evidently be

⁹³ *Kernochan v. Manhattan R. Co.*, 161 N. Y. 339, 55 N. E. 906; *Macy v. Metropolitan El. R. Co.*, 59 Hun, 365, 12 N. Y. Supp. 804, *afid.* 128 N. Y. 624, 23 N. E. 485; *Thompson v. Manhattan R. Co.*, 130 N. Y. 360, 29 N. E. 264. reversion when the facts pleaded necessarily show such injury, see *Arneson v. Spawn*, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783; *Tinsman v. Belvidere Delaware R. Co.*, 25 N. J. Law (1 Dutch.) 225, 64 Am. Dec. 415.

⁹⁴ *Meux's Brew. Co. v. City of London Elec. Lighting Co.* [1895] 1 Ch. 287. ⁹⁶ *Davis v. Jewett*, 13 N. H. 88; *Vowles v. Miller*, 3 Taunt. 137. An averment of injury to the possession is insufficient when plaintiff has merely a reversion. *Higgins v. Farnsworth*, 48 Vt. 512.

⁹⁵ *Jackson v. Pesked*, 1 Maule & S. 234; *Dobson v. Blackmore*, 9 Q. B. 991; *Noyes v. Stillman*, 24 Conn. 15; *Bannon v. Mitchell*, 6 Ill. App. (6 Brady.) 17; *Dearborn v. Wellman*, 130 Mass. 238; *Bascom v. Dempsey*, 143 Mass. 409, 9 N. E. 744; *Davis v. Jewett*, 13 N. H. 88; *Potts v. Clarke*, 20 N. J. Law (Spencer) 536; *Tinsman v. Belvidere Delaware R. Co.*, 25 N. J. Law (1 Dutch.) 255, 64 Am. Dec. 415. That there is no necessity to state an injury to the ⁹⁷ *Davis v. Jewett*, 13 N. H. 88; *George v. Fisk*, 32 N. H. 82; *Baker v. Sanderson*, 20 Mass. (3 Pick.) 348.

⁹⁸ *Chitty, Pleading* (16th Am. Ed.) 396.

⁹⁹ See *Schnable v. Koehler*, 28 Pa. 181.

¹⁰⁰ *Dutro v. Wilson*, 4 Ohio St. 101.

affected by the nature of that estate,¹⁰¹ and likewise by the length of the period which the leasehold interest has still to run.¹⁰²

When the landlord re-enters for breach of condition, it has been decided, his damages on account of a prior injury to the property, consisting of the removal of buildings, are to be computed as of the time of such re-entry, and not as of the time named for the expiration of the term.¹⁰³

In assessing the damages in favor of either a landlord or tenant, "it is to be borne in mind that where there are divided interests in land, the amount of damages must not be increased in consequence of that subdivision of interests,"¹⁰⁴ that is, that neither should be allowed to recover more than an amount which, together with the amount to which the other would be entitled, would equal the total amount which the landlord could have recovered if his estate had been one in possession, and not in reversion.^{104a}

For a direct injury to the land or to the structures thereon the landlord is entitled, it has been decided in England, to recover

¹⁰¹ A reversioner for life could not, for instance, ordinarily recover the same damages for a permanent injury as if he held the reversion in fee. See *Davis v. Jewett*, 13 N. H. 88; *Vowles v. Miller*, 3 Taunt. 137.

¹⁰² *Uttendorffer v. Saegers*, 50 Cal. 496; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621.

¹⁰³ *Winston v. President & Trustees of Franklin Academy*, 28 Miss. 118, 61 Am. Dec. 540.

¹⁰⁴ *Cotton, L. J.*, in *Rust v. Victoria Graving Dock Co.*, 36 Ch. Div. 113. In the same case *Lindley, L. J.*, expresses himself as follows: "The problem to be solved is simply to find out the measure in money of the damage done to the houses and land by the flood. That is the thing to be got at. Having got at that, you have to consider how that sum ought to be apportioned among the persons interested in the property damaged, i. e., in the present case, how much of that sum ought to be awarded in respect of his (the reversioner's) interest, and how much to the tenants who are not before the court. Unless that principle is kept steadily in view there is great danger of error."

^{104a} *City of Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591; *Hastings v. Livermore*, 73 Mass. (7 Gray) 194; *Beavers v. Trimmer*, 25 N. J. Law (1 Dutch.) 97; *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642, and cases cited post, note 106. This principle is frequently asserted in connection with condemnation proceedings, though there it is not so likely to be lost sight of, as the damages to landlord and tenant are ordinarily awarded simultaneously. See 2 *Lewis, Eminent Domain*, § 483, and cases cited.

the consequent diminution in the selling value of the reversion,¹⁰⁵ and this would seem to be the ordinary measure of damages for such an injury, it being equivalent to the amount of the diminution in the present value of the premises, considered without reference to the existence of the two estates therein, less the amount of the loss to the tenant by reason of such impaired condition of the premises.¹⁰⁶

As to the measure of damages in an action by the landlord on account of an interference with the rights of enjoyment in the premises, as distinguished from a direct injury to the premises themselves, the cases are in a very unsatisfactory condition. It was decided in an English case¹⁰⁷ that since, in the case of a nuisance of a continuing character, successive actions may be brought from time to time, and damages can consequently be given for prospective injury, the landlord is not entitled, in the first action, to recover the diminution in the saleable value. In that case a verdict for nominal damages only in favor of the landlord was approved, and it was there said that this is a usual practice, substantial damages being given only on the bringing of a second action in case the defendant persists in maintaining the nuisance. Presumably, a like view would there obtain as to the landlord's right of recovery for any other interference with the enjoyment of the premises, without any direct injury to them. In this country the cases are in conflict as to the right of one to recover in one action for future as well as past damage caused by a continuing nuisance.¹⁰⁸ The view that there is such recovery appears to be involved in occasional decisions or *dicta* that the landlord can recover the amount of the diminution in the selling value of his reversion,¹⁰⁹ and a judgment for that amount would,

¹⁰⁵ *Hosking v. Phillips*, 3 Exch. Ed.) § 1038 et seq.

182.

¹⁰⁹ *Kankakee & S. R. Co. v. Horan*,

¹⁰⁶ See *Nashville, C. & St. L. R. Co. v. Heikens*, 112 Tenn. 378, 79 S. W. 1038, 65 L. R. A. 298; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519, and cases cited; ante, note 104.

¹⁰⁷ *Battishill v. Reed*, 18 C. B. 696.

¹⁰⁸ See 1 Sedgwick, Damages, §§ 94, 947; *Sutherland, Damages* (3rd

131 Ill. 288, 23 N. E. 621; *Tinsman v. Belvidere Delaware R. Co.*, 25 N. J. Law (1 Dutch.) 255, 64 Am. Dec. 415; *Nashville, C. & St. L. R. Co. v. Heikans*, 112 Tenn. 378, 79 S. W. 1038, 65 L. R. A. 298; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

presumably, preclude another action by the landlord for subsequent injuries from the same wrongful condition.¹¹⁰

(6) **Loss or reduction of rent.** A difficult question arises when the landlord sues for damages on account of a nuisance, or other wrongful interference with the enjoyment of the land, which had its commencement before the creation of the tenancy. The view is asserted, in a subsequent part of this chapter,^{110a} that the tenant's right and *quantum* of recovery for the injury to his rights of enjoyment are ordinarily independent of the fact that he obtained the premises at a reduced rent by reason of the existence of the nuisance, and conceding this to be so, it seems necessarily to follow that the landlord cannot recover by reason of the fact that the lease was made by him at such a reduced rent, since if the damages recoverable by the tenant cannot be reduced on account of the reduction in rent, and yet those recoverable by the landlord could be increased on that account, the wrongdoer's total liability would be determined with reference, not to the amount of damage, but to the rent agreed upon, with the frequent result that he would pay the actual damage plus the amount of the enforced reduction of rent. The case is similar on principle, it seems, to the case of a sale of land at a reduced price by reason of the existence of a nuisance on neighboring land, in which case, while the vendor could recover for the damage up to the time of the sale, the damage accruing subsequently thereto could be recovered only by the vendee. So the landlord is entitled to the damage, ordinarily the diminution in rental value, for the time prior to the lease, while the lessee or his assignee is entitled to the diminution in rental value,¹¹¹ or other damage, accruing during the term of the lease. The wrongdoer is not concerned with the terms on which the lease or sale is made, and his liability should be adjusted without reference to such terms. Under this view it may no doubt result that the lessee recovers for an injury for which he has already been compensated in advance by the

¹¹⁰ See 2 Black, Judgments (2d Ed.) § 743. the person entitled to the use. One who has parted with the right to use

^{110a} See post, at note 144. the land cannot well recover for

¹¹¹ "Rental value" means merely diminution in the value of such "value of use" (See post, note 157), right. and this is properly recoverable by

reduction of rent, while the lessor is precluded from recovering for the loss resulting from his enforced reduction of the rent, but the lessor might protect himself in this regard, to some extent, at least, by inserting a stipulation in the instrument of lease, providing that the lessee shall pay to the lessor any damages which he may recover on account of the nuisance, or he could defer making a lease until, by proper proceedings, he has procured an abatement of the nuisance. But, even though, ordinarily, the tenant is entitled to recover for the diminution in the rental value during his term, and the landlord cannot recover on account of the reduction in rent based on such diminution, this would, presumably, not be so if, in the particular jurisdiction, or under the particular circumstances, it was considered that there was no right to bring successive actions on account of the nuisance, and that all the damages, including those still to accrue, should be recovered in one action. In such case, the lessor having recovered, as of the time prior to the lease, all the damages to the property, a subsequent lessee, or other grantee of an interest in the land, would have no right of recovery.

The view above indicated that, when the damages for the maintenance of a nuisance are recoverable only by successive actions, the lessor is not entitled to damages by reason of the reduction of rent to which he was compelled to submit on account of a nuisance or other interference with enjoyment existing at the time of the lease, is supported by a recent New York case.¹¹² And it

¹¹² *Miller v. Edison Elec. Illuminating Co.*, 184 N. Y. 17, 76 N. E. 734, 38 L. R. A. (N. S.) 1060. In this case the decision, by a majority of four judges to three, adverse to the landlord's right of recovery, was based chiefly on the view that in the prior case of *Bly v. Edison Elec. Illuminating Co.*, 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500, the tenant had been allowed to recover the diminution in rental value caused by the same nuisance, and to allow recovery by the landlord of the diminution in the rental value would involve the allowance of double damages for the same injury. It is to be remarked, however, that the report of the earlier case contains no statement that the tenant was entitled to recover the amount of the diminution in the rental value. The majority opinion in the later case also refers to the fact that "the defendant's plant did not constitute the nuisance, but its operation." In this case as in others, there appears to be a failure to discriminate between "rental value" and rent actually reserved. The case of *Francis v. Schoellkopf*, 53 N. Y. 152, does not seem to accord with the latest decision above referred to.

appears to be necessarily involved in a decision that¹¹³ the tenant's right and *quantum* of recovery are not affected by the fact that he obtained the premises at a reduced rent on account of the nuisance. There are, however, occasional decisions which indicate a contrary view.¹¹⁴

Occasionally, although the nuisance or other interference with the enjoyment did not commence until after the making of the lease, the landlord has been regarded as entitled to recover by reason of, and to the extent of, a reduction made by him in the rent, on the threat of the tenant to "quit" on account of the nuisance unless such reduction were made.¹¹⁵ It seems, however, most questionable whether, at least in the case of a tenancy for years, such concession can give the landlord a right of recovery, it being purely voluntary on his part. The fact that the act of a third person renders it difficult for one to perform his contract to pay money would not ordinarily entitle the payee to release the payor from liability and to sue the third person for the agreed sum. That a wrongdoer has interfered with a tenant's enjoyment of the premises gives him no right to "quit" in the sense of relinquishing possession and refusing to pay rent. In the case of a tenant at will, though there is a right in the tenant to relinquish possession and so terminate his liability for rent, a reduction of rent made in consequence of the tenant's threat so to do would seem to be no ground for recovery by the landlord,¹¹⁶

¹¹³ *Halsey v. Lehigh Valley R. Co.*, regards an interference with an easement of support. 45 N. J. Law, 26; post, note 145.

¹¹⁴ See *Baker v. Sanderson*, 20 Mass. (3 Pick.) 348; post, note 115. In *Funston v. Hoffman*, 232 Ill. 360, 83 N. E. 917, it was held that the landlord alone had a right to sue when the lease was made after the doing of the wrongful act, it being said that the lessee, knowing of the interference with the right of drainage, "should have insisted on a lower rent or in being protected in some other way by the landlord." The decision is based on *McConnell v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265, where the same view is indicated as

¹¹⁵ *Baker v. Sanderson*, 20 Mass. (3 Pick.) 348. In *Moody v. King*, 74 Me. 497, there is a dictum that the landlord is entitled to recover for loss of rent. In *Parker v. City of Lowell*, 77 Mass. (11 Gray) 358, it does not appear whether the loss of rent for which recovery was allowed was from the departure of actual tenants or from the loss of possible tenants.

¹¹⁶ In *Baker v. Sanderson*, 20 Mass. (3 Pick.) 348, where such a reduction was regarded as a ground for recovery by the landlord, the ten-

this being analogous to the case of a reduction made by a lessor in consequence of a pre-existing nuisance, previously discussed.¹¹⁷

When, by the express terms of the lease, the rent was to be reduced in case of any such interference by a third person with the enjoyment of the premises, the landlord was allowed to recover the amount of a reduction in rent consequent upon the interference.¹¹⁸ And so he has been allowed to recover a loss in rent, owing to the fact that it was to consist of a share of the crops, and that a third person injured the crops.¹¹⁹

It has in one state been decided that the landlord may recover, as against an elevated railroad company, by reason of the fact that on a readjustment of the rent, under an arbitration clause in the lease, the amount to be paid was reduced in consideration of the construction of the railroad in the street on which the property abutted.¹²⁰ This accords with the view adopted in that state¹²¹ that the landlord alone has a right to recover on account of interference with the enjoyment of the leased property by the construction of such a work under legislative authority. That is, the landlord, and not the tenant, is entitled to recover the diminution in rental value. It seems, however, that when the wrongdoer is an individual, not acting under legislative authority, the same rule would apply as regards the landlord's loss by reason of such a reduction of rent during the term under an arbitration clause in the lease, as when the rent is reduced in order to make a lease in the first place.¹²²⁻¹²⁴ The tenant is the one entitled to recover the loss of rental value, and the wrongdoer has no right to assert in defense to an action by the tenant that the latter has obtained a reduction of rent. Consequently, the landlord cannot recover on account of such reduction. The landlord can, by legal proceedings, ordinarily put an end to the interference before the time for readjustment of the rent.

ancy was apparently at will, but the Caldwell [Tex. Civ. App.] 18 Tex. court makes no reference to this Ct. Rep. 539, 102 S. W. 461. fact.

¹¹⁷ See ante, at notes 110, 111.

¹¹⁸ Plimpton v. Gardner, 64 Me. 360.

¹¹⁹ Younggreen v. Shelton, 101 Ill. App. 89; Gulf, C. & S. F. R. Co. v.

¹²⁰ Kernochan v. Manhattan R. Co., 161 N. Y. 339, 55 N. E. 906; Winthrop v. Manhattan R. Co., 17 App. Div. 509, 45 N. Y. Supp. 515.

¹²¹ See post, at note 170.

¹²²⁻¹²⁴ See ante, at note 112.

b. **Action by tenant**—(1) **Right of action.** The tenant has a right of action against a person who does any act interfering with his rights of possession or enjoyment, and this is independent of whether the landlord also has a right of action for injury to the reversion by the same act. Any entry on the land by a stranger, without right, would give the tenant a right to the recovery of at least nominal damages,¹²⁵ and if entry results in actual injury to the tenant, he may recover substantial damages.¹²⁶ Thus, he may recover for injuries to his crops,¹²⁷ and also to the growing grass which he is entitled to cut,¹²⁸ and also, though, ordinarily, he cannot recover for permanent injuries to the trees, these being the landlord's,¹²⁹ he may, it seems, recover for the loss of their shade and of the fruit therefrom,¹³⁰ or, if entitled to cut lumber for certain purposes, for the resulting loss to him.¹³¹ In case of destruction of the building on the premises, the tenant may recover in respect of the value of his possessory interest, and

¹²⁵ *Baxter v. Taylor*, 4 Barn. & 39 Tex. Civ. App. 406, 13 Tex. Ct. Adol. 72. Rep. 189, 87 S. W. 746. In *Texas &*

¹²⁶ See post, § 353 b (4).

¹²⁷ *Indiana, I. & I. R. Co. v. Pat-* App.) 16 S. W. 547, it is decided chette, 59 Ill. App. 251; *Goodwin v.* that a tenant at sufferance can re- Clover, 91 Minn. 438, 98 N. W. 322, cover, as against a railroad com- 103 Am. St. Rep. 517; *McKee v. St.* pany which destroyed the grass, Louis, K. & N. W. R. Co., 49 Mo. App. only the value of the grass for graz- 174; *Grand Rapids Booming Co. v.* ing purposes up to the time of the Jarvis, 30 Mich. 308; *Childers v.* commencement of an action by the Verner, 12 S. C. 1; *Texas & P. R. Co.* landlord to recover possession. *v. Bayliss*, 62 Tex. 570. The North ¹²⁹ See *Woodfall, Landl. & Ten.* Carolina statute (Code 1883, § 1754), (13th Ed.) 738, citing *Herlakenden's* vesting the possession of the crops Case, 4 Coke, 62 a; *Espinasse, Nisi* in the lessor, is for the lessor's pro- Prius, 384. See, also, ante, at note 4. tection only, and as against all A tenant is not the owner within other persons the tenant may sue a statute making one cutting trees in his own name for an injury to the on another's land liable for treble damages to the owner. *Lewis v.* crops. *Bridges v. Dill*, 97 N. C. 222, Thompson, 3 App. Div. 329, 38 N. Y. 1 S. E. 767. Supp. 316.

¹²⁸ *St. Louis, I. M. & S. R. Co. v.* ¹³⁰ *Bedingfield v. Onslow*, 3 Lev. Hall, 71 Ark. 302, 74 S. W. 293; 209; *Co. Litt.* 57 a, *Hargrave's* note Townley v. Oregon R. & Nav. Co., 33 Or. 323, 54 Pac. 150; *Gulf, C. & S. F.* (2); *Viner's Abr., Trees* (G). *R. Co. v. Smith*, 3 Tex. Civ. App. 483, ¹³¹ See *Zimmerman v. Shreve*, 59 23 S. W. 89; *Baldwin v. Richardson*, Md. 357.

the landlord in respect of the injury to his reversion.¹³² So the tenant may recover for acts done on adjoining land, if such acts interfere with his free enjoyment of the premises, as by the interference with a right of way¹³³ or other easement,¹³⁴ by the pollution,¹³⁵ the diversion,¹³⁶ or the obstruction of flow,¹³⁷ of water, the withdrawal of lateral support,¹³⁸ the pollution of the air,¹³⁹ or the maintenance of a nuisance in the highway.¹⁴⁰

A tenant at will has the same right as a tenant for years to sue on account of an interference by a third person with his possession and enjoyment,^{140a} unless, perhaps, the interference is the result of the rightful erection of a work of public utility, so that the damages recoverable are to be regarded as compensation for property taken under the right of eminent domain.¹⁴¹

The fact that the landlord has authorized a person to commit an act injurious to the tenant's possession or enjoyment does not relieve such person from liability to the tenant for the doing of

¹³² *Panton v. Isham*, 3 Lev. 359, 1 Salk. 19; *Bass v. West*, 119 Ga. 698, 36 S. E. 244. In *Foster v. Elliott*, 33 Iowa, 216, it is decided that a tenant may maintain trespass for throwing down fences. As to decisions that the tenant can recover damages for the whole injury to the premises, on the ground that he would be liable over to the landlord for the injury to the reversion, see ante, § 352 b.

¹³³ *Hamilton v. Dennison*, 56 Conn. 359, 15 Atl. 748, 1 L. R. A. 287; *Foley v. Wyeth*, 84 Mass. (2 Allen) 135; *Morrison v. Chicago & N. W. R. Co.*, 117 Iowa, 587, 91 N. W. 793; *Schmoele v. Betz*, 212 Pa. 32, 61 Atl. 525, 108 Am. St. Rep. 845; *Coleman v. Holden*, 88 Miss. 798, 41 So. 374.

¹³⁴ *Walker v. Clifford*, 128 Ala. 67, 29 So. 588, 86 Am. St. Rep. 74.

¹³⁵ *Sherman v. Fall River Iron Works Co.*, 84 Mass. (2 Allen) 524, 79 Am. Dec. 799.

¹³⁶ *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28.

¹³⁷ *Baltimore, etc., R. Co. v. Hac-*

kett, 87 Md. 224, 39 Atl. 510; *Loc-kett v. Ft. Worth, etc., R. Co.*, 78 Tex. 211, 14 S. W. 564; *Garland v. Aurin*, 103 Tenn. 555, 53 S. W. 940, 48 L. R. A. 862, 76 Am. St. Rep. 699. ¹³⁸ *Bass v. West*, 110 Ga. 698, 36 S. E. 244; *Baughner v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279 (removing party wall).

¹³⁹ *Central R. Co. v. English*, 73 Ga. 366; *Lockett v. Ft. Worth & R. G. R. Co.*, 78 Tex. 211, 14 S. W. 564.

¹⁴⁰ *Sherman v. Fall River Iron Works Co.*, 84 Mass. (2 Allen) 524, 79 Am. Dec. 799; *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013.

^{140a} *Hamilton v. Dennison*, 56 Conn. 359, 15 Atl. 748, 1 L. R. A. 287; *St. Louis, I. M. & S. R. Co. v. Hall*, 71 Ark. 302, 74 S. W. 293; *Foley v. Wyeth*, 84 Mass. (2 Allen) 135; *Goodwin v. Clover*, 91 Minn. 438, 98 N. W. 322, 103 Am. St. Rep. 517.

¹⁴¹ See *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621.

such act, since the landlord has no power to confer such authority;¹⁴² but such a rule could not be applied, it appears, in favor of the tenant asserting a claim for injury to the landlord's reversionary rights, if his right to recover for such injury is to be regarded as based on the theory that the tenant is liable to the landlord for such injury,¹⁴³ since such liability could not well exist for an injury to the landlord which was authorized by the latter.

(2) **Interference existing prior to lease.** That the interference with the tenant's enjoyment is the result of a condition of things originally created before the making of the lease, which condition is allowed by its creator to continue thereafter, does not ordinarily deprive the tenant under the lease of a right of action on account of such interference.¹⁴⁴ One has a right to sue on account of a wrong to his property rights, as by the maintenance of a nuisance, although his predecessor in the possession also suffered from such wrong. And the fact that he obtained the property on better terms as regards price or rent by reason of such injurious condition is, it seems, not ground for relieving the wrongdoer

¹⁴² *Darling v. Kelly*, 113 Mass. 29; *Brown v. Powell*, 25 Pa. 229; *Crowell v. New Orleans & N. E. R. Co.*, 61 Miss. 631; *Central R. Co. v. Valentine*, 29 N. J. Law (5 Dutch.) 561; *Fisher-Leaf Co. v. Caldwell*, 15 Ky. Law Rep. 542; *Holland v. City of San Antonio* (Tex. Civ. App.) 23 S. W. 756; *Miller v. Fitzgerald Dry Goods Co.*, 62 Neb. 270, 86 N. W. 1078. In *Mine Hill & S. H. R. Co. v. Lippincott*, 86 Pa. 468, it was held that a landlord by releasing, after the making of the lease, all his rights under a covenant, made with him before the lease by a railroad company, to change the location of its right of way across the land, could not affect the tenant's right to sue for the breach of the covenant. It does not clearly appear on what principle the tenant was regarded as having a right to sue on the cov-

enant, it being merely said that he was "rightfully a use party, and had an interest which his lessor could not revoke or transfer." Presumably it was regarded as a covenant, the benefit of which ran with the land. See *Tiffany*, Real Prop. § 343.

¹⁴³ See ante, at notes 32-39.

¹⁴⁴ *Central R. Co. v. English*, 73 Ga. 366; *Morrison v. Chicago & N. W. R. Co.*, 117 Iowa, 587, 91 N. W. 793; *McKee v. St. Louis, K. & N. R. Co.*, 49 Mo. App. 174; *Bly v. Edison Elec. Illuminating Co.*, 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500; *Sherman v. Fall River Iron Works Co.*, 84 Mass. (2 Allen) 524, 79 Am. Dec. 799; *Smith v. Phillips*, 8 Phila. (Pa.) 10. Contra, *Funston v. Hoffman*, 232 Ill. 360, 83 N. E. 917; ante, note 114.

from liability to him or for reducing such liability.¹⁴⁵ In fixing damages for an injury to land, the courts do not concern themselves with the cost of the land. In case of an injury by the erection of a structure under public authority, however, one claiming under a lease made after the erection has been held to be entitled to no damages on account thereof, it being assumed that, since the structure was necessarily permanent, the lease was taken on the understanding that the right of action for injury to the property should be exclusively in the landlord,¹⁴⁶ and it would seem clear that, in any case in which the owner of land is allowed to recover in one action for all damage, future as well as past, one to whom he subsequently leases the land, as one to whom he conveys it in fee, could not recover for the continuance of the nuisance.

(3) **Form of action.** A tenant may bring an action of trespass *quare clausum fregit* for any injury involving a violation of his possession.¹⁴⁷ This right exists in favor of a tenant at will as well as of a tenant for years,¹⁴⁸ even though his landlord also has the

¹⁴⁵ *Halsey v. Lehigh Valley R. Co.*, 45 N. J. Law, 26; *Bly v. Edison Elec. Illuminating Co.*, 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500. Contra, *Baker v. Sanderson*, 20 Mass. (3 Pick.) 348; *Sumner v. Tileston*, 24 Mass. (7 Pick.) 198. "By the letting the tenants acquired the right to the enjoyment of the property unimpaired by any wrongful acts of the defendant. That, through fear of such acts, they had been enabled to obtain that right at a diminished price, neither licensed the acts nor relieved the defendants in any degree from the duty of reparation. The measure of the tenant's damages did not depend upon the amount of rent which they paid, but upon the diminution in the value of the use of the premises resulting from the wrongful diversion of water. The landlords, in leasing to the tenants at reduced rates,

were not to be regarded as agents of the defendant adjusting with the tenants the compensation for the injury to be done." Per Dixon, J., in *Halsey v. Lehigh Valley R. Co.*, 45 N. J. Law, 26.

¹⁴⁶ *Kernochan v. New York El. R. Co.*, 128 N. Y. 559, 29 N. E. 65; *Bly v. Edison Elec. Illuminating Co.*, 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500; *Sposato v. New York*, 178 N. Y. 583, 70 N. E. 1109. And see *Chicago & A. R. Co. v. Smith*, 17 Ill. App. (17 Bradw.) 58.

¹⁴⁷ See ante, § 3 a.

¹⁴⁸ *Y. B. 21 Hen. 7, 15*; *Y. B. 11 Hen. 4, 23*; 2 Rolle's Abr. 551; *Geary v. Barecroft*, 1 Sid. 347; *Brown v. Bates*, Bray (Vt.) 230; *Hayward v. Sedgely*, 14 Me. 439, 31 Am. Dec. 64; *Greber v. Kleckner*, 2 Pa. 289; *Cunsolus v. Lormer*, 54 Wis. 630, 12 N. W. 62.

right to bring the action.¹⁴⁹ A tenant at sufferance even may bring trespass, as having the possession.¹⁵⁰

A tenant who has subleased to another cannot, after the latter has taken possession, maintain an action of trespass against a third person, since possession or the right of possession is necessary for this purpose.^{150a}

The tenant, like the landlord, is not necessarily restricted to an action for damages against one interfering with his possession or enjoyment, but may, in a proper case, obtain an injunction against such interference. Thus an injunction has issued, on the application of the tenant, against a diversion of water,¹⁵¹ the maintenance of an elevated railroad in front of the premises,¹⁵² the obstruction of a right of way thereto,¹⁵³ and the operation of an electric lighting plant, emitting smoke and cinders and causing a vibration to the injury of the premises.¹⁵⁴

(4) **Measure of damages.** The damages recoverable by a tenant for interference with his enjoyment are to be determined by the same considerations as apply in an action by a tenant in fee simple in possession, modified by the fact that his estate is limited in duration, and that, consequently, the total damages cannot be the same as if he had an estate in fee. Ordinarily, it appears, he is entitled to recover the diminution in rental value¹⁵⁵

¹⁴⁹ See ante, at notes 86, 87.

¹⁵⁰ 2 Rolle's Abr., Trespass (N) pl. 1; Heyden v. Smith, 13 Coke, 67; Greber v. Kleckner, 2 Pa. 28.

^{150a} McDougall v. Campbellton Water Supply Co., 34 New Br. 467.

¹⁵¹ Crook v. Hewitt, 4 Wash. 749, 51 Pac. 28.

¹⁵² Witmark v. New York El. R. Co., 149 N. Y. 393, 44 N. E. 78. In this case it was held that if the tenant's lease expired pending the proceeding, and a renewal lease was made in accordance with covenants of the former lease, the renewal lease was admissible to show that his interest in the property had continued.

¹⁵³ Schmoele v. Betz, 212 Pa. 32, 61 Atl. 525, 108 Am. St. Rep. 845; Mil-

ler v. Fitzgerald Dry Goods Co., 62 Neb. 270, 86 N. W. 1078.

¹⁵⁴ Bly v. Edison Elec. Illuminating Co., 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500.

¹⁵⁵ McPhillips v. Fitzgerald, 76 App. Div. 15, 78 N. Y. Supp. 631; Pritchard v. Edison Elec. Illuminating Co., 179 N. Y. 364, 72 N. E. 243; Elliott v. Missouri Pac. R. Co., 8 Kan. App. 191, 55 Pac. 490; Schlemmer v. North, 32 Mo. 206. In Miller v. Edison Elec. Illuminating Co., 184 N. Y. 17, 76 N. E. 734, 3 L. R. A. (N. S.) 1060, it is said that in Bly v. Edison Elec. Illuminating Co., 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500, the tenant recovered the depreciation in the rental value of the premises. See ante, note 112.

for the period of the lease,¹⁵⁶ that is, the diminution in the value of the use.¹⁵⁷ The same idea is, it is conceived, expressed by the statement that he may recover the diminished value of his interest.¹⁵⁸ Occasionally, additional items of damage have been allowed in favor of the tenant.¹⁵⁹ As before remarked,¹⁶⁰ it does not seem that the damages recoverable by the tenant should be reduced because the rent to be paid by him was reduced on account of the wrongful interference with the enjoyment.

(5) **Effect of contract by landlord.** It has been decided that a release by the owner of land of all rights of action on account of the construction and maintenance of a railroad is effective as against one to whom he subsequently leases the land, and who

¹⁵⁶ *Oakes v. Aldridge*, 46 Mo. App. 11; *Bass v. West*, 110 Ga. 698, 36 S. E. 244; *Elliot v. Missouri Pac. R. Co.*, 8 Kan. App. 191, 55 Pac. 490; *Schlemmer v. North*, 32 Mo. 206.

¹⁵⁷ In *St. Louis, I. M. & S. R. Co. v. Hall*, 71 Ark. 302, 74 S. W. 293, it was said that he was entitled to the diminution in "usable value." That "rental value" means "value of use," see *Alexander v. Bishop*, 59 Iowa, 572, 13 N. W. 714; *Nelson v. Minneapolis & St. L. R. Co.*, 41 Minn. 131, 42 N. W. 788; *Wood v. State*, 66 Md. 61, 5 Atl. 476.

¹⁵⁸ *Fisher v. Grace*, 27 U. C. Q. B. 158 (tenancy from year to year).

¹⁵⁹ In *Bass v. West*, 110 Ga. 698, 36 S. E. 244, it was held that the profits of the tenant's business might be considered in assessing his damages for wrongful ouster by a third person. In *Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291, it was held that the tenant, compelled to abandon the premises by reason of another's trespass, could recover the value of the leasehold, the expenses of removal, and compensation for the loss of the use of improvements made by him and of the benefit of a contract

which he had made for a water supply. In *Pritchard v. Edison Elec. Illuminating Co.*, 179 N. Y. 364, 72 N. E. 243, it was held that the tenant of a hotel might recover not only the diminution in rental value by reason of a discharge of soot and cinders, but also additional damages by reason of the fact that upholstery became soiled and needed renewing more frequently than formerly, and that an extra man had to be employed to do the cleaning. It might, it is conceived, be suggested that these drawbacks to the utilization of the hotel were considered in determining the extent of the diminution in rental value.

In *McPhillips v. Fitzgerald*, 177 N. Y. 543, 69 N. E. 1126, it was held that in estimating the value of buildings on leased land, which buildings belonged to the tenant, the fact might be considered, in an action by the tenant, that the owner of the land, a religious corporation, had been in the habit, for many years, of renewing its short time leases in favor of the owners of the buildings on the leased land.

¹⁶⁰ See ante, notes 144, 145.

knows of the release.¹⁶¹ If the right of action for all damage, present and future, can be regarded as accruing immediately upon the construction of the railroad, there can be no question as to the effectiveness of such a release as against a subsequent lessee or grantee. If, however, the subsequent lessee or grantee would, apart from the release, have a right of action on account of resulting damage subsequently arising, such a release can, it would seem, exclude his right of action only on the theory that it involves a grant to the railroad company of an easement or servitude in the land, for the purpose of flowage, pollution of air, or other purpose, as the case may be. Or, perhaps, its effectiveness against a lessee or grantee of the land taking with notice might be supported by an extension of the equitable theory before referred to,¹⁶² that one taking with notice of an agreement restricting the use of the land takes subject thereto.

It has in one case been held that the tenant under a lease can recover against a third person on account of injuries caused to the tenant's property on the premises by such person's neglect in failing to keep the premises heated, as he had contracted with the landlord to do, so as to prevent the bursting of pipes and consequent flooding of the premises.¹⁶³ The tenant's right of recovery in this case was by reason, not of the contractor's breach of his contract, but of the latter's failure to exercise due diligence in doing what he had set about to do. In another case it was held that if one contracted with his adjoining owner to keep a fence in repair, one to whom the former leased the property was bound thereby, and consequently could not recover against the adjoining owner because the latter's cattle entered by reason of a lack of repair.¹⁶⁴

§ 354. Taking for public use.

The tenant is, like any other owner of property, entitled to compensation for his interest if taken for public use.¹⁶⁵

¹⁶¹ *Gulf, C. & S. F. R. Co. v. Thornton* (Tex. Civ. App.) 109 S. W. 220. In this case, however, the release in terms provided that it should run with the land and operate against the assigns of the releasor. That such a release is effective as against a subsequent lessee is assumed in

Hoffeditz v. South Penn. R. & M. Co., 129 Pa. 264, 18 Atl. 125.

¹⁶² See ante, § 131.

¹⁶³ *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116.

¹⁶⁴ *Baynes v. Chastain*, 68 Ind. 376.

¹⁶⁵ See 2 *Lewis, Eminent Domain*,

In the case of an interference with an easement or natural right appurtenant to the leased premises, by reason of the construction or operation of a work of a public character, such as a railroad, the landlord has, no doubt, the right, as in other cases, to recover for the injury to the reversion. In those jurisdictions in which it is the rule that all damages on account of such a work, past, present and prospective, must be recovered in a single suit,¹⁶⁶ the lessee is evidently in the same position as a purchaser, and cannot recover any damages in case the construction of the work was prior to the lease;¹⁶⁷ while if the rule prevails that damages can be recovered only for injuries sustained prior to the commencement of the suit, and that other suits must be brought for injuries subsequently sustained, the lessee can, it seems, recover for injuries caused to his possessory interest, although the structure was erected before the lease.¹⁶⁸ In case such a structure is erected during the tenancy, the tenant has, ordinarily, a right of action for the injuries to his interest.¹⁶⁹

§ 326; 15 Cyclopaedia Law & Proc. 790; Kohl v. United States, 91 U. S. 367, 23 Law. Ed. 449; Pause v. Atlanta, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290; Philadelphia, etc., R. Co. v. Getz, 113 Pa. 214, 6 Atl. 356; Gluck v. Baltimore, 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 515; Cobb v. City of Boston, 109 Mass. 438; In re William Street, 19 Wend. (N. Y.) 678; Seattle & M. R. Co. v. Scheike, 3 Wash. St. 625, 29 Pac. 217, 30 Pac. 503.

In *Burridge v. New Albany & S. R. Co.*, 9 Ind. 546, it was held that when the lease reserved to the lessor the right of recovery of damages for the location of a railroad though the premises, the lessee could not recover on account of such a location, the lease being in such case regarded as subject to the railroad right of way.

It has been decided that a tenant from year to year cannot claim dam-

ages as for his deprivation of the property for another year because the landlord failed to terminate the tenancy at the end of the current year, condemnation proceedings having been instituted before such end of the current year, and his holding over being thus subject to such proceedings. In *re State House*, 21 R. I. 59, 41 Atl. 1004, citing *Schreiber v. Chicago & E. R. Co.*, 115 Ill. 340, 3 N. E. 427, where it was decided that after the filing of the petition in condemnation proceedings, a tenant could not, by holding over his term, acquire any new rights as against the petitioner.

¹⁶⁶ See 2 Lewis, *Eminent Domain*, § 653 b.

¹⁶⁷ See *Illinois Cent. R. Co. v. Ferrell*, 108 Ill. App. 659.

¹⁶⁸ See ante, at note 108.

¹⁶⁹ 2 Lewis, *Eminent Domain*, § 483. But see post, at note 173.

In New York the view has been adopted that the landlord, and he alone, is entitled to maintain an action for injury to property by the construction of an elevated railway in the street on which the property abuts, if the lease was not made until after such construction, the theory being that the presence of the railroad must have been considered in fixing the rent under the lease.¹⁷⁰ It has on the other hand been there decided that in the case of a conveyance in fee of the abutting property after the construction of the railroad, the right of action for damage accruing thereafter is in the grantee, for the reason that the owner of the property is entitled to sue on account of injuries thereto, without reference to the fact that he may have acquired it at a reduced price by reason of the presence of the railroad.¹⁷¹ There may be a question, it is submitted, whether the same rule should not apply in the case of a lease for years as in the case of a conveyance in fee. In the former case, as in the latter, the tenant is entitled to enjoy his property free from interference from a wrongdoer, and should have a right of action for that purpose, and in determining the liability of the wrongdoer to either the tenant or the landlord, the compensation paid by the former to the latter, whether in the shape of a gross sum or a periodic rent, should not be considered.¹⁷² There is in principle, it is conceived, no distinction in this regard between the position of one who acquires a fee simple interest in land and that of one who acquires an estate for years, whether for one year or ninety-nine years with a covenant for perpetual renewal. The distinction involved in these decisions obviously suggests the question whether a right of action would exist in favor of a grantee in fee simple who agrees to pay a stipulated rent instead of a certain purchase price, or in favor of a lessee for years, who instead of agreeing to pay a periodic rent, pays a sum in gross for the lease.

In the same jurisdiction it has been intimated that, if the construction of the railway is subsequent to the lease, the landlord cannot, at least during the existence of the tenancy, recover damages on account of such construction, unless the lease provides

¹⁷⁰ *Kernochan v. New York El. R. Co.*, 128 N. Y. 436, 28 N. E. 518, 26 R. Co., 128 N. Y. 559, 29 N. E. 65. *Am. St. Rep.* 486.

¹⁷¹ *Pappenheim v. Metropolitan El.* ¹⁷² See ante, § 353 b 2.

for a readjustment of the rent at intervals during the tenancy with reference to the rental value as it then exists.¹⁷³ This view is not in accord with the cases generally as to the right of a landlord to recover for injury to the reversion.¹⁷⁴

§ 355. Interference with relation of tenancy.

There are occasional early decisions that one who by threats or force causes a tenant at will to depart from the tenancy is liable in damages to the landlord.¹⁷⁵ It is said, moreover, that such an action lies only in the case of a tenancy at will, for the reason, apparently, that if a tenant for years is thus forced to leave the premises, the landlord still has the remedies of debt for rent and distress.¹⁷⁶ It has, however, been decided in one case in this country that a right of action exists in favor of a landlord whose tenant for years is thus caused to leave, and who thereby loses the rent;¹⁷⁷ and there are other cases in which the existence of such a right of action in the landlord is apparently assumed.¹⁷⁸

The question whether a right of action exists in favor of the landlord when a tenant for years is thus induced, by force, threats, or persuasion, to leave the premises, and, consequently, ceases to pay rent, would seem to depend, in some degree, upon the question whether, and to what extent, in the particular jurisdiction, one party to a contract has a right of action against a person inducing its violation by the other party, a question upon which the courts are at very considerable variance.¹⁷⁹ The mere abandonment of the premises by the tenant under compulsion from a

¹⁷³ *Kernochan v. Manhattan R. Co.*, 161 N. Y. 339, 55 N. E. 906.

¹⁷⁴ See ante, § 353 a.

¹⁷⁵ Y. B. 21 Hen. 6, 31, 32, pl. 18; Y. B. 9 Hen. 7, 7, pl. 4.

¹⁷⁶ Y. B. 21 Hen. 6, 31, 32, pl. 18; Bro. Abr., Trespass, pl. 144.

¹⁷⁷ *Aldridge v. Stuyvesant*, 1 Hall (N. Y.) 235. The court (Oakley, J.) bases the decision on the ground that the landlord was injured by the "fraudulent misconduct" of defendant. By this is meant, presumably,

the intentional and malicious conduct of the defendant.

¹⁷⁸ *Ashley v. Wilson*, 61 Ga. 297; *Kernan v. Humble*, 51 La. Ann. 389, 25 So. 431, and see *Bell v. Midland R. Co.*, 10 C. B. (N. S.) 287. In *Walden v. Conn.*, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204, there is an extended *dictum* in favor of the existence of such a right of action.

¹⁷⁹ See *Pollock, Torts* (6th Ed.) 230, note. For citations of cases in-

third person does not injure the landlord, since he does not thereby lose his right to the rent,¹⁸⁰ and such ouster by a third person could never, it seems, give a right of action to the landlord unless as a result thereof the tenant failed to pay the rent.

A state statute is occasionally found imposing a liability upon one who entices away another's tenant or employs such tenant of another.¹⁸¹

§ 356. Action of ejectment.

One entitled under a lease has, ordinarily, the right to maintain ejectment against a third person to recover possession of the property.¹⁸² Even a lessee who has not entered on the premises is properly, it seems, to be regarded as having this right.¹⁸³ A lessee or assignee of a lessee who has leased to another has, however, no such right, since not he, but the sublessee, is entitled to possession.¹⁸⁴

Upon the question whether, in the case of a tenancy at will, the landlord or the tenant is the proper person to maintain ejectment against one wrongfully in possession, the authorities are few. There is a *dictum* to the effect that the landlord cannot maintain ejectment on account of the ouster of the tenant at will, he not having the possession,¹⁸⁵ and it has been asserted that the tenant at will may maintain the action.¹⁸⁶ Such would seem, unquestion-

volving this general question, see 300, 45 N. E. 627.

Hammon, Contracts, 711.

¹⁸⁰ See ante, §§ 182 h, 186 b.

¹⁸¹ *Georgia Acts* 1901, p. 63 (see *Pace v. Goodson*, 127 Ga. 211, 56 S. E. 363); *Mississippi Laws* 1900, c. 102, p. 140 (see *Wagner v. Ellis*, 85 Miss. 422, 37 So. 959; *Sneed v. Gilman* (Miss.) 44 So. 830). The latter act does not appear in *Miss. Code* 1906.

¹⁸² *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91; *Austin v. Kimball*, 167 Mass. 300, 45 N. E. 627; *Viner's Abr.*, Ejectment, pl. 18.

¹⁸³ See ante, § 37.

¹⁸⁴ *Austin v. Kimball*, 167 Mass.

¹⁸⁵ *Stone v. Grubham*, 1 Rolle, 3; 2 Bulst. 225. But see dictum of *Bridgman, C. J.*, contra, as stated in *Viner's Abr.*, Ejectment (M), pl. 18.

¹⁸⁶ *Buntin v. Doe*, 1 Blackf. (Ind.) 27; *Covert v. Morrison*, 49 Mich. 133, 13 N. W. 390, citing *Runnington*, Ejectment, 9, which states moreover that the tenant at will may make a lease for years for the purpose of maintaining ejectment. That a tenant at will may make such a lease, see *Spark v. Spark*, *Het.* 73; *Homes v. Bingley*, *Styles*, 380; *Blunden v. Baugh*, *Cro. Car.* 302.

ably, to be the case when the tenant at will, as in most of the states, has the right to retain possession, as against the landlord, until the expiration of a notice from the latter of a certain length. The tenant has, until the expiration of the required period after notice, "not only the possession, but also the right of possession, and, in this respect, he stands on the same footing as a tenant for a term certain."¹⁸⁷ Even in a jurisdiction where the tenancy is terminable without previous notice, it is difficult to see why the tenant should not have a right of action. He has the right of possession, and usually the actual possession as well, and the fact that this right may at any time be brought to an end by the action of the landlord is not, it seems, properly available to the third person wrongfully taking or retaining possession.¹⁸⁸

At common law, in case an action of ejectment was brought against the tenant under a lease, he, the tenant, was not compelled to give notice of the action to the landlord, and, even if the landlord did receive notice of the action, there was some question whether he could be permitted to defend, unless the tenant consented that he should do so, the result of which might be that, if the tenant failed to defend the action, and the plaintiff accordingly obtained possession, the landlord would be able to recover possession only by showing a good title, which he might not always be able to do.¹⁸⁹ This state of uncertainty was remedied by St. 11 Geo. 2, c. 19, § 13, which provided in effect that the court might suffer the landlord to appear and defend the action. In a number of states, even apart from statute, the landlord is ordinarily permitted to come in and defend.¹⁹⁰ In some there is a

¹⁸⁷ Per Wilde, J., in *French v. Dutton v. Warschauer*, 21 Cal. 609, Fuller, 40 Mass. (23 Pick.) 104. 82 Am. Dec. 765; *Reay v. Butler*, 69

¹⁸⁸ In *Ashford v. McNaughten*, 11 Cal. 572, 11 Pac. 463; *Thompson v. Schuyler*, 7 Ill. (2 Gilm.) 271; *McClelland v. Doe*, 6 Ky. (3 Bibb.) 266; *Buford v. Gaines*, 29 Ky. (6 J. J. Marsh.) 34. See *Doe d. Wiggins' Heirs v. Reddick*, 33 N. C. (11 Ired. Law) 380; *Bryant v. Kinlaw*, 90 N. C. 337; *Kennedy v. Campbell*, 3

¹⁸⁹ See Adams, *Ejectment* (3rd Ed.) 256, and opinion of Parke, B., in *Butler v. Meredith*, 24 L. J. Exch. 239.

¹⁹⁰ *Dimick v. Deringer*, 32 Cal. 488; *Jackson v. Allen*, 30 Ark. 110;

statutory provision substantially similar to the English one so providing.¹⁹¹

The statute 11 Geo. 2, c. 19, § 13, above referred to, provides that if the tenant fails to notify the landlord of an action of ejectment brought against him, he shall forfeit to the latter three years' rent of the premises. There are in a number of states provisions of a more or less similar nature, making the tenant failing so to notify the landlord liable either for any damage or loss resulting to the landlord,¹⁹² or for two¹⁹³ or three¹⁹⁴ years' rent.

- ¹⁹¹ *Alabama* Code 1907, § 3844; *Illinois*, Hurd's Rev. St. 1905, c. 45, § 18; *Iowa* Code 1897, § 4190; *New Jersey*, 2 Gen. St. p. 1284, § 17; *Michigan* Comp. St. § 11198; *Missouri* Rev. St. 1899, § 3057; *New York* Code Civ. Proc. § 1503; *Oregon*, Bell. & C. Ann. Codes, § 327; *Pennsylvania*, Pepper & Lewis' Dig. St. "Ejectment," § 3; *Tennessee*, Shannon's Code 1896, § 4973; *Virginia* Code 1904, § 2726. See *Morris v. Beebe*, 54 Ala. 300; *McClendon v. Equitable Mortgage Co.*, 122 Ala. 384, 25 So. 30; *Dake v. Sewell*, 145 Ala. 581, 39 So. 819; *State v. Orwig*, 34 Iowa, 112; *Chicago & E. I. R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223; *Sutton v. Casseleggi*, 77 Mo. 397; *Hill v. Atterbury*, 88 Mo. 114; *Den d. Vancleve v. Green*, 20 N. J. Law (Spencer) 171; *Fosgate v. Herkimer Mfg. & Hydraulic Co.*, 12 N. Y. 580; *Godfrey v. Townsend*, 8 How. Pr. (N. Y.) 398; *McClay v. Benedict*, 1 Rawle (Pa.) 424; *Linderman v. Berg*, 12 Pa. 301; *Mitchell v. Baratta*, 17 Grat. (Va.) 445; *Hanks v. Price*, 32 Grat. (Va.) 107.
- ¹⁹² *Arkansas*, Kirby's Dig. St. 1904, § 4693 (no penalty named); *California* Civ. Code, § 1949; *Montana* Rev. Codes 1907, § 5234; *North Dakota* Rev. Codes 1905, § 5534; *South Dakota* Civ. Code 1908, § 1440.
- ¹⁹³ *Delaware* Rev. Code 1893, p. 876; *Illinois*, Hurd's Rev. St. 1905, c. 45, § 17; *Pennsylvania*, Pepper & Lewis' Dig. St. "Ejectment," § 2.
- ¹⁹⁴ *Missouri* Rev. St. 1899, § 4103; *New York*, Real Prop. Law, § 195; *Wisconsin* Rev. St. 1898, § 2197.
- As to the effect of notice to the landlord as rendering a judgment against the tenant conclusive on him, see *Black, Judgments*, § 577.

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